

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

CAROLYN S. BATTEN,)	
Plaintiff,)	
)	
v.)	Civil Action No. 7:03cv720
)	
JO ANNE B. BARNHART,)	By: Hon. Michael F. Urbanski
COMMISSIONER OF SOCIAL)	United States Magistrate Judge
SECURITY,)	
Defendant.)	

REPORT AND RECOMMENDATION

Plaintiff Carolyn S. Batten (“Batten”) filed this action challenging the final decision of the Commissioner of Social Security denying her claim for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”). 42 U.S.C. §§ 401-433. Jurisdiction is based upon 42 U.S.C. §§ 405(g). This case was referred to the undersigned Magistrate Judge on October 4, 2006, for report and recommendation. Following the filing of the administrative record and briefing, oral argument was held on February 28, 2007. As such, the case is now ripe for decision. The undersigned finds that substantial evidence supports the Commissioner’s determination that Batten was not disabled as of the last date insured and, therefore, is not entitled to DIB benefits. Accordingly, it is recommended that the Administrative Law Judge’s (“ALJ”) decision be affirmed.

I.

Batten was born in 1947, graduated from high school, and took some college level courses at night school. (Administrative Record [hereinafter R.] at 74, 88, 434) From 1986 to 1989, Batten was employed by Westinghouse Corporation as a secretary, as a manager of the computer drafting department, and later as a system analyst, although she claims that she never

had any actual training in system analysis. (R. 102, 104, 422-27) Batten also states that she owned, but did not work at, a retail store business from 1990 to 1994. (R. 102-03) The parties agree that the last day on which Batten was insured for purposes of DIB was December 31, 1994 and, thus, to be eligible for benefits she must prove she was disabled as of that date. 42 C.F.R. § 423(a)(1)(A), (c)(1)(B); 20 C.F.R. §§ 404.101(a), 404.131(a); Johnson v. Barnhart, 434 F.3d 650, 655-56 (4th Cir. 2005).

Batten filed an application for benefits on or about December 13, 2000, alleging that she became disabled on July 31, 1993¹, due to fibromyalgia and chronic fatigue syndrome. (R. 74) The claim was denied initially and on reconsideration, and a request for rehearing was filed. (R. 44) The rehearing was held on September 11, 2002, (R. 16-24), and on September 26, 2002, the ALJ issued a written opinion denying Batten's claim for benefits. (R. 31-36) Subsequently, Batten submitted new evidence, and she asked that the evidence be considered and the September 26, 2002 decision be reopened. The earlier decision was reopened, and on February 27, 2003, Batten's claim again was denied. (R. 16-24) The Appeals Council declined Batten's request for review, and Batten appealed to the District Court, which ultimately remanded the matter due to the inaudibility of a substantial portion of the September 11, 2002 hearing. (R. 405-06) A rehearing was held on July 7, 2004, and by written opinion dated September 10, 2004, the ALJ once again denied Batten's claim for benefits. (R. 405-461) Specifically, the ALJ found that Batten was not disabled as of December 31, 1994, but instead was able to do a range of work at the light exertional level,² including her past relevant work as a computer draftsman

¹ During the July 7, 2004 disability hearing, Batten amended her alleged date of onset from June 1, 1989 to July 31, 1993. (R. 418-19)

² Light work requires exerting up to 20 pounds of force occasionally, and/or up to 10
(continued...)

and manager of a computer aided drafting department. (R. 404-13) This decision became final for the purposes of judicial review under 42 U.S.C. § 405(g) on May 5, 2006, when the Appeals Council denied Batten's request for review. (R. 436-47) Batten then filed this action challenging the Commissioner's decision.

II.

Batten argues that the ALJ erred in finding that she retained the residual functional capacity to do a range of light work, including her past relevant work. Accordingly, she asks that the Commissioner's decision be reversed.

Judicial review of a final decision regarding disability benefits under the Act is limited to determining whether the ALJ's findings "are supported by substantial evidence and whether the correct law was applied." Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990) (citing 42 U.S.C. § 405(g)). Accordingly, the reviewing court may not substitute its judgment for that of the ALJ, but instead must defer to the ALJ's determinations if they are supported by substantial evidence. Id. Substantial evidence is such relevant evidence which, when considering the record as a whole, might be deemed adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971). If such substantial evidence exists, the final decision of the Commissioner must be affirmed. Hays, 907 F.2d at 1456; Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966).

²(...continued)

pounds of force frequently, and/or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

<http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

III.

Batten argues that the ALJ misinterpreted her statements on various disability related forms and her testimony regarding her functional limitations and ignored evidence in the medical record establishing that she was totally disabled from all substantial gainful employment. The ALJ determined that although Batten suffered from chronic fatigue and fibromyalgia as of the date last insured and those diseases were likely to have produced pain and fatigue, her testimony regarding the degree of her symptoms and limitations she alleges to have experienced are inconsistent with the record as a whole and, thus, are not credible. (R. 412)

Batten testified that she stopped working in 1989 because she was physically unable to work because of exhaustion. (R. 421) Batten stated that since then she has been plagued with unrelenting fatigue and pain so severe she is basically bed or chair bound most of the day. (R. 436, 438, 443, 446-48, 453) She continued that her pain moves around her body, but tends to stay localized for some amount of time, and it is so severe she can only stand or sit for about fifteen minutes before needing to lie down. (R. 437, 455-56) She also stated that she has severe headaches every couple of weeks, which on least one occasion have caused her to lose consciousness and be hospitalized. (R. 454) Finally, she testified that her combined symptoms are so debilitating she cannot even read a book or watch a movie. (R. 430, 446-47) This testimony stands in marked contrast to those activities Batten reported she was able to do in her daily activities questionnaire, completed on February 24, 2001. At that time, Batten indicated that each day she walks for forty-five minutes on a flat road, she does stretching exercises, and she does some household chores. (R. 111) She also indicated that she helps cook dinner four or five nights a week, she goes grocery shopping twice a month, she goes to church once a week, and she visits with friends outside her home about once a week. (R. 111-14)

The ALJ considered Batten's testimony as well as the record as a whole in determining that her statements of disabling pain in 1994 were not wholly credible and that as of the date last insured she retained the residual functional capacity to do some light work. (R. 405-13) In light of conflicting evidence in the record, it is the duty of the ALJ to fact-find and to resolve any inconsistencies between a claimant's alleged symptoms and her ability to work. See Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Accordingly, the ALJ is not required to accept Batten's subjective allegation that she was disabled by pain and exhaustion as of December 31, 1994, but rather must determine, through an examination of the objective medical record, whether she has proven an underlying impairment that could have been reasonably expected to produce the symptoms alleged. Craig v. Chater, 76 F.3d 585, 592-93 (4th Cir. 1996) (stating the objective medical evidence must corroborate "not just pain, or some pain, or pain of some kind or severity, but the pain the claimant alleges she suffers."). Then, the ALJ must determine whether Batten's statements about her symptoms are credible in light of the entire record. Credibility determinations are in the province of the ALJ, and courts normally ought not interfere with those determinations. See Hatcher v. Sec'y of Health & Human Servs., 898 F.2d 21, 23 (4th Cir. 1989).

The medical records establish that although Batten may now be disabled from all forms of gainful employment due to chronic pain and fatigue, she was not disabled as of December 31, 1994. Batten's regular treating physician, Dr. Browne, began documenting her complaints of moving pain, low grade fever, and sore throats in August 1988. (R. 155-56, 162-63, 167) At that time, Dr. Browne noted Batten did not report any fatigue, she had a good appetite, and she did not complain that her discomfort had hindered her daily activities, and he found her symptoms were most likely related to a viral outbreak at her place of employment. (R. 161-62,

167) However, in the spring of 1989, following Batten's complaints of constant fatigue, lassitude, lack of energy, and general malaise, Dr. Browne diagnosed Batten with fibromyalgia and referred her to a specialist, Dr. Ooghe. (R. 153, 158)

Dr. Ooghe first saw Batten in May 1989. During that exam, Dr. Ooghe indicated that Batten's symptoms were consistent with chronic fatigue syndrome; however, he believed her symptoms were more representative of depression than anything else. (R. 200-04) Nonetheless, he recommended that she go to either Duke University or John Hopkins University for a full study. (R. 200-04) Again, in July 1989, Dr. Ooghe noted that he believed Batten's chronic fatigue was most likely caused by depression, and he advised her to begin out-patient psychiatric treatment, which Batten declined to do. (R. 198) However, he also noted that he believed she was disabled by her symptoms and she should be off work "indefinitely pending further diagnosis," and she was referred to an infectious disease and internal medicine specialist and a psychiatrist for further diagnostic examinations. (R. 198)

Dr. Mann, an infectious disease and internal medicine specialist, examined Batten in July 1989. (R. 209-10) Although he noted Batten's complaints of fatigue and general aches and pains, he found that she was well-groomed and healthy appearing; her skeletal and neurological exams were entirely normal; she had a normal range of motion in all joints; and she had no bone or muscle tenderness, muscle atrophy, or muscle weakness. (R. 209-10) Dr. Mann concluded that Batten's symptoms were consistent with chronic depression, and he recommended that she get further psychiatric counseling. (R. 209-11) Similarly, after conducting a psychiatric diagnostic exam in September 1989, Dr. Hucek advised Dr. Ooghe by letter that he believed all of Batten's symptoms were caused by major depression, and he too recommended she begin psychotherapy. (R. 213)

There are no further treatment records from Dr. Ooghe, Dr. Mann, or Dr. Hucek, and there are very few medical records at all between the fall of 1989 and February 1993. In fact, there are only four records for that entire period, all generated by Dr. Browne, and they consist of: one entry in 1990, one entry in 1991, and two entries in 1993. (R. 147-150) Of those, only the two entries from 1993 even mention Batten's chronic pain. (R. 148-49) On January 8, 1993, Dr. Browne noted that Batten had complained of "intermittent joint aches and chronic fatigue" and she came to the office that day because she found a lump in her armpit. (R. 149) Dr. Browne was concerned that Batten was having problems from her breast implants and he referred her to Duke University for further evaluation. (R. 148-49) Batten returned in February 1993, for her annual exam, and during that exam Batten reported that she "systemically feels good." (R. 148) Dr. Browne noted that her physical exam showed marked tenderness with a decreased range of motion over her left shoulder, but no diffuse pain. (R. 148)

The only other records from 1993 are from the Southside Rehab Center, Inc. where Batten went for treatment for a shoulder injury. In the initial evaluation, Louise Wenzel, RPT, noted that Batten reported shoulder pain beginning in 1991 with increasing symptoms. (R. 232) Nonetheless, Batten reported that "[s]he continues to work as usual." (R. 232) Batten completed physical therapy on February 3, 1993, and the discharge summary notes state that Batten did not resume treatment after her business trip. (R. 234)

Batten did not see any physicians until more than a year later. In August 1994, Batten traveled to Duke University for a follow-up exam regarding her breast implants. She first saw Dr. Howell regarding the removal of her breast implants. Dr. Howell noted that Batten complained of difficulty swallowing, fatigue, joint pain in her left upper extremity, numbness, memory lapse, and shortness of breath which had first arisen in 1989, improved until 1992, and

then became much more severe. (R. 256, 258) Dr. Howell noted that Batten was not taking any prescription pain relievers, she had a full range of motion in all joints, no edema, and that her reflexes were normal. (R. 256, 259) Batten's breast implants were removed without complications on September 14, 1994, and she did not receive any further treatment from Dr. Howell. (R. 258-60)

Also in August 1994, Batten began seeing Dr. Harrell at Duke University. During the initial evaluation, Dr. Harrell also noted that although Batten complained of chronic pain and fatigue which were so severe she had been unable to work since 1989, she was not taking any prescription pain relievers or other medication to treat her symptoms. (R. 240) On exam he found that Batten had some muscular tenderness in the left trapezius and right paraspinal area, but that the neurological exam was essentially normal with only decreased pin prick findings over her great toes, that her reflexes were intact, and that her joints were normal. (R. 240) In January 1995, Dr. Harrell reported that Batten continued to complain of pain in her joints and he noted that her symptoms were consistent with fibromyalgia. (R. 239) He recommended that she begin an exercise program and start taking antidepressants. (R. 239) In March 1995, Dr. Harrell noted that Batten was continuing on her psychiatric medication and was doing well, her sleeping pattern had improved, she was less fatigued, and her pain was less severe on the right side, though she continued to have some pain on the left side. (R. 238) He also noted that Batten reported she was exercising regularly and she had been using the treadmill three to four times per week. (R. 238) Batten did not return for more than a year, until April 1996. During that exam, Dr. Harrell noted that Batten reported she "did great" through the fall of 1995, but then discontinued taking her psychiatric medication and had taken no medication since then and, now, her pain, fatigue, and sleep disturbances had returned. (R. 237) Similarly, in May 1996 Batten

complained of pain and fatigue, but she noted that she had been “so busy” she had had little time to get much sleep. (R. 236-37)

There are no further treatment notes from 1996, only one record from 1997, and no records from 1998. The one record from 1997, generated by Dr. Browne, reported that Batten had minimal, if any, fibromyalgia trigger points, but did have some point tenderness in her trochanteric areas and medial and lateral epicondyles. (R. 235)

Batten began treatment at the Stuart Family Practice in January 1999 after moving from South Boston, Virginia. During her initial exam she advised her physician that she “works at home,” is currently “building a house,” and “is exercising a lot . . . to keep herself free from fibromyalgia symptoms.” (R. 265) Her physician noted that overall Batten was doing pretty well. (R. 265) Similarly, in March 1999, Batten reported that she was doing regular, moderate amounts of exercise. (R. 263) In May 1999, Batten reported that her fibromyalgia symptoms were worse, but she also reported that she was “actually building a house with her husband right now,” had been painting and sanding on that house, and a few months earlier she fell off of a ladder. (R. 263) On exam, her physician noted some tenderness in her right elbow, in the lateral joint of the thumb, and pain in her left trochanteric bursa and hip, but that her pulses were full and symmetric and her neurological exam was normal. (R. 263) Overall her physician noted the exam was inconsistent, he injected her trochanteric bursa, and he recommended Batten do more exercise. (R. 263) In a recheck in August 1999, Batten’s physician noted that although Batten still complained of left hip pain and that she received no relief from the joint injection, she appeared well rested, she only had tenderness in her groin, she had a full range of motion in both hips with no alleged increase in pain in her hips and/or back on joint manipulation. (R. 262) X-rays of her left hip were unremarkable. (R. 270)

In October 1999, Batten began seeing Dr. Blaylock at the Lewis Gale Clinic for symptoms related to fibromyalgia. During her intake exam, Batten complained of severe and debilitating pain, but despite these complaints, she advised Dr. Blaylock that up until recently she had been walking three or four miles a day, four times a week and was now consumed with getting her house built. (R. 287) During the exam, Dr. Blaylock found slight tenderness in a variety of areas, and he recommended that Batten do thirty minutes of aerobic activity daily or at least one hour of aerobic activity four times a week and do stretching exercises to control her discomfort. (R. 285) Thereafter, although Batten continued to complain of disabling pain, she reported that she was doing moderate amounts of regular exercise, and Dr. Blaylock encouraged her to continue to do even more exercise. (R. 281-83) In June 2000, although Batten continued to complain of pain, she stated she was exercising everyday, most of which consisted of walking up and down the stairs of her home and doing housework. (R. 281-82) Likewise, in September and December 2000, Batten advised Dr. Blaylock she continued to do moderate amounts of exercise, including walking two miles a day four or five times a week, using a health rider with 25 to 50 repetitions three times a week, and stretching. (R. 276-79) By December 2000, Dr. Blaylock noted that Batten's symptoms had improved tremendously, and he advised her to begin counseling because he believed there was a psychological component to her alleged pain symptoms. (R. 276-77) Batten returned in June 2001, still complaining of disabling pain which had caused her to stop walking as much, but she stated she had been doing water aerobics twice a week for an hour and was stretching twice a day. (R. 321) Dr. Blaylock again advised her to

do more exercise, and he suggested that she take water aerobics or swim for at least thirty minutes a day or for at least an hour four times a week.³ (R. 322)

The medical record as whole does not indicate that Batten was totally disabled from all substantial gainful activity as of December 31, 1994. Although Batten's medical records establish that she began complaining of symptoms associated with fibromyalgia in 1988, it is clear these symptoms were not wholly disabling as of the date last insured. Batten's medical records generated before December 31, 1994 are sporadic at best and simply do not indicate she is disabled from all forms of work due to chronic fatigue and pain. During this period, on several occasions, she went for nearly a year or longer without seeing a physician and took minimal amounts of pain medication. Further, there are several indications in the medical record that Batten was expending considerable efforts working on her home and/or her businesses after December 31, 1994. (R. 236-37, 263, 265) Likewise, the record establishes that both before and after December 31, 1994, Batten was doing at least moderate amounts of regular exercise, including walking several miles a day. (R. 111, 238, 263, 265, 276-79, 281-82, 321) Batten's physicians' have not indicated she is physically unable to work nor have they suggested she cease or drastically limit her physical exertional activities. In fact, quite the opposite is true, as numerous physicians have encouraged Batten to do more aerobic exercise and stretching exercises.

Batten argues that her disability is apparent from (1) Dr. Ooghe's July 1989 treatment note that Batten was disabled by her symptoms and she should be off work "indefinitely pending further diagnosis," (R. 198); (2) Dr. Harrell's August 15, 1994 letter, generated after examining

³Batten's record includes additional records from Dr. Blaylock as well as from other physicians generated after 2001 which are not detailed here because the medical record clearly establishes that Batten was not disabled from all forms of employment as of December 31, 1994.

her only once and whose opinion was expressed solely for purposes of determining to which class compensation category she should be assigned following the settlement of a silicone breast implant class action suit, (R. 135); and (3) Dr. Blaylock's July 20, 2004 letter, in which he indicated that Batten was disabled as of July 31, 1989. (R. 534) To the extent these records can be construed to be opinions that Batten is disabled from all forms of work, they are unpersuasive. Opinions that a claimant is "unable to work" are not entitled to controlling weight because such decisions are reserved for the Commissioner. 20 C.F.R. § 404.1527 (e)(1) (stating a medical expert's opinion as to the ultimate conclusion of disability is not dispositive); Morgan v. Barnhart, 142 Fed. Appx. 716, 722 (4th Cir. 2005) (holding that a treating physician's opinion that claimant was "disabled," "unable to work," could not work an eight hour job, and/or could not do her previous work was not entitled to controlling weight). Moreover, as noted above, such a finding in this case is inconsistent with the record as a whole and, thus, these snippets of the record are not entitled to great weight. See Craig v. Chater, 76 F.3d 585, 590 (4th Cir. 1996) (finding that a treating physician's opinion may be assigned little or no weight if it is conclusory and/or is not supported by objective testing or the record as a whole).

Dr. Blaylock's 2004 opinion that Batten was disabled in 1989 is particularly suspect as he did not begin treating her until some ten years later. Further, during Batten's initial examination by Dr. Blaylock in 1999, she reported that until just recently she had been walking three or four miles a day, four times a week. (R. 287) Thereafter, Dr. Blaylock's treatment notes are replete, over the course of several years, with indications that Batten was doing more than moderate amounts of regular exercise which included daily walks of several miles, significant amounts of household chores which required walking up and down stairs, and water aerobics, and Dr. Blaylock always encouraged Batten to do even more exercise. This amount of activity

reflected in Dr. Blaylock's contemporaneous notes appear inconsistent with his 2004 opinion as to Batten's condition in 1989. Thus, the ALJ properly afforded this opinion little weight.

The ALJ did not discount Batten's testimony that she was currently experiencing extreme limitations in her functional abilities due to fibromyalgia and chronic pain. However, he found that her testimony regarding the extent of her limitations on December 31, 1994, the date last insured, were not credible based on her medical record and her admitted functional abilities at the time she filed her disability application. (R. 406-13) Considering the entire record, especially the information contained in Batten's medical record, there is no reason to disturb the ALJ's credibility determination. See Shively v. Heckler, 739 F.2d 987, 989-90 (4th Cir. 1984) (finding that because the ALJ had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight). Further, based on a complete review of Batten's medical history and her admitted functional abilities on her disability application, the court finds there is substantial evidence to support the ALJ's determination that as of December 31, 1994, the date last insured, Batten retained the physical capacity for a some range of light exertional work. See Johnson v. Barnhart, 434 F.3d 650, 658 (4th Cir. 2005) (upholding finding of no disability where plaintiff testified that she suffers from severe pain and hand problems where plaintiff was able to attend Church twice a week, read books, watch television, clean the house, wash clothes, visit relatives, feed pets, manage household finances, and perform exercises recommended by her chiropractor); Gross v. Heckler, 785 F.2d 1163, 1166 (4th Cir. 1986) (upholding a finding of no disability where plaintiff was able to cook, shop, wash dishes, and walk to town every day).

IV.

To the extent Batten argues her past relevant work as a computer draftsman or as a manager of a computer-aided drafting department is no longer available in significant number in the national economy and, thus, should not be considered substantial gainful employment, it is without merit. Once the Commissioner finds that a claimant can return to her past relevant work, the Commissioner need not determine whether the claimant's past relevant work currently exists in significant numbers in the national economy. Barnhart v. Thomas, 540 U.S. 20, 26 (2003). Rather, the finding that a claimant can do her past relevant work indicates by proxy that the claimant is able to do "some" type of work which is available in the national economy. Id. at 28. Thus, the Commissioner's determination that Batten could return to her past relevant work as a computer draftsman or as a manager of a computer-aided drafting department, without undertaking a separate analysis as to whether such work continued to exist in significant number in the national economy, was not erroneous.

V.

Based on the foregoing, it is the recommendation of the undersigned that plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted.

In making this recommendation, the undersigned does not suggest that plaintiff was, as of the date last insured, free of all pain and subjective discomfort. The objective medical record simply fails to document the existence of any condition which would reasonably be expected to have resulted in total disability for all forms of substantial gainful employment as of December 31, 1994. It appears that the ALJ properly considered all of the objective and subjective evidence in adjudicating plaintiff's claim for benefits. It follows that all facets of the

Commissioner's decision in this case are supported by substantial evidence. It is recommended, therefore, that defendant's motion for summary judgment be granted.

The Clerk is directed immediately to transmit the record in this case to the Hon. Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court hereby is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 8th day of May, 2007.

/s/ Michael F. Urbanski
United States Magistrate Judge