

**United States District Court
Western District of Virginia
Harrisonburg Division**

KATRINA T. GRUNDY,)	
)	
<i>Plaintiff,</i>)	Civil No.: 5:10cv00053
)	
v.)	REPORT AND
)	RECOMENDATION
MICHAEL ASTRUE,)	
Commissioner of the Social Security)	
Administration)	
)	
<i>Defendant</i>)	By: Hon. James G. Welsh
)	U. S. Magistrate Judge
)	

Plaintiff, Katrina T. Grundy, brings this action pursuant to 42 U.S.C. § 405(g) challenging a final decision of the Commissioner of the Social Security Administration ("the agency") denying her claims for a period of disability insurance benefits ("DIB") under Title II of the Social Security Act, as amended, ("the Act") and for Supplemental Security Income ("SSI") under Title XVI of the Act. 42 U.S.C. §§ 416 and 423 and 42 U.S.C. §§ 1381 *et seq.* respectively. Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g).

On September 20, 2010 the Commissioner filed his Answer along with a certified copy of the Administrative Record ("R."), which included the evidentiary basis for the findings and conclusions set forth in the Commissioner's final decision. By an order of referral entered on September 27, 2010, this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Both parties have since moved for summary judgment; each has filed a supporting memorandum of points and authorities and the

argument of counsel has been heard. The following report and recommended disposition is submitted.

I. Administrative History

The record shows that the plaintiff protectively filed her applications on March 28, 2006 alleging disability as of October 5, 2005. They were denied both initially and on reconsideration. (R.13,103-104,106-108.) Pursuant to the plaintiff's timely request, an administrative hearing was held on February 7, 2008 before an administrative law judge ("ALJ"). At the hearing, the plaintiff was present; she testified, and she was represented by counsel. (R.7-60.) Dr. Barry Hensley gave vocational testimony. (R.92-101.) By written decision dated February 29, 2008 the plaintiff's applications were once again denied. (R.11-32.)

Along with her request for Appeals Council review, the plaintiff submitted additional medical records variously dated between October 10, 2007 and January 8, 2009. (R.1-4,1094-1150.) The plaintiff's request for Appeals Council review was denied without comment on the additional evidence submitted, and the ALJ's unfavorable decision now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981.

During the pendency of her appeal, the plaintiff filed a second disability application alleging a March 1, 2008 onset date. This second application was granted and the plaintiff is now receiving disability benefits. The plaintiff's a pending appeal to this court, therefore, is limited to consideration of her disability claim for the period between October 5, 2005 (the onset

date alleged in her initial application) and February 29, 2008 (the date of the ALJ's adverse decision in her initial application).

II. Summary of Recommendation

The plaintiff in this case was fifty-four years of age at the time of her alleged disability onset. She has a high school education; she also completed two years of art school, and her past work included jobs as a newsroom assistant and receptionist. (R.15,39-45.)

As outlined in her disability reports, in her hearing testimony, and in her medical records, the plaintiff's basic contention is that she is disabled due to degenerative disc disease, hepatitis-C, multiple sclerosis, peripheral neuropathy and depression. (R.46-92,173,301.) The Administrative Law Judge concluded that she retained the functional capacity to perform light work, including her past jobs as a newsroom assistant and a sales clerk. (R.30-32,496,505-506.)

After a thorough review of the administrative record, including the fact that the agency had found the plaintiff to be disabled as of one day after the unfavorable decision on her initial application, one is constrained to conclude that the subsequent finding of a disability and any related medical information constitute new and material evidence, which would likely change the outcome in the instant case. Therefore, remand pursuant to sentence six of 42 U.S.C. § 405(g) and denial of both parties' summary judgment motions are recommended.

III. Standard of Review

The court's review in this case is limited to a determination as to whether there is substantial evidence to support the Commissioner's conclusion that the plaintiff failed to meet the statutory conditions for entitlement to a period of DIB. "Under the . . . Act, [a reviewing court] must uphold the factual findings of the [Commissioner], if they are supported by substantial evidence and were reached through application of the correct legal standard." *Mastro v. Apfel*, 270 F.3^d 171, 176 (4th Cir. 2001) (quoting *Craig v. Chater*, 76 F.3^d 585, 589 (4th Cir. 1996)). Evidence is substantial when, considering the record as a whole, it might be deemed adequate to support a conclusion by a reasonable mind, *Richardson v. Perales*, 402 U.S. 389, 401 (1971), or when it would be sufficient to refuse a directed verdict in a jury trial. *Smith v. Chater* 99 F.3^d 635, 638 (4th Cir.1996). Substantial evidence is more than a mere scintilla and somewhat less than a preponderance. *Perales*, 402 U.S. at 401. If the Commissioner's decision is supported by substantial evidence, it must be affirmed. 42 U.S.C. § 405(g); *Perales*, 402 U.S. at 401.

This standard of review is more deferential than de novo. "In reviewing for substantial evidence, [the court should not] undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner]." *Id.* (quoting *Craig v. Chater*, 76 F.3d at 589). Nevertheless, the court "must not abdicate [its] traditional functions," and it "cannot escape [its] duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." *Oppenheim v. Finch*, 495 F.2^d 396, 397 (4th Cir. 1974). The Commissioner's conclusions of law are, however, not subject to the same deferential standard and are subject to plenary review. *See Island Creek Coal Company v. Compton*, 211 F.3^d 203, 208 (4th Cir. 2000); 42 U.S.C. § 405(g).

IV. ALJ Findings

Based on a review of the plaintiff's medical information and utilizing the agency's standard sequential evaluation process,¹ which took into account the plaintiff's vocational profile, *inter alia* the ALJ made the following findings: (1) the plaintiff met the DIB insured status requirements through December 31, 2009; (2) the plaintiff's *severe* impairments included multiple sclerosis, degenerative disc disease, hepatitis-C, and a peripheral neuropathy; (3) these impairments and their attendant symptoms, however, neither singularly nor in combination met or equaled the severity of a listed impairment;² (4) the plaintiff retained the residual functional capacity to perform "light work;"³ and (5) through the decision date she retained the ability to perform the duties of her previous positions as a newsroom assistant or sales clerk. (R.27-32.)

V. Pertinent Facts and Analysis

¹ To facilitate a uniform and efficient processing of disability claims, the Social Security Act has by regulation reduced the statutory definition of "disability" to a series of five sequential questions. An examiner must consider whether the claimant (1) is engaged in substantial gainful activity, (2) has a severe impairment, (3) has an impairment which equals an illness contained in the Social Security Administration's Official Listings of impairments found at 20 C.F.R. Part 4, Subpt. P, Appx. 1, (4) has an impairment which prevents past relevant work, and (5) has an impairment which prevents her from doing substantial gainful employment. 20 C.F.R. § 404.1520. If an individual is found not disabled at any step, further inquiry is unnecessary. 20 C.F.R. § 404.1503(a); *Hall v. Harris*, 658 F.2^d 260 (4th Cir. 1981).

² The adult impairments listed in 20 C.F.R. Part 404, Subpart P, Appx. 1, are descriptions of approximately 125 physical and mental illnesses and abnormalities, most of which are categorized by the body system they affect. Each impairment is defined in terms of several specific medical signs, symptoms, or laboratory test results. For a [person] to show that his or her impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify. *See* Social Security Ruling (SSR) 83-19. *Sullivan v. Zebley*, 493 U.S. 521, 529-530 (1990).

³ "Light work" is defined in 20 C.F.R. § 404.1567(b) and § 416.967(b) to involve lifting no more than 20 pounds at a time and with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job in this category generally requires a good deal of walking or standing, or when it involves sitting most of the time it generally involves some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, an individual must have the ability to do substantially all of these activities, and a job may also be considered light work if it requires "standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday" with intermittent sitting. Social Security Ruling ("SSR") 83-10.

In her appeal the plaintiff raises three claims. First, she contends the ALJ erred in his determination that she retained the residual functional capacity to perform light work. Second, she argues that the ALJ did not give appropriate weight either to her treating physicians' opinions or to the opinion of her vocational expert, Gerald Wells, Ph.D. And third, she asserts that her subsequent successful claim for disability benefits, beginning one day after the unfavorable decision currently being appealed, is new and material evidence warranting a reversal and remand of the ALJ's decision.

A.

Addressing her third argument first, a remand on the basis of new evidence is generally warranted only if the new evidence is material and there is good cause for its late submission. *See* 42 U.S.C. § 405(g). "Evidence is material if there is a reasonable possibility that the new evidence would have changed the outcome." *Wilkins v. Sec'y Dep't of Health & Human Servs.*, 953 F.2^d 93, 96 (4th Cir.1991) (*en banc*). Such new evidence must "relate to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. § 404.970(b). This does not mean, however, "that the evidence had to have existed during that period. Rather, evidence must be considered if it has any bearing upon whether the [plaintiff] was disabled during the relevant period." *Reichard v. Barnhart*, 285 F.Supp.2^d 728, 733 (SDWVa. 2003) (citations omitted).

The plaintiff argues that the subsequent award of disability benefits itself constitutes new and material evidence warranting a remand. The agency, on the other hand, contends that a subsequent decision cannot itself be considered new evidence within the meaning of sentence six

of 42 U.S.C. § 405(g). As support for this argument, the Commissioner relies on a decision out of the Sixth Circuit, in which the court therein held that “[a] subsequent favorable decision may be supported by evidence that is new and material under § 405(g), but the decision is not itself new and material evidence.” *Allen v. Commissioner*. 561 F.3^d 646, 653 (6th Cir. 2009).

This district, however, has taken a different approach. In *Hayes v. Astrue*, the court held that “where a second social security application finds a disability commencing at or near the time a decision on a previous application found no such disability, the subsequent finding of a disability may constitute new and material evidence.” 488 F.Supp.2^d 560, 565 (WDVa. 2007) (Jones, J.); accord *Reichard v. Barnhart*, 285 F.Supp.2^d728, 734 (SDWVa. 2003) (finding the ALJ's decision granting disability benefits less than a week after he first pronounced claimant was not disabled is new and material evidence).

The undersigned declines to follow the Six Circuit's *Allen* opinion and instead follows the reasoning of Judge Jones in *Hayes*. Reason suggests that a subsequent disability decision based on a chronic and likely worsening condition, such as the plaintiff's multiple sclerosis and other chronic medical conditions, can itself constitute new and material evidence warranting remand. See *Reichard*, 285 F.Supp.2^d at 734. Here, because the plaintiff has neither submitted a copy of the ALJ's decision nor specified the medical information that served as the basis for the agency's favorable finding on her second application, it is unclear whether that finding of disability was based on any medical information independent of the plaintiff's first application. Thus, the second ALJ decision must be considered on its face to be new and material. See *Hayes*, 488 F.Supp.2^d at 565 (WDVa, 2007).

While a precise date of disability onset based on progressive disorders may require a somewhat arbitrary determination; thus, it is at least reasonable to consider evidence supporting an onset date one day removed from an earlier decision to be potentially persuasive of a contrary result. Moreover, the possible inconsistency between the first decision and the subsequent finding of disability related to the second application also strongly suggests that a remand of this case for further consideration is merited pursuant to *Sentence Six* of 42 U.S.C. § 405(g). See *Hayes*, 488 F.Supp.2^d 560, 566 (WDVa, 2007) (citing *Bradley v. Barnhart*, 463 F.Supp.2^d 577, 580-81 (SDWVa, 2006) (“[The] *Reichard* [case] stands for the proposition that an award based on an onset date coming in immediate proximity to an earlier denial of benefits is worthy of further administrative scrutiny to determine whether the favorable event should alter the initial, negative outcome on the claim.”))

Furthermore, a remand pursuant to *Sentence Six* of 42 U.S.C. § 405(g) is appropriate in this case given the absence of any Appeals Council comment on the additional medical records submitted by the plaintiff when she requested review of the ALJ’s decision. The plaintiff contends that these records, which cover the period between October 10, 2007 and January 8, 2009, were at least a significant factor in the second ALJ decision granting disability benefits. Since the span of time covered in the medical records includes both dates prior to the first ALJ decision and dates directly related to the second ALJ decision, on their face an administrative review of these records on remand would appear to be necessary and appropriate.

As the Fourth Circuit observed in *Wilkins v. Secretary*, where a plaintiff is seeking remand on the basis of evidence that meets both the *new* and *material* requirements of 42 U.S.C.

§ 405(g), it is reasonably possible that upon remand this new evidence will result in a different outcome. Accordingly, it is recommended that the agency's decision on the plaintiff's first applications for disability benefits be vacated and this case remanded for reconsideration in light of the agency's finding that the plaintiff was disabled as of March 1, 2008.

B.

Concluding that it is necessary to develop further the record and remand the decision for further consideration in light of the subsequent disability award, the plaintiff's first and second claims regarding the substantial evidence basis for the ALJ's decision do not need to be addressed herein.

VI. Proposed Findings of Fact

As supplemented by the above summary and analysis, the undersigned submits the following formal findings, conclusions and recommendations:

1. Based on the administrative record as it now stands, it cannot be determined whether the ALJ's decision was supported by substantial evidence;
2. There is a facial inconsistency between the ALJ's denial of disability benefits in the instant case and the subsequent award of benefits effective one day later by the agency based on what is most likely the same impairments;
3. The Commissioner's final decision in the instant case is not based on substantial evidence;
4. The evidence upon which the plaintiff relies in seeking remand is *new* and *material*;
5. Outright reversal and remand simply for the calculation and award of benefits is not appropriate in this case because additional fact-finding is necessary in order to establish a disability onset date; and

6. The final decision of the Commissioner should be reversed and the case remanded pursuant to **Sentence Six of 42 U.S.C. § 405(g)**⁴ for further consideration consistent with this Report and Recommendation and, if necessary, for further development of the record.

VII. Recommended Disposition

For the foregoing reasons, it is RECOMMENDED as follows: the summary judgment motions of both parties be DENIED; the Commissioner's decision denying benefits be VACATED; the case be REMANDED pursuant to **Sentence Six of 42 U.S.C. § 405(g)** for further consideration consistent with this Report and Recommendation.

Should the remand of this case result in the award of benefits, plaintiff's counsel should be granted an extension of time pursuant to Rule 54(d)(2)(B) which to file a petition for authorization of attorney's fees under 42 U.S.C. § 406(b) until thirty (30) days subsequent to the receipt of a notice of award of benefits from the agency; provided, however, any such extension of time **would not extend the time limits for filing a motion for attorney's fees under the Equal Access to Justice Act.**

The clerk is directed to transmit the record in this case immediately to the presiding United States district judge and to transmit a copy of this Report and Recommendation to all counsel of record.

⁴ In *Melkonyan v. Sullivan*, 501 U.S. 89, 101-102, (1991), the Supreme Court stated that in § 405(g) actions, such as the instant case now before this court, "remand orders must either accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four, or conform with the requirements outlined by Congress in sentence six."

VIII. Notice to the Parties

Both sides are reminded that, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, they are entitled to note objections, if any they may have, to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned to which an objection is not specifically made 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) as to factual recitals or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objections.

DATED: 1st day of July 2011.

/s/ James G. Welsh
United States Magistrate Judge