

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

ZORAIDA PRATTS,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	NO. 01-2686
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
	:	
Defendant.	:	

Giles, C.J.

August 1, 2003

**MEMORANDUM**

Zoraida Pratts brings this action under 42 U.S.C. §§ 405(g) and 1383(c) for judicial review of the final decision of the Commissioner of Social Security (“Commissioner”) denying her claim for supplemental security income (“SSI”) under Title XVI of the Social Security Act. Plaintiff and defendant have each filed a Motion for Summary Judgment. For the reasons that follow, both motions are denied and the matter is remanded to the Administrative Law Judge (“ALJ”) for further proceedings consistent with this opinion.

**Procedural History**

Pratts filed an application for SSI on May 7, 1997, alleging disability since May 1, 1997 due to a number of mental and physical impairments, including bad nerves, back cramps, headaches, neck and shoulder pain, and memory problems. (R. 99.) Her application was denied initially and again upon reconsideration. Following these denials, plaintiff requested a hearing before an ALJ. At a June 23, 1999 hearing, the plaintiff was present and represented by counsel.

Counsel requested and was granted a thirty day extension to amplify the record as to plaintiff's mental condition. Plaintiff's counsel waived a new hearing. See (R. 20-22.) Despite the extension, counsel was unable to produce additional evidence. On August 31, 1999, the ALJ issued his decision, concluding that the plaintiff was not disabled. On April 6, 2001, the Appeals Council rejected an appeal and the ALJ's decision became the final decision of the Commissioner. On May 31, 2001, Plaintiff commenced this action.

### **Factual History**

Plaintiff was born October 12, 1946 in the Puerto Rican village of Jayulla and was fifty-two years old when the ALJ issued his decision. (R. 10.) Plaintiff has only a first-grade education and has not been employed since 1979. (R. 10.)

On July 2, 1997, plaintiff underwent a consultative examination with Brig B. Srivastava, M.D. (R. 99-102.) The medical report concluded that her nervousness and depression were under control through the use of medication. However, physical testing showed that pain was elicited upon rotation in the interior and exterior of both lower extremities, mostly on the left side. (R. 102.) Dr. Srivastava's final diagnosis was that plaintiff suffered from anxiety and depression, poor memory, dizzy spells, pain in the cervical and lower spine, and insomnia.

A month later, plaintiff underwent a further consultative examination with David Herman, M.D. (R. 103-07.) The physician found her cooperation and self-sufficiency to have been adequate. It was noted that plaintiff's memory seemed intact and that she was able to control hostile, aggressive, and sexual impulses. Plaintiff's I.Q. was estimated to be at or below 50. This placed her at or below the mild mentally retarded range of cognitive potential.

However, these testing results were thought to be inconsistent with her display of cognitive

potential to do abstract thinking as she interpreted certain proverbs. (R. 106.) Dr. Herman concluded that plaintiff was malingering.<sup>1</sup> He opined that it was not possible to assess plaintiff's ability to understand, retain, and follow instructions, to sustain attention to perform simple repetitive tasks, or to relate to other co-workers due to malingering.<sup>2</sup>

Nearly a year later, plaintiff underwent a consultative examination with Marvin Schatz, D.O. (R. 132-134.) Plaintiff reported that she was unable to leave the house and to perform the simplest of tasks on her own. She stated that she had difficulty walking because her legs were very weak during times of depression. Dr. Schatz concluded that plaintiff either suffered from dementia<sup>3</sup> or pseudodementia.<sup>4</sup>

On July 23, 1998, plaintiff underwent another consultative examination with Gene

---

<sup>1</sup>Malingering is defined as “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as . . .avoiding work, obtaining financial compensation...” Diagnostic & Statistical Manual for Mental Disorders (DSM) 683 (4<sup>th</sup> ed. 1992).

<sup>2</sup>A Psychiatric Activities Assessment conducted by Dr. Herman which appeared to show that plaintiff was able to follow instructions and relate to other co-workers was negligently included in the record. That assessment was of another patient, and is unrelated to plaintiff. (R. 108-111).

<sup>3</sup>Dementia is characterized by the development of multiple cognitive deficits that are due to the direct physiological effects of a general mental condition. Diagnostic & Statistical Manual for Mental Disorders (DSM) 147 (4<sup>th</sup> ed. 2000).

<sup>4</sup>“People with pseudodementia eat and sleep little, and they complain bitterly about their memory loss, in contrast to people who have true dementia, who lack insight about their condition and often deny memory loss. People who have pseudodementia regain mental function after the depression is treated. Depression may also coexist with dementia. In such cases, treatment of depression may improve but not entirely restore mental function.” Mark H. Beers, M.D., *The Merck Manual-Second Home Edition*, available at [http://www.merck.com/pubs/mmanual\\_home2/sec06/ch083/ch083c.htm](http://www.merck.com/pubs/mmanual_home2/sec06/ch083/ch083c.htm)

Corbman, M.D. (R. 135-141.) She reported suffering from depression and an inability to walk due to pain in the lower extremities and throughout the body. Dr. Corbman found that plaintiff's cognitive functions were fair and that any indication of deficits was largely a function of her not caring to answer. However, his report showed that she reported a marked restriction in her daily activities. His Psychiatric Activities Assessment concluded that she kept to herself, tended to be irritable and argumentative, and relied on others to maintain her residence.

On July 12, 1999, one year later, plaintiff's treating psychiatrist, Cesar Fabiani, M.D., responded to a set of interrogatories for the record. (R. 176-184.) Dr. Fabiani concluded that plaintiff was unable to perform the activities of daily living and unable to interact with other employees in the workplace due to severe depression. He did not respond to any questions regarding her physical abilities or characteristics.

### **The ALJ's Decision**

The ALJ performed the five step sequential evaluation for determining whether a claimant is under a disability as set forth in 20 C.F.R. § 404.1520. At step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a). If a claimant is found to be engaged in substantial activity, the disability claim will be denied. Bowen v. Yuckert, 482 U.S. 137, 140 (1987). In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. 20 C.F.R. § 404.1520(c). If the claimant fails to show that her impairments are severe, she is ineligible for disability benefits. In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. 20 C.F.R. § 404.1520(d). If a claimant does not suffer from a listed impairment or

its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. Adorno v. Shalala, 40 F.3d 43, 46 (3d Cir. 1994). If the claimant is unable to resume her past work, the evaluation moves to the final step. At the final step, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. 20 C.F.R. § 404.1520(f). The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled.

At step one, the ALJ acknowledged that there was no evidence to refute the plaintiff's allegation that she was not employed; therefore, the ALJ determined that the plaintiff has not worked or engaged in substantial activity. (R. 10.) At step two, after review of the evidence and testimony, the ALJ concluded that there were medical findings of back pain, nervousness, personality disorder, dizziness, chest pain, headaches, and neck and shoulder pain, which could place a substantial limitation upon the plaintiff's basic work activities. (R. 11.) Therefore, the ALJ concluded that plaintiff had a severe impairment according to Social Security definition. See 20 C.F.R. § 404.1520(d). However, at step three, the ALJ determined that plaintiff's impairments did not meet or equal the criteria for an impairment shown in the listings of impairments in Appendix 1, Subpart P, Regulations No. 4. (R. 11.) As a result of this finding, the burden of production fell upon the ALJ to determine plaintiff's residual functional capacity

(“RFC.”) The ALJ concluded that the plaintiff has the RFC to perform the physical exertion<sup>5</sup> and nonexertional requirements of medium work. (R. 12.) In making this RFC determination, the ALJ relied heavily upon his conclusion of plaintiff’s lack of credibility. He credited Dr. Herman’s conclusion of malingering, Dr. Schatz’s finding that she suffers from either Dementia or Pseudodementia, and Dr. Corbman’s conclusion that any indications of deficits in plaintiff’s mental testing were due to her failure to answer questions.<sup>6</sup> At step four no determination was necessary because the ALJ observed that plaintiff had no past relevant work. At step five, without the assistance of a vocational expert and based exclusively upon the medical vocational guidelines (“grids”) established in Appendix 2, Subpart P, Regulations No. 4, the ALJ determined that plaintiff was not disabled.

### **Standard of Review**

When a district court reviews the decision of the Commissioner, review is limited to the Commissioner’s final decision. 42 U.S.C. § 405(g). If the Commissioner’s decision is supported by substantial evidence the decision must be upheld, even if this court would have reached a different conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). Substantial evidence has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). In this context

---

<sup>5</sup>The physical exertion requirements for medium work are lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c).

<sup>6</sup>In explaining his rationale for concluding that plaintiff has the RFC to perform medium work the ALJ erroneously referred to Dr. Fabiani’s responses to the interrogatories as “talking about physical problems not psychological problems.” (R. 11). Additionally, at page four of the ALJ’s decision a typographical error states that plaintiff has the RFC to perform heavy work. (R. 12).

substantial evidence is more than a mere scintilla, but may be somewhat less than a preponderance of the evidence. Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir. 1971).

## Discussion

### I. Medical Vocational Guidelines

The ALJ’s determination that there are jobs in the national economy which plaintiff can perform is a reversible error because contrary to law the ALJ made his determination based solely upon the medical vocational guidelines (“grids”).

The grids were promulgated through administrative rulemaking by the Secretary of Health and Human Services in 1978 to improve both the uniformity and efficiency of the disability determination. Sykes v. Apfel, 228 F.3d 259, 263 (3d Cir. 2000). “The grids<sup>7</sup> consist of a matrix of four factors, physical ability, age, education, and work experience and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy.” Id. The third circuit has specifically found that an ALJ cannot rely exclusively upon the grids to determine if a claimant can perform work in the national economy in instances where the claimant suffers from both exertional and nonexertional

---

<sup>7</sup>The portion of the grids applicable to plaintiff is as follows:

<b>Rule</b>	<b>Age</b>	<b>Education</b>	<b>Previous Work Experience</b>	<b>Decision</b>
***	***	***	***	***
203.18	Closely Approaching Advanced Age	Limited or Less	Unskilled or None	Not Disabled

impairments.<sup>8</sup> Id. at 269.

At step two of the sequential evaluation process, the ALJ concluded that the plaintiff had severe exertional and nonexertional impairments including, “back pain, nervousness, personality disorder, dizziness, chest pain, headaches, and neck and shoulder pain, which could place a substantial limitation upon the plaintiff’s basic work activities.” (R. 11.) Thereafter, the ALJ was prohibited from relying exclusively upon the grids in making a disability determination. See Sykes v. Apfel, 228 F.3d 259 (3d Cir. 2000). The ALJ rendered his decision without the assistance of a vocational expert, citing only to the grids<sup>9</sup>. This error warrants remand.

## **II. Residual Functional Capacity**

RFC is defined as “that which an individual is still able to do despite the limitations caused by his or her impairments.” Burnett v. Commissioner of Social Security Administration, 220 F.3d 112, 121 (3d Cir. 2000). An ALJ is obligated to consider and explain the reasons for discounting all of the pertinent evidence in making a RFC determination. Id. The third circuit has recognized that there is a “particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record.” Cotter v. Harris, 642 F.2d 700, 706 (3d Cir. 1981). In order for an ALJ to find that a claimant can perform the requirements for a given RFC, a physician must opine that the claimant can

---

<sup>8</sup>“Under the regulations, impairments can be either exertional or nonexertional.” Sykes v. Apfel, 228 F.3d 259, 263 (3d Cir. 2000). Exertional impairments affect a claimant’s ability to meet the strength demands of a job, while nonexertional impairments affect a claimant’s ability to meet all of the other demands of a job. Id.

<sup>9</sup>“Based upon a residual functional capacity for heavy work, and the claimant’s age, education, and vocational experience, sections(s) (20 CFR 416.969) of Regulations No.16, and Rule 203.18, Appendix 2, Subpart P, Regulations No.4 provide the framework for a conclusion of not disabled.” (R. 12-13.)

perform activity consistent with the requirements. Carter v. Apfel, 220 F. Supp. 2d 393, 398 (M.D. Pa. 2000). In Carter, the court reversed and remanded the ALJ's determination that the claimant had a RFC to perform "light work" because no medical opinion had been rendered stating that the claimant could perform the exertional requirements of light work.

Here, the ALJ determined that plaintiff has the RFC to perform the physical exertion and nonexertional requirements of "medium work." (R. 13.) The physical exertion requirements for medium work are defined as "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 404.1567(c). Therefore, such a determination was unsupported by substantial evidence because the record is silent as to the physical exertion capabilities of the plaintiff. Analogous to the plaintiff's record in Carter, there remains no substantial proof of record that shows the plaintiff in this case can perform the physical exertion requirements for medium work. While there were medical findings that plaintiff has "normal range of motion" and "good strength bilaterally," no medical professional has opined, considering all of plaintiff's physical and mental impairments found to exist by the ALJ, that she can lift up to fifty pounds or frequently lift up to twenty-five pounds. Therefore, the ALJ's finding that plaintiff can meet the physical exertion demands of medium work is not supported by substantial evidence.

### **III. Treating Physician**

Plaintiff argues that documented findings of the treating psychiatrist and the APM clinic were not afforded proper weight by the ALJ, and to the extent that these opinions are uncontradicted, they are binding upon the ALJ. (Pl. Mot. Summ. J. at 3.) The Government responds arguing that "Dr. Fabiani's opinion that plaintiff was unable to interact with other

employees was not entitled to significant weight because it was inconsistent with the other medical opinions of record showing that she did not have a significant mental impairment.”

(Def. Mot. Summ. J. at 13.)

The old formulation of the “treating physician rule” stated that “the expert opinion of a claimant’s treating physician on the subject of medical disability was binding on Health and Human Services unless contradicted by substantial evidence, and if contradicted, that opinion nonetheless was entitled to some extra weight.” Baybrook v. Chater, 940 F. Supp. 668, 673 (D. Vt. 1996). This formulation of the “treating physician rule” was superseded by statute. See 20 C.F.R. § 404.1527. Currently, the opinion of a treating physician is controlling only if it is “well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial case evidence in the record.” 20 C.F.R. § 404.1527(d)(2). The regulations establish a framework for an ALJ to analyze the opinions of a claimant’s treating physician, and to determine when the opinions are entitled to substantial weight. 20 C.F.R. § 404.1527(d). The applicable regulations enumerate a six factors that an ALJ must consider: (1) the length of the treatment relationship; (2) the nature and extent of the treating relationship; (3) whether the opinion before him is supportable; (4) whether the opinion is consistent with the record as a whole; (5) whether the treating physician was a specialist; and (6) any other factors which tend to support or contradict the opinion. Id.; see also Irelan v. Barnhart, 243 F. Supp. 2d 268, 277 (E.D. Pa. 2003). Additionally, “[w]here there is conflicting probative evidence in the record, there is a particularly acute need for an explanation of the reasoning behind the conclusions of the administrative law judge (ALJ), in a Social Security disability case, and [the] Court of Appeals will vacate or remand a case where such an explanation is not provided.”

Fagnoli v. Massanari, 247 F.3d 34, 42 (3d Cir. 2000).

The ALJ's failure to explain his reasoning for not crediting the plaintiff's treating physician's findings with substantial weight<sup>10</sup> amounts to reversible error. In discussing Dr. Fabiani's response to the interrogatories, the ALJ stated "notes during 1997 and 1998 from her therapist indicate that she was depressed, psychiatric notes during that same period indicate she is 'doing well, doing fair, doing fine', with only the note of 9/2/98 saying 'mood more depressed'. Thus the treating physician's assessments are contradictory." (R. 12.) Patients suffering from Severe Depression or Personality Disorder could have significant fluctuations in their daily mood. The fact that Dr. Fabiani's progress reports showed that plaintiff felt better on some days and worse on others does not provide substantial contrary evidence of a quality or quantity that justifies a complete rejection of the treating physician's opinion. It is medically accepted that patients suffering from severe depression will have fluctuations in mood. Variance in a patient's daily mood can be simply reflective of the behaviors associated with such disorders<sup>11</sup> and provides no basis for a conclusion of inconsistent evaluations by the doctor or intentional fabrication by the patient.

Therefore, this court finds that the ALJ gave an improper explanation of the reasons for according the plaintiff's treating physician's findings little or no weight.

---

<sup>10</sup> Dr Fabiani's opinion could not have been afforded controlling weight because it was inconsistent with the record as a whole. See 20 C.F.R. § 404.1527.

<sup>11</sup>"The course of Major Depressive Disorder, Recurrent, is variable. Some people have isolated episodes that are separated by many years without any depressive symptoms, whereas others have clusters of episodes, and still others have increasingly frequent episodes as they grow older." Diagnostic & Statistical Manual for Mental Disorders (DSM) 372 (4<sup>th</sup> ed. 2000).

#### **IV. Conclusion**

The plaintiff's motion for summary judgment is denied.<sup>12</sup> The defendant's motion for summary judgment is also denied. This matter is remanded to the ALJ for further proceedings consistent with this opinion.

An appropriate order follows.

---

<sup>12</sup>Plaintiff's argument that it was a "patent error" for the ALJ to assess her credibility because she never gave oral or written testimony under oath (Pl. Mot. Summ. J. at 4) is not adopted. "It is well established that the ALJ has discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence, regarding the true extent of pain alleged by the claimant." Brown v. Schweiker, 562 F.Supp. 284, 289 (E.D. Pa. 1983). The plaintiff made numerous subjective complaints of pain in her disability application and report, function report, and personal pain questionnaire. Such complaints rendered the plaintiff subject to credibility determination at the discretion of the ALJ.

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

ZORAIDA PRATTS, :  
 : CIVIL NO.  
 v. : 01-2686  
 :  
 :  
 JO ANNE B. BARNHART, :  
 COMMISSIONER OF SOCIAL :  
 SECURITY :  
 :  
 :

**ORDER**

AND NOW, this \_\_\_ day of August, 2003, it is hereby ORDERED that the Memorandum issued by this court on August 1, 2003 is AMENDED such that page ten is replaced with the passage below:

“employees was not entitled to significant weight because it was inconsistent with the other medical opinions of record showing that she did not have a significant mental impairment.”  
(Def. Mot. Summ. J. at 13.)

The old formulation of the “treating physician rule” stated that “the expert opinion of a claimant’s treating physician on the subject of medical disability was binding on Health and Human Services unless contradicted by substantial evidence, and if contradicted, that opinion nonetheless was entitled to some extra weight.” Baybrook v. Chater, 940 F. Supp. 668, 673 (D. Vt. 1996). This formulation of the “treating physician rule” was superseded by statute. See 20 C.F.R. § 404.1527. Currently, the opinion of a treating physician is controlling only if it is “well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial case evidence in the record.” 20 C.F.R. § 404.1527(d)(2).

The regulations establish a framework for an ALJ to analyze the opinions of a claimant's treating physician, and to determine when the opinions are entitled to substantial weight. 20 C.F.R. § 404.1527(d). The applicable regulations enumerate a six factors that an ALJ must consider: (1) the length of the treatment relationship; (2) the nature and extent of the treating relationship; (3) whether the opinion before him is supportable; (4) whether the opinion is consistent with the record as a whole; (5) whether the treating physician was a specialist; and (6) any other factors which tend to support or contradict the opinion. Id.; see also Irelan v. Barnhart, 243 F. Supp. 2d 268, 277 (E.D. Pa. 2003). Additionally, "[w]here there is conflicting probative evidence in the record, there is a particularly acute need for an explanation of the reasoning behind the conclusions of the administrative law judge (ALJ), in a Social Security disability case, and [the] Court of Appeals will vacate or remand a case where such an explanation is not"

BY THE COURT:

---

JAMES T. GILES C.J.

copies by FAX on

to