

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

PAMELA J. CHABACK,

Plaintiff

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

)
)
) Civil Action No. 5:09cv00053
)

**REPORT AND
RECOMMENDATION**

By: Hon. James G. Welsh
U. S. Magistrate Judge

Plaintiff, Pamela J. Chaback, 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 claim for a period of disability insurance benefits ("DIB") under Title II of the Social Security Act, as amended, ("the Act"), 42 U.S.C. §§ 416 and 423. Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g).

On December 31, 2009, 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 December 2, 2009 this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Despite the passage of more than seven months since the submission of the administrative record, no brief has been filed by the plaintiff addressing the basis for her contention that the Commissioner's decision is not supported by

substantial evidence or why the decision should be otherwise reversed or remanded.¹ Likewise, the plaintiff has made no written request for oral argument.²

Given this mandatory briefing failure, dismissal of the plaintiff's appeal with prejudice would appear on the face of the record to be warranted. *See Chandler Leasing Corp. v. Lopez*, 669 F.2d 919 (4th Cir. 1982). The facts of this case, however, suggest that dismissal may be too severe a sanction. *Id.* As the Fourth Circuit wrote in *Reizakis v. Loy*, 490 F.2d 1132, 1135 (1974):

A district court unquestionably has authority to grant a motion to dismiss for want of prosecution. Fed. R. Civ. P. 41(b). Indeed, . . . the trial court can take such action on its own motion. But courts interpreting the rule uniformly hold that it cannot be automatically or mechanically applied. Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. (Citation omitted). Consequently, dismissal "must be tempered by a careful exercise of judicial discretion." *Durgin v. Graham*, 372 F.2d 130, 131 (5th Cir. 1967). While the propriety of dismissal ultimately turns on the facts of each case, criteria for judging whether the discretion of the trial court has been soundly exercised have been stated frequently. Rightfully, courts are reluctant to punish a client for the behavior of his lawyer. *Edsall v. Penn Central Transportation Co.*, 479 F.2d 33 35 (6th Cir. 1973). Therefore, in situations where a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme circumstances. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Indeed, it has been observed that "the decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record

¹ Pursuant to paragraph 1 of the court's Standing Order No. 2005-2, the plaintiff in Social Security cases must file, within thirty days after service of the administrative record, "a brief addressing why the Commissioner's decision is not supported by substantial evidence or why the decision otherwise should be reversed or the case remanded." Standing Order No. 2005-2 was superceded on April 8, 2010 by the court's adoption of a series of Local Rules, including WDVa Gen. Rule 4(c)(1), which similarly directs that the plaintiff *must file* his or her supporting brief within thirty days. Although the plaintiff has not complied with this pleading requirement, the administrative record contains adequate specificity to suggest the reasons she believes the Commissioner's final decision is legally deficient. In this instance, therefore, the plaintiff's pleading is deemed to be marginally in compliance with Standing Order No. 2005-2 and WDVa Gen. R. 4(c)(1).

² Both paragraph 2 of the court's Standing Order No. 2005-2 and WDVa Gen. R. 4(c)(2) direct that a plaintiff's request for oral argument in a Social Security case, must be made in writing at the time his or her brief is filed.

of delay or contumacious conduct by the plaintiff." *Durham v. Florida East Coast Ry. Co.*, 385 F.2^d 366, 368 (5th Cir. 1967).

In this instance the defendant has suffered no substantive prejudice, and the administrative record sets forth sufficient information to identify minimally the basis for her appeal. Although the plaintiff's counsel has failed to meet the court's long-established briefing requirement, nothing in the record suggests some personal responsibility by the plaintiff; consequently, in this instance it is concluded that dismissal is an inappropriate remedy. Based on a detailed review of the administrative record, therefore the following report and recommended disposition is submitted.

I. Summary

The plaintiff in this case was forty-four years of age³ at the time of the Commissioner's final decision; she has a high school education, during which time she received some training as a typist, and her past employment included work in a floral shop as a clerk and also as an assistant manager, work in a Pizza Inn as an assistant manager, work as a restaurant manager/owner, and work as a customer service representative in a printer repair business. (R.32-33,53,111,126-127,130,141-144.) As outlined in her hearing testimony, the plaintiff's basic contention in this case that she suffers from a severe chronic back and hip condition (variously described to include scoliosis, fibromyalgia, degenerative joint and disc disease) and severe attendant chronic pain, stress headaches and depression, which have rendered her disabled since April 26, 2006. (R.33,37-45; *see also* R.114,121,125.) The medical record, however, lacks objective evidence to support either her

³ At this age the plaintiff is classified as a "younger person," and pursuant to the agency's regulations age is generally considered not to affect seriously a younger person's ability to adjust to other work. 20 C.F.R. §§ 404.1563(c) and 416.920(c).

claim that she in fact has all of these medical conditions or that she is experiencing attendant pain of disabling intensity.⁴

II. Standard of Review

The court's review 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 conditions for entitlement established by and pursuant to the Act. If such substantial evidence exists, the final decision of the Commissioner must be affirmed. *Hays v. Sullivan*, 907 F.2^d 1453, 1456 (4th Cir. 1990); *Laws v. Celebrezze*, 368 F.2^d 640, 642 (4th Cir. 1966). "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)). This standard of review is more deferential than *de novo*. "It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Mastro*, 270 F.3^d at 176 (quoting *Laws v. Celebrezze*, 368 F.2^d 640, 642). "In reviewing for substantial evidence, [the court should not] undertake to reweigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the Commissioner." *Id.* (quoting *Craig*, 76 F.3^d at 589). The ALJ's conclusions of law are, however, not subject to the same deferential view and are to be reviewed *de novo*. *Island Creek Coal Company v. Compton*, 211 F.3^d 203, 208 (4th Cir. 2000).

⁴ A disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable impairment which can be expected to last for a continuous period of not less than 12 months" 42 U.S.C. § 423(d)(1)(A).

III. Administrative History

The record shows that the plaintiff protectively filed her application for DIB on July 30, 2007, alleging disability as of April 26, 2006 due to a condition which included “scoliosis, muscle deterioration, cyitic nerve problems, [and her] body [being] lopsided.” (R.9,111-114,121-131,154.) She described her activities at that time to include light housework, transporting her two children to and from school, cooking meals, helping with the care and feeding of family pets, grocery shopping, watching television, reading and visiting with family; she also noted that her daily routine had changed due to her hip and back pain, problems with her knee, and “trouble physically and emotionally.” (R133-140,)

Her claim was denied both initially and on reconsideration. (R.63-67,78-80.) Pursuant to her timely request, an administrative hearing on the plaintiff's application was held on July 22, 2008 before an administrative law judge ("ALJ"). (R.9, 22,81-84,100-107,110.) At the hearing, the plaintiff was present; she and her sister (Nicole Moyer) testified; she was represented by counsel, and vocational testimony was given by Bonnie Martindale. (R.9, 22-62,68-72,86,99.108-109.)

Utilizing the agency's standard five-step inquiry, in his written decision dated September 29, 2008, the ALJ found that the plaintiff had not engaged in work activity since her alleged disability

onset date; that her *severe*⁵ impairments included a discongenic/degenerative back disorder, a myofascial pain syndrome, sacroiliitis, osteopenia, anorexia and fibromyalgia; that these conditions, neither individually nor in combination, were not of listing-level severity;⁶ and that the plaintiff retained the functional capacity to perform a range of sedentary work,⁷ which required only occasional climbing of ramps or stairs, only occasional balancing, stooping, kneeling or crouching, no climbing of ladders, ropes or scaffolds, and avoidance of even moderate exposure to heights, moving machinery or other hazardous work conditions; and that she was functionally able to perform several of her past jobs. (R.11-21.)

After the ALJ's issuance of his adverse decision, the plaintiff made a timely request for review by the Appeals Council. (R.4-5.) This request was subsequently denied (R.1-3), and the ALJ's unfavorable decision now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981.

IV. Facts

⁵ Quoting *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984), the Fourth Circuit held in *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984), that "an impairment can be considered as 'not severe' only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." *See also* 20 C.F.R. § 404.1520(c).

⁶ The Listing of Impairments ("the listings") is in appendix 1 of Subpart P of part 404 of 20 C.F.R. For each of the major body systems it describes impairments that the agency considers to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience. 20 C.F.R. § 404.1525.

⁷ "*Sedentary work*" is defined in 20 C.F.R. § 404.1567(a) to involve lifting no more than 10 pounds at a time and occasionally carrying articles like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of standing and walking is often required in carrying-out job duties, and jobs are classified as sedentary if walking and standing are required occasionally and other sedentary criteria are met.

In his written decision the ALJ reviewed and outlined the plaintiff's relevant medical records, including those from Thomas McNamara, DO. (the plaintiff's primary care physician), D. Preston Grice MD. (Augusta Pain Management), New Beginnings Physical Therapy, University of Virginia Medical Center, and Augusta Medical Center. (R.11-19.) He reviewed and evidence presented at the hearing, including that of the vocational witness. (R.17-18,20-21.) He considered the opinion evidence of the state agency medical reviewers, as well as those of William Knitzner, DC, and Scott Young, MD. (R.19-20.) And he assessed the plaintiff's pain and other subjective complaints in accordance with the two-step decisional requirements of *Craig v. Chater*, 76 F.3d 585, 594 (4th Cir. 1996) (citing 20 C.F.R. § 404.1529).

During the year preceding her alleged disability onset, the plaintiff was seen for treatment through her primary care physician's office on five occasions. On April 16, 2005 she was seen and counseled about her efforts to stop smoking. Dr. McNamara's office note for that date listed her medication regime as including Wellbutrin to assist with smoking cessation, Phenergan for motion sickness, Relafen for joint pain and stiffness, and Vicodin for pain relief. (R.199-200.) In July she was seen with a complaint of chest wall pain. At that time she exhibited "no signs of mood, thought or memory difficulty, and her medication list included only Vicodin and Relafen. (R.197-198.) When she was next seen in August, she reported experiencing ongoing cervical and thoracic pain for a "few years;" she was treated by osteopathic manipulation, and it was noted that she tolerated the treatment well. (R.196.) Similarly, she reported symptomatic relief after a follow-up manipulative treatment in December 2005. (R.193-195.) Although she reported the same persistent

back and neck pain at the time she was seen in February 2006, she received no further manipulative treatment because on the same day she had undergone chiropractic manipulation by Dr. Knitzner due to a flare-up of her symptoms. (R.191-192.)

At her next follow-up office visit (one day after her alleged disability onset date of April 26, 2006), the plaintiff reported having seen Dr. Knitzner several times for chiropractic manipulation; once again she reported ongoing thoracic and lumbar pain and for the first time reported that her “[right] hip had ‘gone out’ 3-4 times since January.” (R.188-190.) The results of follow-up spinal and hip MRIs were “negative;” however, at the plaintiff’s request Dr. McNamara referred her to Dr. Preston Grice, MD, at Augusta Pain Management. (R.169,170,188.)

Based on his June 9, 2006 clinical examination, his review of her “essentially normal” spinal and right hip MRIs and his evaluation of her subjective complaints, Dr. Grice’s diagnostic impression was that the plaintiff had a chronic lumbosacral strain, and he prescribed an initial pain relief regime that included Hydrocodone, Norflex, a TENS unit, and physical therapy. (R.167,170-172.) In his opinion, there was nothing in the plaintiff’s “examination or history to warrant the use of narcotics.” (R171.)

Although the plaintiff told Dr. Grice that her pain level had not decreased after ten physical therapy sessions, the therapist reported that the plaintiff was exhibiting good pelvic and spinal alignment and was reporting temporary post-treatment relief, which was being offset by increased daily living and child care activities. (R.159-168.) Moreover, except for reporting the development

of some radicular pain into her left lower extremity on one occasion and pain into her left buttock on a later occasion, Dr. Grice's office notes covering seven follow-up office visits between July 7, 2006 and November 27, 2007 document no other potentially significant change in her condition. In December Dr. Grice injected her sacroiliac in an effort to give her some longer term pain relief, and throughout this period she reported some "modest" or "fair" pain relief with use of her TENS unit, some "fair to moderate" pain relief with the prescription use of Ultraset and Zanaflex, and "more than anything else" some pain relief from continuing chiropractic manipulation. (R.173-184,211-212, 214,249-252,255,280-282,285.)

During this same period, bilateral digital X-ray studies of the plaintiff's hips done on November 27, 2007 demonstrated only "mild degenerative arthritis in [her] left hip," and as Dr. Grice recorded the same day in his office notes, he continued to be "uncertain [about] the exact nature" of her pain. (R.211,213,269.) A later whole body bone density scan on January 18, 2008 at Augusta Medical Center also failed to demonstrate any physiological basis for the plaintiff's chronic pain complaints. (R.237-238,253-254,267-268,283-284.)

During the Summer and Fall of 2007 the plaintiff also saw Dr. McNamara on two occasions. When he saw her in August 2007, she reported that she had not worked since she had last seen him, that she had been referred-back to him by the pain clinic for a "disability evaluation," and that she had applied for disability, which he viewed to be "appropriate." (R.185.) His physical examination, however, disclosed no abnormality other than some "tenderness" in the mid-thoracic and upper lumbar spine. (R.185-186.) A chest X-ray taken the same day also disclosed no heart or pulmonary

abnormality. (R.187.) Moreover, when she saw Dr. McNamara in October, her physical condition was unchanged. (R/208-210.)

Following-up on his December injection of the plaintiff's left hip, Dr. Grice saw her on January 8, 2008, and at that time she reported an overall forty percent decrease in her pain level. (R.215.) Similarly, when she saw Dr. McNamara in February, her pain level remained "moderate." (R.270-271.) Likewise, pain related to her back condition was not a medically significant issue, when she subsequently sought treatment in the emergency room at Augusta Hospital during the same month. (R.247-249,256-262,277-279,286-292.)

In contrast, when she saw Dr. McNamara at the end of March 31, 2008, her chief complaints were back pain, neck pain and a headache. (R.240-243.) On this occasion Dr. McNamara noted, among other things, that she had not sought treatment from him for back pain in more than two years; he treated her with osteopathic manipulation therapy treatment; he continued her pain medication without change, and he suggested that she needed a complete physical examination in order "to assess her general status and . . . reasons for [her recent weight] loss. (*Id.*)

In addition to the weight loss noted by Dr. McNamara, he described her pain level as "moderate . . . with no apparent distress" and noted that she reported experiencing no joint pain, joint swelling, muscle cramping, muscle weakness, or stiffness. (*Id.*) A dual-energy X-ray absorptiometry bone density test during the following month disclosed that her spinal bone mineral density was consistent with osteopenia and that her left hip bone mineralization was normal. (R.231-

232.) There is no indication in the record that any follow-up treatment or suggested life-style change was suggested by these findings.

During the administrative consideration of the plaintiff's applications, her medical records were separately reviewed and summarized by a state agency medical consultants in October 2007 and again in January 2008. (R.201-207,216-222, 223-229.) *Inter alia* as part of their respective assessments, each reviewer took specific note of the results of various diagnostic studies, the absence of any documented joint abnormality, weakness, neurologic changes or loss of strength, and the fact that the objective medical findings did not show a physical impairment of disabling severity. (R.205-207,221-222,228-229.) Each concluded that neither the objective medical record nor the scope of the plaintiff's daily activities supported her statements about the debilitating intensity and persistence of her symptoms; similarly, they concluded that this record did not support Dr. McNamara's statement in his office notes that she was unable to work. (*Id.*) Each further concluded that the plaintiff retained the functional capacity for at least sedentary work with light lifting and postural limitations related to pain.⁸ (R.202-203,206.217-281,221,224-225,228.)

In contrast, the plaintiff submitted contrary opinion evidence from William Knitzner, MD,⁹

⁸ The state agency reviewer in January 2008 assessed the plaintiff be marginally more posturally limited, and these additional restrictions were included in the ALJ's hypothetical question to the vocational witness. *See* R.54-55,203,218,225.)

⁹ No supporting clinical treatment record or objective diagnostic studies were submitted in connection with Dr. Knitzner's letter summarizing his chiropractic care of the plaintiff that began in January 2006.

and from Scott Young, MD.¹⁰

In a two-page letter dated July 7, 2008, Dr. Knitzner wrote that he had been providing the plaintiff with regular chiropractic care since January 2006, which involved a low lumbar mobilization series with electrical muscle stimulation and heat, and that she had at times experienced some symptomatic low back pain improvement with this treatment; however, he further reported that her general activities frequently caused a “re-exacerbation of symptoms,” and over time she had additionally developed radicular pain involving her left leg. (R.294-295.) In his opinion the chronic nature and the extent of the plaintiff’s “lumbar instability” were inconsistent with her “performing stressful activities or activities involving prolonged standing, sitting, bending or rotational movements.” (*Id.*)

In his written responses to a July 2008 functional ability questionnaire, Dr. Young described the plaintiff as having “chronic cervical, lumbar [and] thoracic back pain” with a congenital spinal curvature (“scoliosis”), “constant” paraspinal muscle pain and an intermittent left lower extremity radiculopathy . (R.296.) In Dr. Young’s opinion the plaintiff’s condition limited her ability at any one time to sit for only 10 minutes or stand for only 5 minutes; it limited her total ability during a normal work day to sit or stand to less than 2 hours; it “never” permitted her to do any lifting or carrying in a work situation; it “never” permitted any activity involving stooping, crouching or climbing, and it only “rarely” permitted any twisting activity. (R.297-298.)

¹⁰ Dr. Young appears to have become the plaintiff’s primary care physician following Dr. McNamara’s departure on 03/31/2008, and his functional assessment was made after seeing the plaintiff for the first time on July 9, 2008. (R.240,296.)

V. Discussion

A.

The agency's sequential disability evaluation process¹¹ directs that if an individual is not engaging in substantial gainful work activity, it must be determined whether he or she has one or more *severe*¹² impairments that either meet or equal the criteria of an impairment listed in 20 C.F.R. Part 404. Subpart P, Appendix 1. In the case now before the court, the ALJ found that the plaintiff's back disorders were severe, and he assessed their severity under the applicable listing for evaluating musculoskeletal impairments. (R.11-16.) *Inter alia*, the ALJ took note of the negative lumbar MRI results (R.169), the bilateral hip X-ray studies that demonstrated only mild degenerative arthritis in the left hip and no abnormality in the right hip (R.213), the absence of any motor loss in either the upper or lower extremity, and the absence of any objective evidence of nerve root or spinal cord compromise. (R.16.)

¹¹ Determination of eligibility for social security benefits involves a five-step inquiry. *Mastro v. Apfel*, 270 F.3d 3d 171, 177 (4th Cir. 2001). It begins with the question of whether the claimant engaged in substantial gainful employment. 20 C.F.R. § 404.1520(b). If not, step-two of the inquiry is a determination whether, based upon the medical evidence, the claimant has a severe impairment. 20 C.F.R. § 404.1520(c). If the claimed impairment is sufficiently severe, the third-step considers the question of whether the claimant has an impairment that equals or exceeds in severity one or more of the impairments listed in Appendix I of the regulations. 20 C.F.R. § 404.1520(d); 20 C.F.R. Part 404, subpart P, App.I. If so, the claimant is disabled; if not, step-four is a consideration of whether the claimant's impairment prevents him or her from returning to any past relevant work. 20 C.F.R. § 404.1520(e); 20 C.F.R. § 404.1545(a). If the impairment prevents a return to past relevant work, the final inquiry requires consideration of whether the impairment precludes the claimant from performing other work. 20 C.F.R. § 404.1520(f).

¹² Quoting *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984), the Fourth Circuit held in *Evans v. Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984), that "an impairment can be considered as 'not severe' only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." *See also* 20 C.F.R. § 404.1520(c) and Social Security Ruling 85-28.

Without serious question, therefore, at the third step of his decisional inquiry the ALJ's finding that the plaintiff's back disorders neither met nor medically equaled a listing-level spinal disorder is supported by substantial evidence, and she has failed to show the contrary. *See Sullivan v. Zebley*, 493 U.S. 521, 539 (1990) ("for a claimant to show that his impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of the criteria, no matter how severely, does not qualify.").

Given that the plaintiff's burden of proving she is disabled, the question of whether the ALJ erred in finding that she possessed the residual functional capacity to perform sedentary work presents the court with two issues. First, in his consideration of the plaintiff's subjective complaints of pain and related symptoms, did the ALJ err in his evaluation of her credibility? And second, did the ALJ accord the medical opinion of Dr. Young and the chiropractic opinion of Dr. Knitzner their proper decisional weight?

B.

Evaluation of the plaintiff's credibility as it relates to her subjective pain complaints caused by her back disorders is a two-step process. *Craig v. Chater*, 76 F.3d 585, 594 (4th Cir. 1996). The ALJ must first determine whether there is objective evidence showing the existence of a medical impairment which could reasonably be expected to produce the alleged pain or other symptoms; then he must evaluate the alleged intensity and persistence of her pain or other symptoms on the basis of

all of the evidence ¹³ in the record. *Id.* And in making this determination, the ALJ must indicate and explain the decisional weight he has given to obviously relevant evidence and refer to the evidence upon which he relies to support his findings. *See e.g., Williams v. Astrue*, 152 Soc. Sec. Rep. Services, 582 (WDVa, 2010); *Hammond v. Heckler*, 765 F.2^d 424, 426 (4th Cir. 11985) (the “duty of explanation . . . is especially crucial in evaluating pain”); *Gordon v. Schweiker*, 725 F.2^d 231, 236 (4th Cir. 1984) (remanded on the basis of the ALJ’s failure to explain adequately the basis of his findings).

In the instant case, the ALJ found that the plaintiff’s underlying back disorders could be reasonably expected to produce pain and related symptoms, and he then assessed her allegations about their intensity, persistence and functionally limiting effects. He concluded that these allegations of debilitating pain, leg numbness and tingling were “not credible” to the extent they were inconsistent with his conclusion that the plaintiff retained the functional capacity to perform a range of sedentary work activity on a regular and sustained basis. In doing so, the ALJ made specific references in the record that were inconsistent with the plaintiff’s pain-related allegations. Among others, these included the lack of any supportive, objective diagnostic findings or studies, the lack of any clinical diagnosis other than “chronic pain” or “chronic lumbosacral pain,” the low level of pain she reported in October 2006 with the use of pain medication and chiropractic manipulation, the absence of any ongoing physical therapy, the “mild” nature of her degenerative

¹³ Step two of the credibility analysis involves consideration of the claimant's statements of pain and other alleged symptoms as well as factors such as: (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the pain or other symptoms; (3) precipitating or aggravating factors; (4) the type, dosage, effectiveness, and side effects of medication; (5) treatments and other measures taken for relief; and (6) other factors concerning functional limitations and restrictions. 20 C.F.R. § 404.1529(c)(3).

left hip arthritis demonstrated both by X-ray in November 2007 and by a whole body bone scan in March 2008, the significant level of pain relief she reported following orthopaedic manipulation in March 2008, and the nature and extent of her reported daily living activities. (R.18-19.) Additionally, the ALJ considered the medical opinions of the state agency reviewers, the medical opinions of Dr. Young, and the chiropractic opinions of Dr. Knitzner.

For the reasons outlined hereinafter, he rejected the opinions of Dr. Young and Dr. Knitzner. He then determined that the opinions of the state agency reviewers regarding the plaintiff's work-related functional abilities were well-supported by the medical record available at the time of these reviews. And he further concluded that later medical evidence "justifie[d] a conclusion" that the plaintiff's impairments were more limiting, albeit non-disabling, than originally determined by the state agency reviewer. (R.19-20.) *See* Social Security Ruling ("SSR") 96-6p.

Having appropriately considered the full record in this case, the ALJ's conclusion that the plaintiff's statements concerning the intensity, persistence, and debilitating effects of her pain and related symptoms were not entirely credible is supported by substantial evidence.

C.

In rejecting Dr. Young's opinion regarding the plaintiff's residual functional capacity, the ALJ noted that Dr. Young has seen the plaintiff only once, that he had no history of monitoring her treatment, that he had not found it necessary to prescribe any medications or other treatment modality, and that his functional capacity assessment was inconsistent with the plaintiff's overall

record of treatment. (R.20.)

The opinion of an individual's treating physician is entitled to be given great weight and is to be disregarded only if there is persuasive contradictory evidence. *See Coffman v. Bowen*, 829 F.2^d 514, 517 (4th Cir. 1987). Otherwise stated, it is entitled to controlling weight only if (1) it is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and (2) it is not inconsistent with the other substantial evidence in the record. *See* 20 C.F.R. § 404.1527(d)(2). Thus, when a treating physician's opinion does not satisfy these criteria, it must be analyzed in the same manner as any other medical opinion in the record. *Id.* Reviewed by that standard, the ALJ in the instant case reasonably concluded that Dr. Young's functional capacity opinion should not be accorded great, or even decisionally significant weight, and this determination not to adopt it is supported by substantial evidence in the record.

To the extent that Dr. Young's functional capacity assessment is an expression of his opinion that the plaintiff is *disabled*, as noted in his opinion, the ALJ is not bound by a conclusory opinion of disability or entitlement to benefits, even when rendered by a treating physician, since the issue of disability is the ultimate issue in a Social Security case and that issue is reserved for the Commissioner. *See* 20 C.F.R. § 404.1527(e)(1).

Lastly, as the ALJ observed with reference to Dr. Knitzner's opinion, under the agency's regulations a chiropractor is not considered to be an "acceptable medical source" pursuant to 20 C.F.R. § 404.1513(d)(1). An opinion from a chiropractor can, "at best," qualify "only as a layman's

opinion.” *Lee v. Sullivan*, 945 F.2^d 687, 691 (4th Cir. 1991). In this case, the ALJ concluded that Dr. Knitzner’s opinion should properly be rejected on the basis of its inconsistency with the objective medical record. (R.20.) Furthermore, it is supported by no treatment notes or functional assessments. Reasonably, therefore, the ALJ concluded that Dr. Knitzner’s opinion should be “given little” decisional weight.

D.

The recommendation in this case to affirm the Commissioner’s final decision should not be read to suggest that the plaintiff does not suffer from a significant chronic back pain syndrome. The medical record certainly documents her efforts to obtain relief from this pain; however, it also amply supports the ALJ’s conclusion that her back condition and related problems are not of sufficient severity to be reasonably expected to result in a totally disabling condition.

VI. Proposed Findings of Fact

As supplemented by the above summary and analysis and on the basis of a careful examination of the full administrative record, the undersigned submits the following formal findings, conclusions and recommendations:

1. Dismissal of the plaintiff’s appeal pursuant to Rule 41(b) is not warranted by the facts and circumstances of this case;
2. The Commissioner’s final decision is supported by substantial evidence;
3. The plaintiff’s back disorders were properly found to be a *severe* condition, and its severity was properly assessed under the applicable listing for the evaluation of musculoskeletal impairments;
4. The Commissioner’s final decision gave the requisite consideration and weight to the

the opinions of Dr. Young concerning the plaintiff's level of functioning;

5. The Commissioner's final decision gave the requisite consideration and weight to the the opinions of Dr. Knitzner concerning the plaintiff's level of functioning;
6. The Commissioner's final decision gave the requisite consideration and weight to the plaintiff's statements and evidence about the severity, persistence and limiting effects of her pain and related symptoms;
7. Substantial evidence in the record supports the finding that through the decision date the plaintiff was not disabled within the meaning of the Act;
8. The plaintiff has not met his burden of proving a disabling condition on or before his date last insured; and
9. The final decision of the Commissioner should be affirmed.

VII. Recommended Disposition

For the foregoing reasons, it is RECOMMENDED that an order be entered AFFIRMING the final decision of the Commissioner, GRANTING JUDGMENT to the defendant, and DISMISSING this case from the docket of the court.

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.

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: 20th day of August 2010.

 /s/ *James G. Welsh*
United States Magistrate Judge