

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

ANTOINETTE C. SMITH	:	CIVIL ACTION
	:	
v.	:	NO. 05-531
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

**MEMORANDUM AND ORDER**

AND NOW, this 23rd day of May, 2006, upon consideration of the cross-motions for summary judgment filed by the parties (Doc. Nos. 10 and 11), the court makes the following findings and conclusions:

1. On May 13, 2003, Antoinette C. Smith (“Smith”) filed for disability insurance benefits (“DIB”) under Title II the Social Security Act, 42 U.S.C. §§ 401-433 alleging an onset date of June 1, 2002. (Tr. 90-92). Throughout the administrative process, including an administrative hearing held on April 28, 2004 before an administrative law judge (“ALJ”), Smith’s claims were denied. (Tr. 4-6; 13-28; 36-71; 72-77). Pursuant to 42 U.S.C. § 405(g), Smith filed her complaint in this court on February 8, 2005.

2. In his decision, the ALJ concluded that Smith had severe impairments consisting of homocystinuria, asthma, decreased vision, and mental retardation. (Tr. 18 ¶ 3; 26 Finding 3).<sup>1</sup> Ultimately, the ALJ concluded that Smith’s impairments did not meet or equal a listing, including 12.05(C) the mental retardation listing, and that she could perform a restricted range of sedentary work that existed in the national economy, and, thus, was not disabled. (Tr. 19 ¶ 4 - 20 ¶ 1; 25 ¶¶ 1-2; 25 ¶ 2 - 26 ¶ 1; 26 Finding 3; 27 Findings 6, 10-11).

3. The Court has plenary review of legal issues, but reviews the ALJ’s factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm’r of Soc. Sec., 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the conclusion of the ALJ is supported by substantial evidence, this court may not set aside the Commissioner’s decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

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<sup>1</sup> All numbered paragraph references to the ALJ’s decision begin with the first full paragraph on each page.

4. Smith raises two arguments in which she alleges that the determinations by the ALJ were either not supported by substantial evidence or were legally erroneous. These arguments are addressed below. However, upon due consideration of all of the arguments and evidence, I find that the ALJ's decision is legally sufficient and supported by substantial evidence.

A. First, Smith contends that the determination by the ALJ that she did not meet the mental retardation listing, 12.05, was not supported by substantial evidence. The capsule definition for listing 12.05 provides that in order to meet the listing, a claimant must have "significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested" before age 22. 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.05. The required level of severity for this disorder is met, among other ways, when there is "A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function." *Id.* at § 12.05(C). In this case, although the ALJ found that Smith had a performance IQ of 68 and a valid physical impairment, he concluded that Smith did not meet listing 12.05 because the record failed to show the requisite deficits in her adaptive functioning. (Tr. 19 ¶ 4). The ALJ based this conclusion on the facts that: (1) Smith had a history of performing significant gainful activity involving semi-skilled work such as a nurse's assistant, a housekeeper, and a clerk; (2) Smith reported being able to deal with household chores such as cooking and doing laundry; (3) Smith was very active in church life including participating in bible studies, being a choir member, being involved in young adult ministries, and acting as a mentor for young people; and (4) Smith attended computer and secretarial science training sessions offered by the Office of Vocational Rehabilitation which were considered semi-skilled by the vocation expert ("VE"). (Tr. 19 ¶ 4 - 20 ¶ 1; 41-44; 46; 50-54; 63-64; 124-127). The ALJ further noted that Smith's poor work sample performance was due to a lack of interest on her part rather than an incapacity to perform occupational activities. (Tr. 19 ¶ 4; 188-190; 192). I also note that Smith was assigned a global assessment of functioning ("GAF") score of 80 meaning that she had no more than slight impairment in social, occupational, or school functioning. (Tr. 199); Diagnostic and Statistical Manual of Mental Disorders IV, Text Revision at p. 32. I find that the record contains substantial evidence to support this decision by the ALJ.

Smith claims that the record shows sufficient deficits in adaptive functioning in her academic performance to meet listing 12.05. Smith primarily bases this contention on the facts that she has: (1) a sixth grade reading ability and a seventh grade ability in spelling and arithmetic according to the Wide Range Achievement Test III ("WRAT-3"); and (2) a developmental age of 7-0 to 7-5 according to the Bender Visual-Motor Gestalt Test. (Tr. 195; 197). Smith states that her abilities in these areas are more than two standard deviations below the norm, and, thus, she has the requisite deficits in adaptive functioning to meet listing 12.05. First, other than her own conclusory statement, Smith provides no evidence that these scores actually fall two standard deviations below the norm.<sup>2</sup> Second, Smith provides no precedent

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<sup>2</sup> Moreover, while I do not rely on it in making my decision, it appears that Smith's WRAT-3 scores are not more than two standard deviations below the norm. Smith's standard scores for reading, arithmetic and spelling were 77, 85, and 86. The mean for the WRAT-3 is 100 while the standard deviation is 15. See e.g. <http://www.cps.nova.edu/~cpphelp/WRAT-3.html>. Therefore, it would appear that Smith's scores must be below 70 in order to be more than two standard deviations below the norm.

holding that having academic scores which are more than two standard deviations below the norm show sufficient deficits in adaptive functioning to meet listing 12.05.<sup>3</sup> Third, and most importantly, Smith fails to counter the substantial evidence relied on by the ALJ and detailed above showing that she lacked the requisite deficits in adaptive functioning. Smith cites to Markel v. Barnhart, 324 F.3d 182 (3d Cir. 2003), for the proposition that the activities cited by the ALJ are not inconsistent with a finding of retardation, and, thus, she should have been found to have deficits in adaptive functioning. Markel is not applicable here. In Markel, the district court judge refused to credit the plaintiff's IQ score because he felt that it was inconsistent with the plaintiff's ability to independently perform self-care needs and various activities of daily living. 324 F.3d at 184. However, the Third Circuit concluded that the ALJ erred in making this finding because the IQ score was not inconsistent with the record and the facts cited by the ALJ to support his conclusion were not inconsistent with a finding of retardation. Id. at 186-87. Unlike in Markel, the ALJ in this case did not reject Smith's IQ score or any other test score. The ALJ was not faced with a presumably valid score which he then sought to discredit. Instead, the ALJ simply reviewed the record and made a finding, based on substantial evidence, that Smith lacked the requisite deficits in adaptive functioning. Simply, what Smith fails to do in this case is to show that the evidence *is* consistent with a finding of retardation or that she does have sufficient deficits in adaptive functioning to meet listing 12.05. For the reasons stated above, I find no error in the ALJ's decision on this matter.

B. Second, Smith argues that the ALJ failed to properly incorporate all of her limitations into the hypothetical questions presented to the VE. Smith first contests the ALJ's inclusion of the fact that she has a high school diploma into the hypothetical questions because she attended special education classes. The fact that Smith has a high school diploma is accurate and, thus, the ALJ's inclusion of this fact into the hypothetical questions was appropriate. Moreover, the ALJ limited Smith to unskilled work with routine and simple tasks and a basic schedule even though she had semi-skilled work experience and her computer and secretarial classes were semi-skilled. (Tr. 25 ¶¶ 1-2; 63-66). Therefore, it is apparent that the ALJ recognized and addressed any effect her special education classes might have had on employment. Smith next contends that like in Burns v. Barnhart, 312 F.3d 113 (3d Cir. 2002), the ALJ's hypothetical questions limiting her to "just routine and simple tasks and a basic schedule" did not adequately convey her intellectual limitations. (Tr. 65). Smith contends that the ALJ should have incorporated certain limitations found by Salvatore J. Presti, Ph.D. ("Dr. Presti") and some limitations noted in the work sample evaluation report. (Tr. 191; 198). A hypothetical question posed to a VE must reflect all of a claimant's impairments supported by undisputed medical evidence, not every work sample observation or every detail of a physician's report. Burns, 312 F.3d at 123. While Dr. Presti did state that Smith showed oppositionality and passive aggressive behavior when threatened by failure, he only recommended short term counseling to address these issues. (Tr. 198-99). Dr. Presti also stated that Smith had "no serious emotional disturbance", noted that her visual problems likely accounted for her poor

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<sup>3</sup> I note that while the "assessment of severity" section of listing 112.00(C) (for children under 18 with mental disorders) provides that "When standardized tests are used as the measure of functional parameters, a valid score that is two standard deviations below the norm for the test will be considered a marked restriction", listing 12.00(C) (for adults), which is the relevant section in this case, has no such language.

showing on visual-motor task, and assigned her an 80 GAF score. (Tr. 198-199). Similarly, as discussed above, the work sample evaluation report provided that much of Smith's difficulty in completing certain tasks stemmed from her disinterest and unwillingness to perform the tasks rather than her inability to perform the tasks. (Tr. 188-190; 192). As a result, the ALJ did not err by not including such limitations in his hypothetical to the VE. Finally, this case is distinguishable from Burns because the ALJ in this case possessed all of the relevant intellectual functioning reports before the hearing at which Smith's limitations were discussed with the VE in attendance. One of the main issues in Burns was that the ALJ's hypothetical and residual functional capacity assessment did not properly take into account the plaintiff's limited mental functioning because the report on his intellectual functioning was not generated until after the hearing. 312 F.3d at 117-118, 122-124. The Third Circuit held that once the report detailing plaintiff's intellectual functioning limitations had been obtained, the ALJ should have held another hearing so that a complete hypothetical could have been posed to the VE. Id. at 123-124. By failing to do so, the ALJ's hypothetical and the VE's response thereto were not supported by substantial evidence. In this case, the ALJ did not fail to assess any additional mental limitations, unknown at the time, when he questioned the VE. I find that the ALJ's hypothetical questions to the VE were legally adequate and, thus, the VE's testimony constitutes substantial evidence.

Upon careful and independent consideration, the record reveals that the Commissioner applied the correct legal standards and that the record as a whole contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby **ORDERED** that:

5. The motion for summary judgment filed by Antoinette C. Smith is **DENIED**;
6. The motion for summary judgment filed by the Commissioner is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST ANTOINETTE C. SMITH**; and
7. The Clerk of Court is hereby directed to mark this case as **CLOSED**.

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LOWELL A. REED, JR., S.J.