

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

CYNTHIA M. PAYNE	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMISSIONER OF THE SOCIAL	:	NO. 97-4578
SECURITY ADMINISTRATION	:	

MEMORANDUM AND ORDER

BECHTLE, J.

NOVEMBER , 1998

Presently before the court in this action for social security benefits are plaintiff Cynthia M. Payne's ("Plaintiff") and defendant Commissioner of the Social Security Administration's ("Commissioner") cross-motions for summary judgment, the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells ("Magistrate Judge") and Plaintiff's objections thereto. For the reasons set forth below, the court will not adopt the Report and Recommendation, will deny without prejudice both the Plaintiff's and the Commissioner's motions for summary judgment and will remand the case to the Commissioner for further proceedings consistent with this opinion.

I. BACKGROUND

This action arises out of Plaintiff's application to the Social Security Administration for disability insurance benefits and supplemental security income and the Commissioner's denial of said benefits. Plaintiff was born December 10, 1956,

has completed the eleventh grade, has the ability to read, write and do simple math, and has had work experience as a pharmacy assistant and dining room hostess. Plaintiff states that pain in her right and left shoulders have prevented her from working since January 5, 1994. On January 13, 1994, Plaintiff applied for disability insurance benefits and on March 11, 1994, she applied for supplemental security income. Both types of benefits were denied initially and again upon reconsideration.

A. ALJ Findings

On October 12, 1995, Plaintiff testified at a hearing before Administrative Law Judge Susanne S. Strauss ("ALJ"). A disability specialist and a Vocational Expert ("VE") also testified at Plaintiff's hearing. On April 12, 1996, the ALJ found that Plaintiff had not been under a disability as defined by the Social Security Act at any time since the onset of the alleged disability on January 5, 1994. In her decision denying Plaintiff benefits, the ALJ made the following Findings of Fact and Conclusions of Law:

1. The claimant met the disability insured status requirements of the Social Security Act, as amended, as of January 5, 1994, the alleged onset date of disability, and continues to meet those requirements until December 31, 1997.
2. The claimant has not engaged in substantial gainful work activity since January 5, 1994, the alleged onset date of disability (Exhibit 10).
3. The medical evidence of record

establishes that the claimant has "severe" neuromuscular impairments, particularly involving her left (dominant) arm. She does not have a "severe" psychological impairment. A Psychiatric Review Technique Form is attached.

4. The claimant does not have an impairment, or combination of impairments, severe enough to meet or equal the severity requirements of any of the listed impairments set forth in Appendix 1 to Subpart P of Regulations No. 4.
5. The claimant has the residual functional capacity to perform light work with minimal (two or three pounds occasionally) carrying or lifting and no repetitive use of the dominant left arm for reaching or handling.
6. The claimant does not have the residual functional capacity to perform any of her past relevant work.
7. The claimant was found less than fully credible, as the record as a whole does not support the intensity of her subjective complaints.
8. Medical-Vocational Rules 202.17 (if her past work is considered unskilled) or 202.18 (if her past work is considered skilled or semiskilled with non-transferrable skills) of Table No. 2 to Appendix 2 to Subpart P of Regulations No. 4 would compel a finding of "not disabled." Because her inability to perform the duties of light work is somewhat compromised, however, these Rules can be used only as a "framework" for decision making.
9. The vocational expert credibly testified that there are a significant number of jobs within the claimant's residual functional capacity that she should be able to perform. Furthermore, those jobs exist in significant numbers at the

substantial gainful activity level on a part-time basis.

10. The claimant has not been under a "disability," as defined in the Social Security Act, as amended, at any time, since the alleged onset date of disability of January 5, 1994, through the date of this decision.

(Tr. at 18-19.)

On May 10, 1997, the Appeals Council denied Plaintiff's request for review. The ALJ's decision thereby became the final decision of the Commissioner.

B. Plaintiff's Challenges to ALJ Findings

On July 14, 1997, Plaintiff filed a Complaint with the court seeking judicial review of the ALJ decision. Plaintiff and the Commissioner filed cross-motions for summary judgment. Plaintiff's Motion for Summary Judgment states several challenges to the ALJ's conclusion that she has not been under a "disability." (Tr. at 19, Finding of Fact and Conclusion of Law 10.) Specifically, Plaintiff asserts that the ALJ findings concerning (1) Plaintiff's ability to perform some light work, and (2) the existence of substantial gainful work in the national economy for Plaintiff are not supported by substantial evidence. (Tr. at 18-19, Findings of Fact and Conclusions of Law 5 & 9.)

At the heart of Plaintiff's challenges lies her contention that the ALJ improperly neglected to consider her treating physician's ("Dr. Jaeger") evaluation of pain. On December 3, 1992, in response to Plaintiff's complaints of discomfort, Dr. Jaeger completed a form characterizing her

condition:

Pain is present to such an extent as to be distracting to adequate performance of any activities or work (variable).

Physical Activity: greatly increased pain is likely to occur, and to such a degree as to cause distraction from the task or even total abandonment of the task.

. . .

Pain . . . can be expected to be severe and limit effectiveness due to distraction . . . [with respect to work activities].

Long-term prospects of recovery: little improvement is likely in this case; in fact, the pain is likely to increase with time.

(Tr. at 213.) Dr. Jaeger also opined that Plaintiff was "at a plateau in her recovery, however, . . . [her] problem may worsen with regard to pain in the future." (Tr. at 212.)

Plaintiff claims the ALJ committed error by failing to properly credit Dr. Jaeger's evaluation as persuasive evidence that Plaintiff was unable to perform any work due to her pain. Plaintiff asserts this alleged error affected the ALJ opinion in three ways. First, the error caused the ALJ opinion to disregard the great weight usually attributed to a treating physician's opinion. (Pl. Mot. for Summ. J. at 12-13.) Second, the error fatally affected the ALJ's evaluation of Plaintiff's pain. (Pl. Mot. for Summ. J. at 13-15.) Third, the error fatally affected the hypothetical question posed to the VE by causing it to be incomplete. (Pl. Mot. for Summ. J. at 15-17.)

Plaintiff also challenges the ALJ's assessment of the

VE testimony in several respects. First, Plaintiff asserts that the ALJ improperly considered certain types of jobs that Plaintiff could perform without determining whether she had the skills to perform them. (Pl. Mot. for Summ. J. at 17-19.) Second, because of this error, it is unclear whether the ALJ determined that the jobs Plaintiff could perform constituted "substantial gainful work." (Pl. Mot. for Summ. J. at 19.) Last, Plaintiff asserts that the ALJ's statement that Plaintiff could "practically dictate her own hours" is not supported by the VE testimony. (Pl. Mot. for Summ. J. at 16-17.)

C. Report and Recommendation

On July 31, 1998, the Magistrate Judge issued a Report and Recommendation which upheld the decision of the ALJ. In her Report and Recommendation, the Magistrate Judge found the ALJ's findings were supported by substantial evidence. The Magistrate Judge concluded that the ALJ properly disregarded Dr. Jaeger's evaluation concerning Plaintiff's pain because it was outdated. (Rep. & Recomm. at 16-17.) The Magistrate Judge noted that Dr. Jaeger's most recent medical report was dated December 3, 1992, almost two years before the alleged onset date of disability. (Rep. & Recomm. at 16.) In addition, the Magistrate Judge stated that other substantial medical evidence supported the ALJ's finding that Plaintiff could perform some light work despite her complaints of pain. (Rep. & Recomm. at 17-18.) Specifically, the Magistrate Judge noted the February 23, 1994 evaluation by Dr. Rodriguez which stated that Plaintiff's overall prognosis was

"fair," that Plaintiff could occasionally lift less than ten pounds and that Plaintiff had no limitations in her ability to stand, walk, sit, pull or push. (Rep. & Recomm. at 17-18; Tr. at 185-86.) The Magistrate Judge noted that although the ALJ's opinion did not specifically mention Dr. Rodriguez's evaluation of Plaintiff, the ALJ opinion was based on the record as a whole. (Rep. & Recomm. at 18.)

In addition, the Magistrate Judge found that whether or not the ALJ properly considered semi-skilled jobs for Plaintiff, enough unskilled jobs existed to constitute substantial gainful work available to Plaintiff. (Rep. & Recomm. 21-22.) The Magistrate Judge held that "2000 unskilled regional 'usher-greeter' positions more than adequately demonstrate[d] substantial gainful work which Plaintiff could undertake." (Rep. & Recomm. at 21-22); see Craigie v. Bowen, 835 F.2d 56, 58 (3d Cir. 1987) (holding that 200 jobs regionally in the light exertional category adequately represents "substantial gainful work").

On August 14, 1998, Plaintiff filed objections to the Report and Recommendation. Plaintiff's objections are substantially the same as those raised in her Motion for Summary Judgment.

II. LEGAL STANDARD

Findings of fact made by an ALJ must be accepted as

conclusive, provided that they are supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 401. This court must determine if substantial evidence in the administrative record supports the Commissioner's final decision. Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985). It is the responsibility of the ALJ to resolve conflicts in the evidence, determine the credibility of witnesses and weigh the evidence presented. Richardson, 402 U.S. at 401; Gober v. Matthews, 574 F.2d 772, 776-77 (3d Cir. 1978). In reviewing a decision of the ALJ, the court "need[s] from the ALJ not only an expression of the evidence s/he considered which supports the result, but also some indication of the evidence which was rejected." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981) (remanding case back to Secretary of Health and Human Services where ALJ failed to explain its implicit rejection of expert medical testimony which was probative and supportive of disability claimant's position). 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." Id. at 706.

III. DISCUSSION

In order to be found "disabled" under the Social Security Act, a claimant must be unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . 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); 20 C.F.R. § 404.1505(a). A claimant may establish a disability through proof that the impairment is severe enough that claimant cannot engage in any type of "substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A); see Heckler v. Campbell, 461 U.S. 458, 460 (1983).¹ If a claimant proves her impairment results in functional limitations to performing past relevant work, then the burden shifts to the Commissioner to prove that work does in fact exist in the national economy which the claimant is capable of performing given her age, education and work experience. Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993).

The court will consider Plaintiff's objections with an eye toward the ALJ's opinion. If substantial evidence supports the ALJ's findings that Plaintiff could perform some light work and that substantial gainful work exists for Plaintiff, the court

¹ A claimant may also establish a disability through medical evidence meeting one or more of the serious impairments detailed in 20 C.F.R. Part 404, Subpart P, App. 1. However, Plaintiff does not contend that she meets one of these serious impairments. Thus, the court need not consider this avenue of establishing a disability.

must adopt the Report and Recommendation. If the ALJ's opinion is not supported by substantial evidence in these respects, the court will remand the case to the Commissioner for further proceedings.

A. Pain Evidence

1. Dr. Jaeger's Evaluation

Generally, a treating physician's opinion is accorded great weight. See 20 C.F.R. § 404.1527(d)(2); Rocco v. Heckler, 826 F.2d 1348, 1350 (3d Cir. 1984); Kent v. Schweiker, 710 F.2d 110, 115 n.5 (3d Cir. 1983). However, the Commissioner or ALJ may disregard a physician's statement of disability if insufficient clinical data supports it or contrary medical evidence exists. See Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988); Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). Here, the Magistrate Judge found the ALJ could properly disregard Dr. Jaeger's evaluation because it was made two years before the alleged onset date of disability. While this may be a valid reason for rejecting Dr. Jaeger's evaluation, the ALJ did not articulate it as the reason for rejecting Dr. Jaeger's evaluation as persuasive evidence of Plaintiff's pain. Because the ALJ disregarded Dr. Jaeger's evaluation of Plaintiff's pain without adequate explanation, the court will remand the case to the Commissioner for further proceedings. See Cotter, 642 F.2d at 705 (requiring "some indication of the evidence which was rejected").

2. Dr. Rodriguez's Evaluation

Dr. Rodriguez's February 23, 1994 evaluation seems to contradict the grim outlook painted by Dr. Jaeger's December 3, 1992 evaluation. As such, the Magistrate Judge found that Dr. Rodriguez's evaluation was part of substantial evidence supporting the ALJ's finding that Plaintiff could perform some light work despite her pain. (Rep. & Recomm. at 17-18.) While this may support a finding that Plaintiff was able to work despite her pain, the ALJ did not articulate it as a reason for finding so in her opinion. See Rep. & Recomm. at 18 ("It is true the ALJ did not specifically cite to Dr. Rodriguez's examination, but it is part of the record."). Because the ALJ failed to explain whether Dr. Rodriguez's evaluation was a factor in her decision, the court will remand the case to the Commissioner for further proceedings. See Cotter, 642 F.2d at 705 (requiring some "expression of the evidence . . . considered which supports the result").

3. Evidence Regarding Job Flexibility for Plaintiff

The court need not consider whether substantial evidence supports the ALJ's findings regarding job flexibility for Plaintiff. The need for Plaintiff to dictate her own hours hinges on the Commissioner's evaluation of Plaintiff's pain. As discussed, the court will remand the case to the Commissioner for further proceedings regarding evidence of Plaintiff's pain. Thus, the Commissioner should also reconsider Plaintiff's need for job flexibility after revisiting the evidence regarding

Plaintiff's pain and its effect on her ability to perform light work.

B. Evidence of Substantial Gainful Work

Three occupational levels--skilled, semi-skilled and unskilled--are relevant to the determination of whether substantial gainful work is available to a claimant. Social Security Ruling 82-41, 1982 WL 31389 (S.S.A.), at *2-4. If an ALJ relies on a claimant's ability to perform skilled or semi-skilled labor, he or she must identify any skills the claimant has which are transferrable to those jobs. Id. at *4-5. Skill levels for jobs are listed in the Dictionary of Occupational Titles ("DOT"). The Social Security Administration has taken administrative notice of the job information in the DOT. 20 C.F.R. § 404.1566(d)(1). The court notes that the ALJ never identified any skills Plaintiff had which could be transferred to semi-skilled work. While the colloquy between the VE and ALJ regarding the types of jobs Plaintiff could perform focused on Plaintiff's physical ability to perform the jobs considered, it did not include any discussion of Plaintiff's skills which would qualify her to perform such jobs. Thus, Plaintiff asserts that the ALJ improperly considered Plaintiff eligible for all jobs discussed at the hearing except that of "usher", which was listed in the DOT as an unskilled job. The Commissioner argues that the VE testimony regarding Plaintiff's ability to perform semi-skilled jobs is not invalid merely because it conflicts with the DOT. The Commissioner asserts that a VE may use his personal

knowledge in determining whether Plaintiff possessed the necessary skills to perform the jobs considered. The court notes and the Commissioner concedes that this exact issue has not been addressed by the Third Circuit. However, even assuming that a VE's personal expertise trumps the DOT in regard to a claimant's ability to perform certain jobs, no such use of that expertise is apparent from the record. The VE testimony in this case focuses solely on Plaintiff's physical ability to perform certain jobs. (Tr. at 54-59.) However, there is no testimony by the VE which suggests a use of his expertise in determining that Plaintiff possessed skills which qualified her to perform those jobs, regardless of her physical condition.

The Magistrate Judge held that, regardless of whether the ALJ improperly considered semi-skilled jobs, the availability of unskilled "usher-greeter" jobs--2000 regionally, hundreds of thousands nationally--was still enough to amount to substantial gainful work. (Rep. & Recomm. at 21-22.) Plaintiff argues that, according to the DOT, "greeter" jobs are semi-skilled, that only "usher" jobs are unskilled, and that only 1300 "usher" jobs exist regionally. Plaintiff also argues that the Magistrate Judge improperly read Craigie v. Bowen, 835 F.2d 56 (3d Cir. 1987). Plaintiff asserts that, in Craigie, the 200 available positions found to constitute substantial gainful work referred to the number of types of occupations available rather than the number of total positions available. See id. at 58. Plaintiff further asserts that whether 1300 jobs in one occupation constitutes

substantial gainful work is a decision for the ALJ, not the court. The court agrees with this latter assertion. The ALJ's finding of substantial gainful work was based upon consideration of a number of occupations of which the "usher" job was only one.² This court should not decide whether the ALJ meant that the amount of "usher" jobs available was enough to satisfy the substantial gainful work requirement, or that Plaintiff had skills which were transferrable to the other jobs considered by the ALJ. Thus, the court will remand the case to the Commissioner for either:

(1) a determination of whether enough unskilled jobs are available to Plaintiff to constitute substantial gainful work; or

(2) a determination of the jobs Plaintiff is qualified to perform and whether the total number of those jobs available are sufficient to constitute substantial gainful work.

C. Summary

The Third Circuit requires an ALJ opinion to express the evidence which the ALJ credited in reaching his or her conclusion as well as the evidence the ALJ rejected in reaching his or her conclusion. Cotter, 642 F.2d at 705. Here, the ALJ

² Other types of occupations considered by the ALJ included some security guard duties, market survey work and information clerk. (Tr. at 54-58.)

discredited relevant evidence of Plaintiff's pain by her treating physician, Dr. Jaeger. While Dr. Jaeger's evaluation may have been given two years prior to the alleged onset date of Plaintiff's disability, the ALJ did not cite this as a reason for rejecting Dr. Jaeger's evaluation as persuasive evidence of Plaintiff's pain. And, while Dr. Rodriguez's evaluation may constitute more reliable medical evidence which contradicts Dr. Jaeger's evaluation of Plaintiff's ability to perform some light work despite her pain, the ALJ did not cite this as a reason in support of her conclusion that Plaintiff was "not disabled." In light of the great weight normally accorded to a treating physician's opinion and the Third Circuit's requirement that supportive and rejected evidence be explained by the ALJ, the court will remand the case to the Commissioner for re-evaluation of Plaintiff's ability to perform some light work despite her claims of pain. Should the Commissioner, after further proceedings, conclude that Plaintiff has the ability to perform some light work, the Commissioner must also determine the availability and types of jobs that Plaintiff is qualified to perform and whether they amount to substantial gainful work.

An appropriate Order follows.

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

CYNTHIA M. PAYNE	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMISSIONER OF THE SOCIAL	:	NO. 97-4578
SECURITY ADMINISTRATION	:	

ORDER

AND NOW, TO WIT, this day of November, 1998, upon consideration of plaintiff Cynthia M. Payne's and defendant Commissioner of the Social Security Administration's cross-motions for summary judgment, the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells and the objections thereto, IT IS ORDERED that:

1. the Report and Recommendation is NOT ADOPTED;
2. plaintiff Cynthia M. Payne's Motion for Summary Judgment is DENIED WITHOUT PREJUDICE;
3. defendant Commissioner of the Social Security Administration's Motion for Summary Judgment is DENIED WITHOUT PREJUDICE; and
4. the action is REMANDED to the Commissioner of the Social Security Administration for further proceedings consistent with this opinion.

LOUIS C. BECHTLE, J.