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

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| **SHIRLEY M. COLEMAN,** | ) | |
| | ) | |
| **Plaintiff** | ) | |
| | ) | |
| **v.** | ) | **Civil Action No. 6:04CV048** |
| | ) | |
| **COMMISSIONER OF SOCIAL SECURITY,** | ) | |
| | ) | |
| **Defendant** | ) | |

**REPORT AND RECOMMENDATION**

Plaintiff Shirley M. Coleman brought this action pursuant to 42 U.S.C. § 405(g) for a review of 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, 42 U.S.C. §§ 401-433. This case was referred to the undersigned magistrate judge on May 23, 2005 for report and recommendation. Oral argument was held on November 15, 2005. Having reviewed the record and after briefing and oral argument, the case is now ripe for decision.

The court's review is limited to a determination as to whether there is substantial evidence to support the Commissioner's conclusion that 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.2d 1453, 1456 (4th Cir. 1990); Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966). Stated briefly, substantial evidence has been defined as such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971).

Shirley M. Coleman was born on April 27, 1963. (R. 357). She has a tenth grade education and no vocational training. (R. 391). Ms. Coleman is a single parent who lives with her 19 year old son in a borrowed mobile home. Plaintiff has worked as a case packer, wrapping rolls of cloth and performing other maintenance duties at Dan River textile company. (R. 122). She has also worked at Thomasville as a case packer. (R. 122). Other employment has included Burger King (food service, cook); Travelers Inn Motel (maid); Burrus Lumber (wood mill); Wynn's Precision Motors (cleaned head gaskets); Nash Construction (flag person); TriTech (packer); Bausch and Lomb (packer). (R. 122, 123, 359-365).

Plaintiff filed an application for DIB on March 15, 2001, alleging she became disabled on October 13, 2000 due to musculoskeletal impairment. (R. 37, 84) Plaintiff's claim has been subjected to exhaustive administrative review, including administrative hearings in 2002 and 2003, and two decisions by administrative law judges ("ALJ"s). Following the Appeals Council's denial of a request to review the second hearing decision, that decision, dated February 11, 2004, became final and an administrative hearing was conducted for the purposes of judicial review under 42 U.S.C. § 405(g). Plaintiff then filed this action challenging the Commissioner's decision.

Coleman makes two principal arguments. First, Coleman argues that the ALJ's decision is tainted by a flawed assessment of her credibility. Second, Coleman argues that the ALJ erred by relying on the medical records and opinion of one treating physician, Dr. Barnard, along with the assessment of the consultative state agency physician, who indicated that Coleman could perform sedentary work, instead of the opinion of another treating physician, Dr. Bowen, who indicated that Coleman was disabled from all work.

**1. <u>The ALJ's Credibility Determination Was Not Erroneous.</u>**

Coleman contends that the ALJ's decision is colored by the erroneous conclusion that Coleman switched doctors from Dr. Barnard to Dr. Bowen because Dr. Bowen indicated that Coleman could do some type of sedentary work. (R. 166, 168) The ALJ noted that he was "convinced that the claimant stopped seeing Dr. Bernard because she did not like the fact that he released her to return to work and that she did not vigorously pursue physical therapy and participation in the community drug assistance program, because she did not value the services and because she was content with her situation; she wanted to pursue disability; she did not want to pursue weight loss, rehabilitation or employment." (R. 23)[1]

Coleman, on the other hand, contends that she quit seeing Dr. Barnard for financial reasons as her health insurance had lapsed. (R. 389) In this regard, the ALJ's decision "notes that Dr. Bernard's records did not referenced [sic] the claimant's insurance coverage or lack of coverage but they clearly stated that the knee surgery had been successful and that the claimant could return to work." (R. 23) This aspect of the ALJ's decision is undermined by certain portions of Coleman's medical record which corroborate her belief that she could not return to see Dr. Barnard. For example, the last entry in Dr. Barnard's medical file relating to Coleman indicates that she was a no show for an appointment on April 23, 2001 and cancelled an appointment scheduled for May 7, 2001 due to "finances (collection.)." (R. 164) Additional medical records likewise suggest that Coleman believed that she could not see Dr. Barnard without paying something towards her outstanding bill. (R. 188, 208, 209, 274) Coleman argues that these entries demonstrate that the ALJ's credibility assessment is erroneous.

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[1]The ALJ's decision consistently refers to Dr. Barnard as Dr. Bernard.

Other entries in the medical records support the ALJ's conclusion. For example, as the ALJ noted, several medical records from Dr. Bowen confirm that Coleman, while claiming to lack the funds to pay Dr. Barnard, chose not to reapply to have her prescriptions filled through a Community Prescription Program. (R. 23, 281, 201)

As to issues of credibility, the law is clear that "[b]ecause he had the opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are entitled to be given great weight." Shively v. Heckler, 739 F.2d 987, 989 (4th Cir. 1984).

While it is true that Coleman has pointed out certain medical records which undermine one facet of the ALJ's credibility determination, the existence of those records alone do not render the ALJ's credibility determination so erroneous as to require reversal of this case. Indeed, as explained by the ALJ, there were many more aspects to the ALJ's credibility determination:

> The fact that the claimant dropped out of treatment with the specialist who released her to return to work, did not participate in physical therapy, did not lose weight, did not seek assistance from available sources, did not maintain her eligibility to receive free or reduced cost medications, indicated in her treatment record that the pain medication was effective, not require a cane or other assistive aide and did not have objective medical evidence that would reasonably be expected to produce the symptoms and limitations that she alleges, all combine to persuade the Administrative Law Judge that the claimant's allegations are not credible.

(R. 24) In short, while it is true that Coleman has pointed to certain medical records which corroborates her claim that she stopped seeing Dr. Barnard for financial reasons, that does not render the ALJ's credibility determination so deficient as to impermissibly taint the remainder of

his decision. The question remains, therefore, whether the ALJ's decision is supported by substantial evidence.

### 2. Substantial Evidence Supports the ALJ's Assessment of the Medical Evidence.

Coleman argues that the ALJ erred by rejecting the disability opinion of Dr. Bowen in favor of the earlier opinion of Dr. Barnard that Coleman could do sedentary work. While both Drs. Barnard and Bowen treated Coleman for her persistent knee pain, Coleman argues that the opinion of Dr. Bowen should be accorded greater weight as it was later in time. In that regard, Coleman argues that "the importance of the recency of Dr. Bowen's treatment is highlighted when [Coleman's] weight gain is considered." Pl.'s Brief at 12. Coleman argues that because she gained nearly 100 pounds after she stopped working, "the patient [Dr. Bowen] examined was very different from the patient who was examined by Dr. Barnard or whose records were reviewed by the Commissioner's non-examining experts." Pl.'s Brief at 13.

Coleman is wrong. Coleman began treatment with Dr. Barnard on December 27,1999. At that time, Coleman's weight was 264 lbs.[2] (R. 177) Over then next two years while Dr. Barnard was seeing Coleman, his medical records consistently reflect her weight at this level and the need to lose weight. Dr. Barnard's very first note stresses the need for "serious weight loss," (R. 177), and subsequent notes "emphasized weight loss." (R. 176, 174)

Coleman was first seen by a nurse practitioner in Dr. Bowen's Centra Health practice a year after she last saw Dr. Barnard, on April 4, 2002. Her weight at that time of her first visit was 274 lbs., and was 270 lbs. two weeks later. (R. 210, 208). Contrary to her argument, Coleman's weight was roughly the same at the time of her treatment with both Drs. Barnard and

[2]Coleman testified that she weighed 180 lbs. while working. (R. 376).

Bowen. Indeed, as with Dr. Barnard, the medical records of Dr. Bowen clearly note the impact of obesity on Coleman's degenerative knee disease. (R.200-210) Thus, Coleman's argument that Dr. Barnard's records and opinion should be disregarded because her physical condition was grossly different during the time he treated her is plainly wrong.

Both Dr. Barnard and Dr. Bowen treated Coleman for degenerative knee disease for a period of years. The medical notes of each repeatedly reference the impact of her weight on her knee problems. (R. 164, 314) As with Dr. Barnard, in his first note Dr. Bowen states that "[t]he main thing is she is terribly heavy and this causes severe degenerative disease." (R. 311) While the ultimate conclusions reflected in the disability opinions of Dr. Barnard and Bowen are at odds, the underlying medical records paint a consistent picture. Coleman has consistently complained of bilateral knee pain, which has been determined to be caused by degenerative joint disease aggravated by obesity.

Coleman's knee problems were of long duration, and she dated their onset to being run over by a tractor years ago. (R. 206, 209) Coleman worked for many intervening years, and states that her knee problems worsened over time. (R. 206, 209) Dr. Barnard performed arthroscopic knee surgery on the right knee in 2000, but Coleman continued to complain of knee pain. (R. 164-171) Dr. Barnard obtained a second opinion from Dr. Gautham Gondi, that Coleman may be a candidate for cartilage resurfacing, (R. 167), but Coleman was not anxious for further surgery. (R. 164, 166) After a little more than a year, Coleman sought treatment with Centra Health, and ultimately was seen by Dr. Bowen. (R. 209, 164) One of Dr. Bowen's 2002 reports of physical examination of Coleman showed "[p]eripheral pulses good. Sensation is good. Strength is good. Good range of motion of both knees. Arthritic, doing fine. A little

obesity. Degenerative disease of both knees. Obesity. Will do well." (R. 202) X-ray reports from that same period, May, 2002, revealed "[m]ild narrowing of the medial femorotibial joint space bilaterally, possible small volume left knee joint effusion," (R. 207), which Dr. Bowen's notes characterized as "minimal degenerative disease of both knees." (R. 200) In later medical records, Dr. Bowen sometimes categorized Coleman's degenerative disease or pain as "severe." (R. 283, 284, 298, 305, 306).

The ALJ found that Dr. Bowen's objective findings did not support his opinion that Coleman was incapable of any work, and review of his medical records provides support for this conclusion. For example, a typical finding on examination was that Coleman had "[f]airly good range of motion, a little loss on the right. Otherwise doing well. Pain and tenderness." (R. 310, 311, 309) Such a finding led Dr. Bowen to conclude early on in his treatment that Coleman had "[m]inimal degenerative disease of right knee. She is terribly heavy. She knows what to do. She doesn't do much now otherwise than that." (R. 310) Dr. Bowen's notes also reveal that Coleman obtained some relief from medications for her knee pain. (R. 308, 307) For example, on May 30, 2003, Coleman appeared at Dr. Bowen's office after a seven month absence and told the nurse practitioner that Dr. Bowen "has prescribed her Bextra and she states that really works good and . . . it gives her 24 hour relief with pain." (R. 281) Several other of Dr. Bowen's notes referred to Coleman as either doing well or that she would do well. (R. 302, 304, 305)

Given the consistent nature of Coleman's complaints, the clinical observations contained in both Dr. Bowen and Dr. Barnard's notes, and the objective reports of x-rays indicating "osteophyte formation along the medial compartment and no significant joint space narrowing,"

(R. 163), the record certainly contains substantial evidence to support the ALJ's decision to credit the opinion of Dr. Barnard and the consultative state agency physician.

The ALJ chose to rely on Dr. Barnard's opinion that Coleman could do sedentary work and the consistent opinion of the consultative state agency physician, and rejects Dr. Bowen's RFC checklist as being unsupported by his medical records. To be sure, the opinions of Drs. Barnard and Bowen conflict as to whether Coleman is disabled. The ALJ chose to accept the opinion of Dr. Barnard and that of the consultative state agency physician because he found Coleman not to be credible and was convinced that Coleman switched doctors to obtain a more favorable disability opinion.

Where there is a conflict in the medical evidence, an ALJ may not accept one conflicting diagnosis over another without addressing the underlying conflict. Murphy v. Bowen, 810 F.2d 433, 437 (4th Cir. 1987). Here, the ALJ took great pains to explain why he believed that the medical evidence did not support Dr. Bowen's conclusion that Coleman was totally disabled. (R. 23-24) While Dr. Bowen's opinion is not binding on the Commissioner, it is entitled to great weight as it reflects his expert judgment based on continuing observation of the plaintiff's condition over a prolonged period of time. Therefore, it may be disregarded only if there is persuasive contradictory evidence. Coffman v. Bowen, 829 F.2d 514, 517 (4th Cir. 1987); Smith v. Schweicker, 795 F.2d 343, 345-46 (4th Cir. 1986); Mitchell v. Schweicker, 699 F.2d 185, 187 (4th Cir. 1983). Here, such persuasive contradictory evidence is present in the medical records of Dr. Barnard and the opinion from the consultative state agency physician.

Given the regulatory framework, it matters not that this court may disagree with the result reached by the ALJ. "The Secretary, and not the courts, is charged with resolving

conflicts in the evidence, and it is immaterial that the evidence before him will permit a conclusion inconsistent with his." Thomas v. Celebreeze, 331 F.2d 541, 543 (4th Cir. 1964). What matters instead is whether there is substantial evidence to support the ALJ's decision. Careful review of all of Coleman's medical records, particularly the consistent clinical observations of both Drs. Barnard and Bowen, provides such evidence.

## CONCLUSION

In making this recommendation, the undersigned does not suggest that plaintiff is totally 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 result in total disability for all forms of substantial gainful employment. 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. Norman K. Moon, 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 is hereby directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 10th day of January, 2006.

/s/ Michael F. Urbanski
United States Magistrate Judge