

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

NINA PORTNOFF,
Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,
Defendant.

Civil Action
No. 96-6914

Gawthrop, J.

January , 1998

M E M O R A N D U M

Before the court are the objections of the plaintiff, pursuant to 28 U.S.C. § 636(b), to the Report and Recommendation of Magistrate Judge Wells. The Magistrate Judge found that there was substantial evidence in the record to support the decision of the Administrative Law Judge ("ALJ") to deny benefits in this case. I agree with the recommendation of the Magistrate Judge, but find that further analysis is warranted with respect to the objections.

After the Appeals Council denied her request for review, making the opinion of the ALJ the final decision of the Commissioner, the plaintiff, Nina Portnoff, sought judicial review of the Commissioner's decision. The court's scope of review of the Commissioner's decision is limited. See Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1191 (3d Cir. 1986) (citation omitted) (stating court must defer to agency inferences

from facts where supported by substantial evidence even if court acting de novo might have reached a different conclusion). It must accept any findings of fact as conclusive, provided that they are supported by substantial evidence. 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 Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

In both her motion for summary judgment and her objections to the Report and Recommendation, the plaintiff argues that the ALJ erred by ignoring the diagnosis of dysthymia from two of the plaintiff's physicians.¹ The plaintiff's position, however, is incorrect. In conducting the sequential review, the ALJ considered the total psychiatric and medical evidence available and found that the weight of the evidence supported a finding of severe mental impairment based upon panic attacks, in remission, and personality disorder. He classified Portnoff's impairment under diagnosis 12.06, anxiety disorder, and 12.08, personality disorder. Dysthymia, an affective disorder, falls within diagnosis 12.04. The plaintiff errs, however, in stating

¹ "Dysthymia is a disorder involving chronically depressed mood occurring most of the day, more days than not, for at least 2 years. In addition to depressed mood, symptoms can include appetite and sleep problems, low energy and self-esteem, poor concentration, difficulty making decisions, and feelings of hopelessness." Pl.'s Object. at 2 (citing Diagnostic and Statistical Manual of Mental Disorders, 345-46 (4th ed. 1994)).

that this demonstrates that the ALJ ignored distinct mental impairments established by the record and failed to consider all of her mental impairments.

In his decision, the ALJ expressly acknowledged the diagnoses of both Dr. Etzi and Dr. Castillo, but this does not conclusively establish that the plaintiff has a severe depression as defined by the regulations. Indeed, Ms. Portnoff does not contend, nor would the medical evidence support, that she met the listing for affective disorders. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04. That listing requires, in connection with a depressive syndrome, the finding of at least four of nine specified signs or symptoms,² and a finding of at least two of four defined levels of functional limitations resulting from the affective disorder. Id. The plaintiff does not claim to meet the requirements of 12.04, part A, which requires "[m]edically documented persistence, either continuous or intermittent" of at least four separate listed problems. Id.; cf. Ramirez v. Shalala, 8 F.3d 1449, 1454-55 (9th Cir. 1993) (holding where claimant met criteria of affective disorder it was error for ALJ not to set forth reasons for disregarding diagnosis of

² Specifically, the "A criteria" for a depressive syndrome require at least four of the following: anhedonia or pervasive loss of interest in almost all activities; appetite disturbance with change in weight; sleep disturbance; psychomotor agitation or retardation; decreased energy; feelings of guilt or worthlessness; difficulty concentrating or thinking; thought of suicide; or hallucinations, delusions or paranoid thinking. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(A).

dysthymia). Rather, she claims that the combined effects of her impairments establish a disability as defined by the regulations; however, Ms. Portnoff has not presented, nor does the record show, how her mental disorders meet or equal an affective disorder or any other listed impairment in Appendix 1.

The ALJ properly concluded that Ms. Portnoff did not satisfy the functional limitation aspect of the listings for anxiety or personality disorders, because neither the medical evidence nor the plaintiff's testimony suggested that she was restricted to the degree delineated in the listings. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.06(B), 12.08(B). In reviewing the B criteria of functional limitations to the plaintiff's ability to work, the ALJ found that there is only a "slight" restriction of activities of daily living, "moderate" difficulties in maintaining social functioning and that deficiencies of concentration, persistence or pace resulting in failure to timely complete tasks have "often" occurred. The listing requires a finding that the functional limitations are in the "marked" or "frequent" level of severity. There is substantial evidence in the record to support the ALJ's findings that the plaintiff's mental disorder did not result in functional limitations severe enough to prevent her from working. Because the functional limitations for anxiety, personality, and affective disorders are the same, there is also substantial evidence to support that Ms. Portnoff did not meet the listings

of impairments for any of these disorders alone or in combination. See id. § 12.04(B); see also Johnson v. Sullivan, 749 F. Supp. 664, 669 (E.D. Pa. 1990) ("Sections 12.04, 12.06, and 12.08 which provide guidelines for determining when the disorders with which they coincide are sufficiently severe, are substantially the same."). This conclusion requires a finding against the plaintiff with respect to her assertion that she should have been found disabled due to the combined effect of her impairments.

There is also substantial evidence in the record to support the ALJ's finding that, in consideration of her age, education, work history, and residual functional capacity, the plaintiff had the ability to perform certain jobs available in the economy, despite her mental impairment. See Brown v. Bowen, 845 F.2d 1211, 1214 (3d Cir. 1988)(quoting Stunkard v. Secretary of Health & Human Servs., 841 F.2d 57, 59 (3d Cir. 1988)) (holding that Commissioner bears the burden to show that "given the claimant's age, education, and work experience, the claimant is capable of performing substantial gainful work activity in the national economy"). The ALJ found that the plaintiff has a severe mental impairment, but that she nevertheless had the ability to be gainfully employed. He determined, based partially on the testimony of Beth Kelley, a vocational expert, that the plaintiff was not disabled because she possesses the residual functional capacity to perform in several categories of jobs.

The plaintiff objects that there is not substantial evidence to support this determination. She further states that in determining her residual functional capacity, the ALJ did not consider all of her mental limitations. Specifically, the plaintiff claims that the ALJ and the vocational expert failed to consider her inability to deal with frustration or anger.

To establish "substantial evidence" for a plaintiff's residual functional capacity, an ALJ must consider the record as a whole, account for all relevant expert testimony, and point to specific facts. See Jesurum v. Secretary of Health & Human Servs., 48 F.3d 114, 118 (3d Cir. 1995). The ALJ explicitly identified the facts on which he relied in reaching the residual functional capacity. R. at 19-20. Among other aspects, he stated that the plaintiff had been able to control her affect around the baby and that she related well to all Social Security personnel. Id. Further, the ALJ said that he considered information and observation by treating and examining physicians. Id. This evidence supports that the plaintiff's impairment does not preclude her from engaging in any substantial gainful activity. For example, although not specifically noted by the ALJ, Dr. Yantis stated that in their last meeting the plaintiff was calm and interacted well with the baby. She also reported that the plaintiff had a history of "severe temper tantrums," but now experienced only "occasional outbursts of temper." R. at 17, 206. The ALJ's finding that despite her mental impairment the

plaintiff could still perform work in a setting that did not require excessive social interaction or high concentration, I agree, was supported by substantial evidence.

Further, the plaintiff objects that the vocational expert did not consider these limitations and claims that the only limitations addressed by the vocational expert were moderate limitations on the plaintiff's ability to concentrate and maintain attention, to accept instructions and respond appropriately to criticism from supervisors, and to respond appropriately to changes in the work setting. However, the vocational expert stated that the plaintiff could not return to her previous positions because they involved close interactions with others. R. at 20, 95-96. The vocational expert also included specific restrictions on the plaintiff's ability to perform work activities, such as avoiding contact with the public, that resulted from her mental impairment. R. at 96. This restriction clearly shows that the vocational expert addressed more than the moderate limitations listed above. I thus find that the vocational expert adequately considered all of the plaintiff's medically documented limitations.

Finally, the plaintiff argues that the Magistrate Judge erred by stating that no physician ever reported that the plaintiff cannot work and is totally disabled. In support of her argument, Ms. Portnoff quotes two medical sources from the record

that purportedly indicate that she experiences limitations that preclude her from working. The plaintiff correctly asserts that the regulations reserve the determination of disability for the Commissioner. See 20 C.F.R. §§ 404.1527(e), 416.927(e) (commenting that statement of "disability" by a medical source may be outweighed by other evidence and does not necessitate a finding of disabled). Since, as discussed above, there is substantial evidence in the record to support the ALJ's finding that the plaintiff is not disabled, I find this argument unpersuasive.

Finally, the Magistrate Judge also notes the plaintiff's failure to follow medical orders for prescribed medication and a residential treatment program as further support for the denial of Social Security benefits. I disagree. Such refusal may cause a loss of entitlement to Social Security benefit if it is willful and without justifiable excuse. See Mendez v. Chater, 943 F. Supp. 503, 508 (E.D. Pa. 1996) (citing Schena v. Secretary of Health and Human Serv., 635 F.2d 15 (1st Cir. 1980)). The plaintiff, however, has been found to suffer from a severe mental impairment. Thus, "any noncompliance on her part could have been a result of her mental impairment and, therefore, neither willful nor without justifiable excuse." Id. (citing Sharp v. Bowen, 705 F. Supp. 1111 (W.D. Pa. 1989)). Since the ALJ did not rely on the plaintiff's noncompliance when

he denied her benefits, I do not find that this discrepancy changes the outcome of this case.

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O R D E R

AND NOW, this day of January, 1998, after careful and independent consideration of the cross-motions for summary judgment, the plaintiff's response, the entire administrative record, the Report and Recommendation of Magistrate Judge Wells, and the objections and response thereto, it is hereby ORDERED that:

1. The objections are OVERRULED, except insofar as some are found to have merit - albeit not dispositive merit - in the above Memorandum.
2. The Report and Recommendation is Approved and Adopted in accordance with this Order.
3. The plaintiff's motion for summary judgment is DENIED.

4. The defendant's motion for summary judgment is
GRANTED.

BY THE COURT

Robert S. Gawthrop, III, J.