

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

GEANNA FRANCES SCOTT-FLAX,)	Case No. 5:06cv00101
)	
<i>Plaintiff</i>)	REPORT AND
v.)	RECOMMENDATION
)	
MICHAEL J. ASTRUE, ¹)	By: Hon. James G. Welsh
Commissioner of Social Security,)	U. S. Magistrate Judge
)	
<i>Defendant</i>)	
)	

The plaintiff, Geanna Frances Scott-Flax, brings this action pursuant to 42 U.S.C. § 405(g) challenging the 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 and for supplemental security income (“SSI”) benefits under Title XVI of the Social Security Act, as amended (“the Act”), 42 U.S.C. §§ 416 and 423. Jurisdiction of the court is pursuant to 42 U.S.C. 405(g).

On February 23, 2007, the Commissioner’s answer was filed along with a certified copy of the administrative record (“R.”) containing the evidentiary basis for the findings and conclusions set forth in the Commissioner’s final decision. By order of referral entered three days later, this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

¹ On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure, and 28 U.S.C. § 405(g) he is substituted, in his official capacity, for Jo Anne B. Barnhart, the former Commissioner.

The plaintiff's Motion for Summary Judgment was subsequently filed on April 25, 2007, and it is deemed to be her brief addressing the reasons why she believes the final decision of the Commissioner ought to be reversed.² No written request having been made for oral argument.³ The Commissioner filed his brief in response and Motion for Summary Judgment on May 29, 2007. The undersigned having now reviewed the administrative record, the following report and recommended disposition are submitted.

In her motion the plaintiff asserts two basic assignments of error . First, she contends the administrative law judge (“ALJ”) erred in failing to give the requisite decisional consideration and weight to her medically documented post-traumatic lumbar disc disease with attendant nerve root impingement and chronic back pain. Second, she argues the ALJ’s step-five conclusion that she retained the functional ability to do light work⁴ was not based on substantial evidence. In response, the Commissioner argues he is entitled to summary judgment on the basis of the ALJ’s adequate and proper weighing of the medical evidence and assessment of the plaintiff’s residual functional capacity.

² Pursuant to paragraph 1 of the court's Standing Order No. 2005-2, the plaintiff in a Social Security case 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." In minimal compliance with the intent of this Standing Order, the plaintiff's summary judgment motion sets forth the reasons she believes the final decision of the Commissioner is legally deficient, and it references the court to parts of the administrative record she deems to be supportive of her position.

³ Paragraph 2 of the court's Standing Order No. 2005-2 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.

⁴ “*Light work*” is defined in 20 C.F.R. § 404.1567(b) to involve lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category generally requires a good deal of walking or standing, or when it involves sitting most of the time 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. 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.

I. Standard of Review

The court's review is limited to determining whether there is substantial evidence to support the Commissioner's conclusion that the plaintiff failed to meet the conditions for entitlement established by the Act and applicable administrative regulations. 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 v. Apfel*, 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 re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the [Commissioner]." *Id.* (quoting *Craig v. Chater*, 76 F.3^d at 589). The administrative decision-maker'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).

II. Administrative History

The record shows that the plaintiff protectively filed her applications for DIB and SSI on December 31, 2003. (R.14,113-117,526-529,536-538). In her supporting disability reports, the plaintiff alleged that her disability began on July 15, 2003 due to functional limitations related to low back pain, problems with her entire right side, high blood pressure, and diabetes-related blurred vision. (R.127,142, 174). Her claims were denied both initially and on reconsideration. (R.80-81,530-535,539-545). Pursuant to a timely request, an administrative hearing on her applications was held on March 3, 2006 before an ALJ. (R.91-96,99-107,22-78). The plaintiff was present, testified, and was represented by counsel at the administrative hearing. (R.97-98,14,22-52).

Utilizing the agency's standard five-step sequential inquiry,⁵ the plaintiff's claim was denied by written administrative decision on July 27, 2006. At the initial determination step, the ALJ found that the plaintiff met the Act's insured status requirements through March 31, 2008 and taken individually her work attempts after her alleged onset date did not constitute substantial gainful work activity. (R.16,14).

⁵ Determination of eligibility for social security benefits involves a five-step inquiry. *Mastro v. Apfel*, 270 F.3d 171, 177 (4th Cir. 2001). It begins with the question of whether, during the relevant time period, the individual engaged in substantial gainful employment. 20 C.F.R. § 404.1520(b). If not, step-two of the inquiry is a determination, based upon the medical evidence, of whether the individual has a severe impairment that has lasted or is expected to last for 12 months. 20 C.F.R. § 404.1520(c); *Barnhart v. Walton*, 535 U.S. 212 (2002). If the claimed impairment is sufficiently severe, the third-step considers the question of whether the individual 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 individual is disabled; if not, step-four is a consideration of whether the individual'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 individual from performing other work. 20 C.F.R. § 404.1520(f).

At step-two the ALJ concluded that the medical record established the plaintiff's disc disease, diabetes and obesity to be a "severe combination of impairments." (R.16). As phrased, this step-two findings implies, but does not directly conclude, that individually none of the identified medical conditions was determined to be "severe"⁶ within the meaning of the Act.

Noting his reliance "in part" on the opinions of the state agency physicians which he deemed to be "well-supported in the record," the ALJ stated that the plaintiff's impairments, neither singularly nor in combination, met or medically equaled a listed impairment. (R.16). *See* 20 C.F.R. Part 404, Subpart P, Appendix 1.

Based on his assessment of the medical evidence, the plaintiff's hearing testimony and the vocational testimony, the ALJ concluded that the plaintiff retained the functional capacity to engage in work activity at light exertional levels and could perform the exertional requirements of her past relevant work as a telemarketer, receptionist/secretary, teacher's assistant, school bus monitor, cashier, activities director, and office worker/manager. (R.17-21,14).

After issuance of the ALJ's adverse decision, the plaintiff made a timely request for Appeals Council review. (R.11,549). Her request was denied (R.7-10), and the decision of the ALJ now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981.

⁶ Quoting *Brady v. Heckler*, 724 F.2^d 914, 920 (11th Cir. 1984), the Fourth Circuit held in *Evans v. Heckler*, 734 F.2^d 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).

III. Facts

The record in this case shows that the plaintiff was fifty-four years of age⁷ at the time of the administrative hearing. (R.28,113,118). She completed high school and some additional business school course work. (*Id.*). Her past relevant employment included work as a telemarketer, research assistant, certified nursing assistant, office receptionist/secretary, and teacher's assistant/school bus monitor. (R.54-55,128-129,137,143,154-161,175-176,183-195).

In addition to an underlying medical history of high blood pressure, poorly controlled diabetes mellitus, right knee arthroscopic surgery and medical treatment for two separate minor physical injuries in the Summer of 1997 and the Spring of 1998, the plaintiff's medical records document a history of low back pain and attendant right lower extremity radiculopathy which she attributed to a work-related injury that occurred while lifting a patient in September 1998. (R.241-247,253,255-264,294,300,308,403-422). X-rays subsequently demonstrated a herniated disc at L4/5, and in April 1999 she underwent an L4/5 discectomy and foraminotomy. (R.462). This surgery was accomplished without any complications or residual instability, and she was ambulatory at the time of her hospital discharge. (R.252,262).

Despite the successful surgery, a period of physical therapy (R.270-285), and a number of radiographic studies which initially showed only "mild" degenerative disc disease, the plaintiff

⁷ Under the agency's regulations, the plaintiff is classified as a "person closely approaching advanced age." 20 C.F.R. § 404.1563(d). (R.53).

continued to complain of chronic low back pain and right leg radiculopathy which was exacerbated by prolonged sitting or standing. (R.248-251,285,293,294,510-513). A lumbar myelogram and a post-myelographic CT in December 2005, however, demonstrated a significant change in her condition. At that time, she was found to have “marked” post-surgical neurologic changes at L4/5, “moderate” disc space narrowing at the same location, and “severe” disc space narrowing at L3/4 due to a “large right lateral disc protrusion.” (R.497-499). Follow-up radiographic studies in February 2006, shortly before her administrative hearing, similarly confirmed the plaintiff’s “severe” disc disease, particularly at L4/5. (R.516-520).

The plaintiff’s medical records for the years 2004 and 2005 show that her diabetes remained poorly controlled, and in May 2004 required her to be hospitalized for treatment. (R.308-309,332,339, 343-345,352-353,356,358,423; *see also* R.404-422). Although she exhibited some problems with blurred vision, an early sign of diabetic retinopathy, her vision remained essentially unimpaired. (R.324-328). During this same period, the plaintiff also received outpatient medical care for a number of more transient medical problems, including tonsillitis, cellulitis, sore throats, environmental allergies, coughs, right wrist stiffness and swelling, rashes, sinus headaches and congestion, ear pain, “nerves” and anxiety, right thumb pain, right wrist arthritis, nausea, a right elbow injury, a right knee injury, and right hip and leg pain. (R.312,329-354,428-494,496-505,507-508,521-525).

In June 2003 and again in May 2004 the plaintiff’s then available medical records were reviewed by state agency physicians. In each instance, the reviewer concluded that the plaintiff was functionally able to do light work on a regular and sustained basis. (R.286-292,300-307).

Between these two state agency physician reviews, the plaintiff was seen by Dr. Chris Newell in May 2004 for a consultive examination. As part of her history, the plaintiff reported that she had stopped working the previous month due to the intractable nature of her low back pain and attendant lower extremity radiculopathy. (R.294-295). As part of his examination, Dr. Newell noted the plaintiff's apparent back stiffness, slow movements, and somewhat shortened gait when bearing weight on her right side. (R.295). He found her dominant right hand and thumb to demonstrate tenderness on palpation and her back to show left paravertebral muscle spasms on palpation in the lumbosacral area, decreased range of motion, tenderness and loss of lumbar lordosis. (R.295,298,29). In his opinion, these clinical findings of chronic low back pain and osteoarthritis of the right hand and thumb would limit the plaintiff to 2-4 hours standing and walking and "about" 4 hours sitting during an 8-hour work day. (R.296). In his view, the plaintiff "would need frequent breaks every 30 minutes to stretch," would be limited in her ability to bend, stoop or crouch, would be able to carry no more than ten pounds occasionally and five pounds regularly, and would be able to use her hand for occasional grasping and handling of objects. (R.295-296).

At the hearing, the plaintiff confirmed her age, her education, her work history, and stated that she had not worked since May 2004 due primarily to chronic back and right leg pain. (R.27-36,44-49). She testified that she is in significant pain every day, that prescription medications give her only short-term pain relief, that the pain makes it difficult for her to get more than about four hours sleep at night, that the pain makes it difficult for her to stand longer than about ten minutes or to sit longer than about one hour, and that her arthritic right hand impairs her grip and use of this dominant hand.

(R.37-38). In addition, she testified that she has been scheduled for additional back surgery, including a bone graft and spinal fusion. (R.37).

As a hypothetical question, Dr. Earl Glosser was asked by the ALJ to assume an individual with the plaintiff's vocational profile (age, education and work experience), with the functional ability to do light work, with an ability to bend frequently at the waist, but with only an occasional ability to climb stairs, kneel, crouch, squat, crawl or reach overhead. (R.56-57). Such an individual, in the opinion of this vocational witness, would be able to perform most of the types of work the plaintiff had done in the past, including work as an officer manager, activities director, telemarketer, school bus monitor, or teacher's assistant. (R.57-59). As a second hypothetical question, the vocational witness was asked to make the same assumptions plus an ability to bend forward at the waist only occasionally. (R.59-60). In Dr. Glosser's opinion, such an individual would be able to work as a cashier or as an activities director. (R.60,63). As a third hypothetical question, the vocational witness was asked to assume the first hypothetical person with only a ten pound ability to lift and carry occasionally. (R.64). In Dr. Glosser's opinion, such a person would be able to work as a telemarketer, office manager, receptionist/secretary or some types of cashiering. (R64-65). And as a final hypothetical question, Dr. Glosser was asked to assume an individual with the limitations outlined by Dr. Newell in is consultive examination report. (R.66-67 A person with these functional limitations, in Dr. Glosser's opinion, would not be employable. (R.67).

IV. Analysis

A. Step-Two Consideration

As noted above, at step-two of his sequential analysis, the ALJ concluded that the medical record established the plaintiff's disc disease, diabetes and obesity to constitute a "severe combination of impairments." (R.16). This finding inescapably implies that the ALJ viewed neither the plaintiff's significant disc disease nor her poorly controlled diabetes standing alone to constitute a severe impairment. As such, it is contrary to the uncontroverted medical evidence, and it is contrary to the Fourth Circuit's holding in *Evans v. Heckler*, 734 F.2d 1012,1014 (4th Cir. 1984).

Standing alone, the radiographic studies (R.516-521) done at the University of Virginia Medical Center ("UVaMC") shortly before the administrative hearing objectively demonstrate the severity of the plaintiff's lumbar disc disease and associated right lower extremity radiculopathy. *Inter alia*, her significant disc disease was also objectively demonstrated by Dr. Newell (R.295-296) during his consultive examination.

Similarly, the medical record demonstrates the plaintiff's significant ongoing problems with a poorly controlled diabetic condition requiring a combined insulin and medication treatment regime. (*E.g.*, R.403-426). Likewise, it shows that the plaintiff's diabetes was so out of control that it required her to be hospitalized on at least one occasion. (R.308-309).

As the Fourth Circuit held in *Evans v. Heckler* at 1014, an impairment can be considered "not severe" only when it is "a *slight abnormality* which has such a *minimal effect* on the individual" and

would not be expected to interfere with the individual's ability to work. *See also* 20 C.F.R. § 404.1520(c). Considered individually, the plaintiff's diabetes and her lumbar disc disease each meets this definition of a severe impairment.

These step-two errors inevitably infected the ALJ's subsequent analytical steps, including steps three, four and five, and require remand.

In passing, it should also be noted that the ALJ's step-two finding cannot be based on the absence of a listing-level impairment. Although not stated as a basis for his step-two finding, it appears to be implied from the tenor of this finding. If there was any such reliance, it was misplaced. As the Fourth Circuit observed in *Martin v. Secretary of Dept. of Health, Educ. & Welfare*, 492 F.2^d 905, 910 (1974), the listings are "a handy guide to lay examiners to advise them when disability . . . has unquestionably resulted, but the regulation cannot be construed to establish the exclusive means by which the showing may be made." *See also Chico v. Schweiker*, 710 F.2^d 947, 950-55 (2^d Cir. 1983) (remand required by the ALJ's misplaced reliance on listings).

A. Step-Three Consideration

As part of the agency's evaluation process, the ALJ is required at the third sequential step in the decisional inquiry to determine whether any "severe" impairment meets or equals the medical criteria found in the Listing of Impairments (20 C.F.R. Part 404, Subpart P, Appendix 1) and to explain his conclusion. *Kennedy v. Heckler*, 739 F.2^d 168 (4th Cir. 1984); *Cook v. Heckler*, 783 F.2^d

1168 (1986). If the impairment does, “a finding of disability without consideration of vocational factors is mandated.” *Kennedy v. Heckler* 739 F.2^d at 171. “If, and only if,” it does not meet or equal a listing must the ALJ undertake the next decisional step. *Id.*

In *Cook v. Heckler*, 783 F.2^d 1168 (1986), the Fourth Circuit remanded the case to the agency for further explanation because of the ALJ’s failure to explain his conclusion that the plaintiff’s significant disabilities were not equivalent to any listed impairment. Therein, the court explained:

The ALJ should have identified the relevant listed impairments. He should then have compared each of the listed criteria to the evidence of [the plaintiff’s] symptoms. Without such an explanation, it is simply impossible to tell whether there was substantial evidence to support the determination.

Id. at 1173.

Despite the plaintiff’s vague and indefinite contention in her summary judgment motion that the ALJ’s review of the evidence was incomplete and despite her failure to suggest any pertinent case law authority to support this assignment of error, it is clear from the record that the ALJ did not undertake to make a comparison of any listing criteria to any of the plaintiff’s relevant “severe” impairments. Unless such a particularized determination is made, it is not possible for a reviewing court to tell whether substantial evidence to support the determination that an individual’s identified impairments do not meet or medically equal one of the Listing of Impairments.

It is only when the record reflects a comparison of the individual’s impairment-related symptoms, signs, and laboratory findings with the corresponding listing criteria that such a

determination can be made. *See* 20 C.F.R. §§ 416.925 and 416.926(a); *Cook v. Heckler*, 783 F.2^d at 1172; *Ketcher v. Apfel*, 68 F.Supp. 2^d 629, 646-47 (D. Md. 1999); *Combs v. Astrue*, 2007 U.S. Dist. LEXIS 28391, *23 (WDVa). Likewise, it is the ALJ's obligation to consider whether an individual's impairments in combination are or are not of listing-level such severity. *See* 42 U.S.C.A. § 423(d)(2)(B); *Hines v. Bowen*, 872 F.2^d 56, 59 (4th Cir. 1989) (a "failure to establish disability under the listings by reference to a single, separate impairment, does not always prevent a disability award").

Having failed to fulfill this step-three obligation to address the plaintiff's "severe" impairments and the relevant listing criteria and further having failed to provide an explanation of his reasoning, the Commissioner's final decision does not provide an adequate basis for court review. This error at step-three also warrants reversal and remand.⁸

In passing, it also merits noting that the ALJ predicated his negative step-three conclusion "in part" on the opinions of state agency physicians. This reliance is misplaced. Neither in their functional assessments (R.286-292,300-307) nor anywhere else in the record is there an indication of any listing-related consideration of the plaintiff's significant impairments by the state agency physicians. Even if these assessments are assumed *arguendo* to bear on the issue of listing-level severity, they were made without benefit of the later UVaMC studies which objectively demonstrated a marked change for the worse in the plaintiff's degenerative lumbar disc disease.

⁸ The court is obligated to keep in mind that any applicant for disability is entitled to a full and fair consideration of his or her claim, and a failure to receive such consideration may constitute sufficient cause to remand the case. *See Sims v. Harris*, 631 F.2^d 26, 27 (4th Cir. 1980).

Because remand is necessary for the Commissioner to make the proper step-three evaluation of the plaintiff's several "severe" impairments, the court need not consider the plaintiff's other allegations of error.

V. 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. The Commissioner's final decision fails to consider adequately all of the evidence in this case;
2. The Commissioner's factual analysis of the record at step-two of the required sequential consideration is not supported by substantial evidence;
3. The Commissioner's factual analysis of the record at step-three of the required sequential consideration is not supported by substantial evidence;
4. The Commissioner's final decision is not supported by substantial evidence;
5. It is proper to reverse the Commissioner's decision and to remand the case to the Commissioner, pursuant to "sentence four" of 42 U.S.C. § 405(g), for reconsideration in a manner consistent with this report and recommendation; and
6. On remand, the parties should have the opportunity to introduce such additional evidence as they may be advised is appropriate.

VI. Recommended Disposition

For the foregoing reasons, it is RECOMMENDED that an order be entered DENYING the defendant's motion to dismiss, VACATING the final decision, REMANDING the case to the

Commissioner for further proceedings and reconsideration in a manner consistent with this Report and Recommendation and with the parties to have the opportunity to introduce such additional evidence as they may desire, 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.

VII. 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 ten (10) 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: 2nd day of August 2007.

/s/ JAMES G. WELSH

United States Magistrate Judge