

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEBORAH E. RUSH : CIVIL ACTION
 :
 v. :
 :
 :
 KENNETH S. APFEL :
 Commissioner of Social Security : 00-2825

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

November 7, 2001

Plaintiff, Deborah Rush ("Rush"), seeks judicial review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security (the "Commissioner") denying her claims for Supplemental Security Insurance ("SSI") and Disability Insurance Benefits ("DIB") under the Social Security Act (the "Act"). See 42 U.S.C. § 401, et seq. The parties filed cross-motions for summary judgment. Upon de novo review of plaintiff's objections to the Report and Recommendation of United States Magistrate Judge Jacob Hart ("Judge Hart"), plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted.

BACKGROUND

Plaintiff filed claims for SSI on June 5, 1997, and DIB on June 16, 1997. She alleged that carpal tunnel syndrome, degenerative joint disease, arthritis, and hypertension rendered her unable to work as of May 6, 1991. The Commissioner denied plaintiff's claims at the initial and reconsideration levels of

review. After a hearing held September 1, 1998, the Administrative Law Judge ("ALJ") determined plaintiff was not disabled and denied her claims by decision dated December 16, 1998. The Appeals Council denial of plaintiff's request for review of the ALJ's decision made it a final decision of the Commissioner.

Having exhausted her administrative remedies, plaintiff filed a complaint seeking judicial review of the denial of her claims. The court referred the parties' cross-motions for summary judgment to Judge Hart for a Report and Recommendation ("R&R"). Judge Hart found substantial evidence supported the ALJ's conclusion that plaintiff was not disabled. He recommended denial of plaintiff's motion for summary judgment and the grant of defendants' motion for summary judgment.

Plaintiff, filing objections to Judge Hart's R&R, claimed: (1) the evidence did not support the finding that plaintiff could perform a range of light work; (2) the medical evidence was not properly evaluated; and (3) claimant's credibility was not properly evaluated.

DISCUSSION

The court conducts de novo review of the portions of an R&R to which specific objections have been filed. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). To be eligible for social security benefits, the claimant must demonstrate an inability to

engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A). The impairment must be such that the claimant "is not only unable to do his [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

The plaintiff has the burden of proving the existence of a disability and must furnish medical evidence establishing the severity of the impairment. 42 U.S.C. § 423(d)(5). A claimant satisfies this burden by showing an inability to return to former work. See Rossi v. California, 602 F.2d 55, 57 (3d Cir. 1979). The burden of proof then shifts to the Commissioner to show that, given the claimant's age, education, and work experience, the claimant has the ability to perform specific jobs that exist in the national economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1520(f).

The Commissioner decided this matter utilizing the five step sequential evaluation process established by the Department of Health and Human Services to determine whether a person is "disabled." This process requires the Commissioner to consider, in sequence, whether a claimant: (1) is currently employed; (2)

has a severe impairment; (3) has an impairment which meets or equals the requirements of a listed impairment; (4) can perform past relevant work; and (5) if not, whether the claimant can perform other work, in view of age, education and work experience. 20 C.F.R. § 404.1520.

In reviewing the decision of the Commissioner, the Commissioner's determination must be upheld if supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390, 91 S.Ct 1420, 28 L.Ed.2d 842 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986). "Substantial evidence is defined as the relevant evidence, which a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. at 401. Substantial evidence is "more than a mere scintilla of evidence but may be somewhat less than a preponderance of the evidence." Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir. 1979), cert. denied, 402 U.S. 976, 91 S.Ct 1680, 29 L.Ed.2d 142 (1979). The court cannot conduct a de novo review of the Commissioner's decision or re-weigh the evidence of record. See Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d cir. 1986), cert. denied 482 U.S. 905, 107 S.Ct 2481, 96 L.Ed.2d 373 (1987).

The ALJ may disregard subjective complaints when contrary evidence exists in the record. See Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993), but the ALJ must provide reasons

for doing so. See Serody v. Chater, 901 F. Supp. 925, 930 (E.D.Pa. 1995). Credibility determinations are the province of the ALJ and should be disturbed on review only if not supported by substantial evidence. See Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983); 20 C.F.R. § 404.1527(e).

Rush makes three objections to Judge Hart's R&R. In considering these objections, the court has independently reviewed the administrative record, the R&R, and the parties' submissions.

Objection 1

Rush objects to Judge Hart's conclusion that there was no substantial evidence to establish the range of alternate work the ALJ found claimant could perform. The vocational expert's conclusions could be relied upon and constituted substantial evidence that Rush can perform light work with limitations.

A "vocational expert's testimony concerning a claimant's ability to perform alternative employment may only be considered for purposes of determining disability if the questions accurately portray the claimant's individual physical and mental limitations." Podedworney v. Harris, 745 F.2d 210, 210 (3d Cir. 1984). If there exists substantial evidence supporting the claimant's condition as described by the ALJ, then the ALJ may rely on the vocational expert's testimony about a person in such a condition. Dumas v. Schweiker, 712 F.2d 1545 (2nd Cir. 1983).

Here, the ALJ posed a hypothetical question to the vocational expert that specifically characterized Rush's situation as requiring: (1) a limited range of light work; (2) the opportunity to elevate her legs; (3) limited standing; (4) limited walking; and (5) limited repetitive bilateral hand or wrist motion. The vocational expert's response, listing several jobs suitable for Rush, showed his understanding of Rush's specific needs. The vocational expert corroborated his response by stating he had personally placed people with the need to have their legs elevated; he had determined his percentages of available work through surveying, observing jobs sites, and communicating with employers. The vocational expert concluded that a significant number of jobs existed in both regional and national economies, given Rush's residual functional capacity, age education and past work.

Objection 2

Rush claims the ALJ did not properly evaluate the medical evidence of record. "A court considering a claim for disability benefits must give greater weight to the findings of a treating physician." Mason v. Shalala, 994 F.2d at 1067. This is particularly true "when the opinion reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Podeworny, 745 F.2d at 217.

Here, Rush's treating physician for her carpal tunnel

syndrome, Dr. Liebenberg, repeatedly found that she was "doing very well" in both hands after corrective surgery. Additionally, Dr. Liebenberg found that Rush had a full range of motion and that her sensation was intact. Later examinations in April, 1997, showed only slight and mild changes in the prognosis of her left wrist.

The ALJ considered evidence concerning the arthritis in Rush's knees. However, her physicians's examination revealed no erythema, no swelling, no tenderness to palpation and full range of motion of her right knee. The ALJ also considered Rush's disabilities concerning Rush's weight, but Rush did not need assistive devices for ambulation, she had normal range of motion, and her neuro-status was intact. Her physician, Dr. Meyers, simply advised her to lose weight.

Rush also relies on her hypertension, but there is concern over the accuracy of her readings. Rush had a normal electrocardiogram and there is no evidence of end organ damage from hypertension.

On de novo review of the ALJ's consideration of Rush's claimed disabilities, there is substantial evidence that Rush's medical history does not present a disability preventing her from performing work. The medical reports from Rush's physicians considered by the ALJ were corroborated by the two state agency medical assessment's of Rush's Residual Functional Capacity.

The agency assessments concluded that: (1) Rush was limited to lifting twenty-five pounds occasionally and ten pounds frequently; (2) Rush could sit, stand or walk for six hours in an eight hour workday with normal breaks; (3) Rush had no limitations on operating hand or foot controls; and (4) Rush suffered no exertional or functional work-related limitation. Rush's Residual Functional Capacity assessment demonstrates she meets the standards for light work as well as the standards for sedentary work as defined by the Social Security Regulations.¹ Rush is under a physician's care and is taking prescribed medicine for her arthritis pain and

¹ The Regulations define light work as lifting no more than ten pounds regularly, and twenty pounds occasionally. A job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of the arm or leg controls. 20C.F.R. §§ 404.1567 and 416.967.

Under Section 20 C.F.R. 404.1567, the Commissioner defines "sedentary work" to include: "jobs which involve lifting no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and the sedentary criteria are met." 20 C.F.R. § 404.156(a).

Social Security Ruling 83-10 defines occasionally as "from very little up to one third of the time. Since being on one's feet is required 'occasionally' at the sedentary level of exertion, periods of standing or walking should generally total no more than about two hours of an eight-hour work day, and sitting should generally total approximately six hours of an eight-hour work day. Work process in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles." SSR 83-10.

hypertension that allows her to perform gainful activity. Here, ALJ's evaluation of the medical record was supported by substantial evidence.

Objection 3

Rush alleges that the ALJ did not properly evaluate claimant's credibility concerning her pain limitations. When a plaintiff claims that the ALJ failed to properly consider subjective complaints of pain, the court must determine whether the ALJ considered all the evidence relevant to plaintiff's complaints of pain and whether the evidence so contradicts plaintiff's subjective complaints that the ALH could discount her testimony as not credible. See Benskin v. Bowen, 830 F.2d 878, 882 (8th Cir. 1978).

Factors for evaluating subjective complaints of pain include: (1) the objective medical evidence; (2) the subjective evidence of pain; (3) any precipitating or aggravating factors; (4) the claimant's daily activities; (5) the effects of any medication; and (6) the claimant's functional restrictions. See Polaski v. Heckler, 739 F.3d 1320, 1322-23 (8th Cir. 1984).

Pain alone may be disabling within the meaning of the Social Security Act if it is supported by objective medical evidence showing the existence of a medical impairment, which could reasonably be expected to cause the pain. However, if inconsistencies in the record and a lack of supporting medical

evidence support the ALJ's decision, the court should not reverse the decision simply because some evidence may support the opposite conclusion. See Marciniak v. Shalala, 49 F.3d 1350, 1354 (8th Cir. 1995).

The ALJ determined that Rush's complaints of pain were not credible because the medical evidence did not support Rush's claims. Dr. Liebenberg found that Rush had full range of motion in her hands. Rush had full range of motion in her right knee. Also, the two state agency medical assessment's of Rush's Residual Functional Capacity concluded that Rush had no limitations on operative hand or foot controls.

The ALJ found that Rush was limited from performing medium, heavy or very heavy work and that Rush has work limitations preventing prolonged standing or walking, and repetitive motions of her hands and wrists. She needed to elevate her legs, but these limitations do not prevent her from light or sedentary work.

The ALJ also considered that claimant maintains a full range of activities of daily living. While Rush may have pain, her activities as primary caretaker of her children continue. She performs household chores, cooks, takes out the trash, drives, and walks to the bus. Rush's ability to perform these daily activities is inconsistent with her allegations of pain. Rush takes medications for her pain and hypertension, with the limited

side-effect of a upset stomach. In balancing the Polaski factors, the objective medical evidence that Rush had no functional limitations outweighs her subjective complaints. The ALJ did not err in discrediting Rush's allegations. See Polaski, 739 F.3d at 1322-23.

Where the ALJ explicitly discredits testimony and gives good reasons for so doing, the court will defer to that judgment. Hogan v. Apfel, 239 F.3d 958, 962 (8th Cir. 2001). Here, the ALJ finding that Rush's subjective complaints of disabling pain were not credible, was supported by substantial evidence of record.

CONCLUSION

Summary judgment will be granted in favor of the defendant.

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 Commissioner of Social Security : NO. 00-2825

ORDER

AND NOW, this 7th day of November, 2001, upon consideration of the cross-motions for summary judgment, de novo review of Report and Recommendation of United States Magistrate Judge Thomas J. Reuter, the objections and response thereto, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. Plaintiff's objections to the Report and Recommendation are **OVERRULED**
2. The Report and Recommendation (#11) is **APPROVED AND ADOPTED**.
3. Plaintiff's motion for summary judgment (#7) is **DENIED**.
4. Defendant's motion for summary judgment (#8) is **GRANTED**.
5. **JUDGMENT IS ENTERED** in favor of defendant Larry G. Massanari, Commissioner.

Norma L. Shapiro, S.J.