

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

SANDRA L. CONNOR : CIVIL ACTION
 :
 v. :
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 JO ANNE B. BARNHART, :
 Commissioner of Social Security : NO. 02-009

MEMORANDUM

Dalzell, J.

January 6, 2003

Sandra Connor is a fifty-five year old woman in frequent pain with a severe impairment of her right arm and carpal tunnel syndrome of her left hand. She appeals the denial of her claim for disability benefits.

I. BACKGROUND

A. Procedural History

On May 17, 1999, Connor applied for Disability Insurance Benefits for herself, and Child Insurance Benefits for her twelve year old son, retroactive to December 18, 1998, when she suffered a fall.

The Social Security Administration denied Connor's application for benefits originally and upon reconsideration. Connor requested a hearing before an administrative law judge (ALJ). That hearing was held on September 23, 2000.

On November 7, 2000, the ALJ issued a decision denying Connor's application for benefits. The ALJ found Connor to have a "severe impairment encompassing the entire right upper extremity" and a non-severe impairment of carpal tunnel syndrome of her left hand. The ALJ determined that as a result of these

impairments Connor was unable to resume her past work as elementary school music teacher, secretary, and retail clerk. However, he decided that Connor was not disabled because she was still able to perform other substantial gainful activity as a receptionist, information clerk, shipping and receiving clerk, and inventory clerk.

Connor appealed the ALJ's decision on November 8, 2000. On November 6, 2001, the Appeals Council denied review, rendering the decision of the ALJ the final decision of the Commissioner.

On January 2, 2002, Connor initiated this disability appeal. The parties filed cross motions for summary judgment, which we referred to United States Magistrate Judge Jacob P. Hart. On August 5, 2002, Judge Hart issued a Report and Recommendation recommending that we grant summary judgment to the Commissioner. Connor filed Objections thereto. We review the objected to parts of the Report and Recommendation de novo.

B. Factual Background

As of the administrative law hearing on September 23, 2000, Connor was fifty-three years old and resided in a house with her husband and two sons. R. at 34. As of December 18, 1998, she had worked thirty-three years. Her past relevant work was as a secretary, retail clerk, and elementary school music teacher.¹ R. at 99, 118. She was working as an elementary

¹ Past relevant work under the Social Security Act is the work the claimant has performed in the past fifteen years. (continued...)

school music teacher when, on December 18, 1998, she slipped and fell down four concrete steps, landing on her outstretched right arm. Connor was taken to the Presbyterian Medical Center Emergency Department, where X-rays of her right elbow revealed a comminuted radial head fracture.² She was splinted and referred for surgery. R. at 155-62.

On December 31, 1998, Dr. Zelouf, an orthopedic surgeon at the Philadelphia Hand Center, conducted exploratory and reconstructive surgery of the right elbow. Dr. Zelouf made an incision of the elbow and observed that:

Immediately evident was complete stripping of all of the soft tissues from the lateral aspect of the elbow at the time of injury. The elbow was also noted to be markedly unstable, and it was clear that she had sustained an elbow dislocation as well as a complex radial head fracture. The elbow joint was visualized, and the radial head was inspected. 50% of the radial head was fractured and was completely comminuted and not repairable. In addition, the remaining portion of the radial head was fractured at the neck and was similarly unstable. This fracture was deemed nonrepairable. ...Unfortunately, there was significant medial instability indicating disruption of the medial collateral ligament as well as the lateral ligamentous complex contributing to the marked instability of the elbow. ...

R. at 164.

¹(...continued)
See 20 C.F.R. § 404.1565(a).

² The radius is one of the two bones of the forearm. Comminuted means "broken into several pieces." Stedman's Medical Dictionary at 386, A15, 1506 (27th ed. 2000).

Dr. Zelouf removed Connor's radial head and replaced it with a titanium implant. He removed loose fragments and reconstructed the surrounding ligaments. R. at 164-65.

Connor remained in Dr. Zelouf's care for six months following the surgery. Dr. Zelouf was disappointed with Connor's post-operative progress because he found that recovery was hindered by the formation of heterotopic ossification, or bone spurs, in the elbow. Dr. Zelouf also noted mild subluxation, or a partial dislocation, of the elbow. Lastly, Dr. Zelouf observed that Connor appeared to be developing carpal tunnel syndrome in the median distribution of her left hand.

Connor participated in physical therapy. For her left hand, Dr. Zelouf recommended a wrist splint and, if symptoms persisted, a corticosteroid injection. But by June of 1999, Dr. Zelouf opined that Connor's right arm had reached its "maximum medical benefit", and without further surgery would remain significantly restricted. Connor opposed further surgery, and she has not had it to date. Dr. Zelouf referred Connor for a functional capacity assessment. R. at 171-79.

Jill Galper of Continuum Healthcare performed a functional capacity assessment on July 28, 1999. Assessing Connor on a variety of activities, Galper found that Connor was severely limited in the motion of her right elbow and forearm and also limited in the motion of her right shoulder. Connor complained of mild tingling and pain in her left hand, brought on by prolonged use of the hand for fine motor activities. These

complaints abated with rest. Connor tested as able to carry 7.5 pounds occasionally and four pounds frequently with both hands, and eighteen pounds occasionally and nine pounds frequently with her left hand. R. at 211-15.

Apparently at the request of Connor's workers' compensation carrier, Connor was evaluated on April 12, 1999 by Dr. Bozentka, an orthopedist of the University of Pennsylvania Health System. Dr. Bozentka diagnosed Connor with elbow contracture with heterotopic ossification of her right elbow, mild adhesive capsulitis with impeachment syndrome of her right shoulder, and carpal tunnel syndrome of her left hand. For the left hand, Dr. Bozentka recommended continued use of the volar wrist splint, and counselled Connor about a corticosteroid injection if symptoms failed to abate. On the right side, Dr. Bozentka discussed with her physical therapy and a subacromial injection for her shoulder, and the benefits and risks of further surgery of the elbow. R. at 191-94.

In August of 1999, Dr. Fried, an orthopedist at the Upper Extremity Institute, assumed Connor's care. Dr. Fried diagnosed Connor with post-contusion right shoulder with residual adhesive capsulitis³, heterotopic ossification with severe

³ Adhesive capsulitis is "a condition in which there is limitation of motion in a joint due to inflammatory thickening of the capsule, a common cause of stiffness in the shoulder. SYN frozen shoulder." Stedman's Medical Dictionary, supra note 2, at 281-82.

capsular contracture⁴ and traumatic arthrosis⁵ of the right elbow, and radial and ulnar neuritis⁶ of the right arm. R. at 198. Dr. Fried gave Connor a tape splint for the overuse problem of her left hand. Connor's left hand exhibited symptoms consistent with a progressive median neuropathy and tested positive on the Tinel and Phalen test for carpal tunnel syndrome. R. at 199, 275-76. On December 18, 1999, the last examination on record, Dr. Fried noted improvement in motion of the right shoulder, slight improvement in motion of the right elbow, and decrease in pain. Dr. Fried resolved to focus further attention in the future to the nerve problems affecting Connor's right arm and back. R. at 197, 275-77. Dr. Fried charted a "conservative" course, advocating continued physical therapy, and opining that even with further surgery the motion of the right elbow would likely remain severely limited. R. at 198-99, 276.

On January 3, 2000, Dr. Fried performed a functional capacity assessment, finding that Connor could lift/carry up to five pounds with her right hand and ten with her left hand, and that pain on both sides was a limiting factor in such activities

⁴ Contracture is "static muscle shortening" caused by, inter alia, "loss of motion of the adjacent joint." Id. at 405.

⁵ Arthrosis is defined as synonymous with osteoarthritis, which is "arthritis characterized by erosion of articular cartilage, either primary or secondary to trauma or other conditions, which becomes soft, frayed, and thinned...; pain and loss of function result...." Id. at 151, 1282.

⁶ Neuritis is inflammation of nerves, id. at 1207, 1211, and the ulna and radius are the bones of the forearm.

as lifting/carrying, repetitive pushing and pulling, and repetitive pinching. On a job simulation with handwriting test, after seven minutes Connor had "pulling pain in the anterior shoulder and the posterior aspect of the elbow and forearm" of her right arm. Dr. Fried concluded that Connor "showed the ability to work at a sedentary work level. She does remain symptomatic and has significant limitations. It is recommended that she work at a self paced level and avoid overhead and repetitive activities especially on the right hand side." R. at 281-92.

On September 29, 1999, an agency physician (we cannot decipher the name) performed a functional capacity assessment. The physician identified the same impairments Connor's other physicians diagnosed. He found that Connor was restricted in reaching in all directions and fingering/fine manipulation. He also found that she was prohibited from repetitive crawling. The agency physician certified Connor able to perform work at the light exertional level, except that "work above the shoulder level as well as repetitive use of RUE [right upper extremity] [is] compromised/precluded." R. at 204-09.

At the hearing on September 27, 2000, Connor could not raise her right arm to take the oath. She testified that she is unable to straighten the arm or turn it over. R. at 33, 39, 44. She and her husband testified that she is unable to wash dishes, cut salad or meat, open a jar, or make a bed. Her husband and sons help with housework. R. at 39, 44, 46-47, 52. Connor

testified that she experiences numbness and tingling of her left hand, but nevertheless relies on that hand to perform daily activities, including eating and driving. R. at 40-41, 46-47. Connor testified that she feels some degree of pain in her right arm all the time and keeps her right arm elevated, even when sleeping, to alleviate pain and swelling. R. at 41-44, 47.

On November 6, 2000, the ALJ issued a disability decision. The ALJ determined that Connor had "a severe impairment encompassing the entire right upper extremity" and the non-severe impairment of carpal tunnel syndrome in her left hand. R. at 13, 17.⁷ The ALJ also decided that Connor's "allegations of pain, swelling, tenderness, coldness, numbness, weakness, and loss of attention and concentration are not substantiated to the degree alleged and are thus not fully credible." R. at 17.

At the hearing, the ALJ presented a hypothetical question to the vocational expert, embodying the functional limitations he determined Connor to have, in order to ascertain whether she is able, in light of her education, work experience, and age, to engage in any substantial gainful activity. The hypothetical question was:

If you were to assume a hypothetical individual with the identical vocational profile as that of the claimant and assume the individual was capable of work at the light exertional level. Would require a

⁷ The ALJ found other non-severe impairments, including hydradentis, diabetes and obesity, but because Connor does not challenge the ALJ's decision with respect to these impairments we do not discuss them here.

sit/stand option. And I'll go through the details with respect to the right upper extremities. But the conclusion is that there is very little ability to use that extremity. The push/pull motion of the right arm would be limited. Reaching in all directions would be limited. Gross and fine manipulations would be limited. Postural movements could be done only on an occasional basis. He or she would have to avoid temperature extremes. And in this particular instance a job would have to allow for not only the sit/stand option, but while seated some type of device that would cushion the right arm while in the seated position. Now, first, given those limitations do you see, do you have an opinion with regard to the ability to perform any of the past relevant work? ... Then the next question is are there jobs in the regional or national economy available to the person with the limitations I've described?

R. at 57-58.

The vocational expert responded that one with the functional restrictions cited above would be unable to return to work as a music teacher, retail clerk, or secretary, because such jobs involve both arms. There are, however, other jobs in the regional and national economy that such a person could perform that require "some use of one, but certainly not two" arms and "might require the use of one arm to do certain things like answer the phone or take some brief messages". Those jobs include receptionist, information clerk, shipping and receiving clerk, and inventory clerk. R. at 58-59.

Based on the vocational expert's testimony, the ALJ concluded that Connor was unable to resume her former work, but was able, despite her impairments, to work as a receptionist,

information clerk, shipping and receiving clerk, and inventory clerk, and accordingly determined that she was not disabled.

II. DISCUSSION

A. Applicable Law

A claimant establishes a disability under the Social Security Act if she demonstrates that she is unable to engage in any substantial gainful activity by reason of a medically determinable impairment or combination of impairments that lasts for at least twelve months. Fargnoli v. Massanari, 247 F.3d at 34, 38-39 (3d Cir. 2001); 42 U.S.C. § 423(d)(1).

The Commissioner uses a sequential five-step disability assessment process:

In 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. 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. 20 C.F.R. § 404.1520(d). The claimant bears the burden of demonstrating an inability to return to her past relevant work.

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. [HN5] At this stage, 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. See 20 C.F.R. § 404.1523. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999), quoted in Fargnoli, 247 F.3d at 39 (some citations omitted). See also 29 C.F.R. § 404.1520.

Here, the ALJ denied Connor's disability claim at step five, finding that although she was unable to return to her former work, she was able despite her impairments to perform other substantial gainful activity as an inventory clerk, information clerk, shipping and receiving clerk, and receptionist. We note that once a claimant shows that she is precluded by her impairments from resuming her former work activity, as Connor has done, the burden shifts to the Commissioner to show that there is other work activity in the regional or national economy that the claimant can perform. Id. at 39; Bowen v. Yuckert, 482 U.S. 137, 145 n.5 (1987).

We review the factual findings of the ALJ under a substantial evidence standard. 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Fargnoli, 247 F.3d at 38. The overriding

question on this appeal is whether the determination of the ALJ that Connor was able to perform other substantial gainful activity was supported by substantial evidence, or adequate to a reasonable mind.

B. Analysis

We find that the ALJ erred in three respects and, as a result, his decision that Connor was not disabled -- in that she was able to engage in other substantial activity -- is not supported by substantial evidence. First, the ALJ erred in disregarding Connor's consistent and medically substantiated complaints of pain. Second, the ALJ failed to take into account the vocational restrictions imposed by the carpal tunnel syndrome of Connor's left hand. Third and similarly, when assessing Connor's vocational capacity, the ALJ neglected to consider that the severe impairment affected Connor's dominant hand.

First, the ALJ erred in declining to credit Connor's allegations of pain, swelling, tenderness, and loss of concentration, R. at 17. Connor testified in the administrative hearing that pain affects her right arm all of the time and ranges from a "banging" to a more usual "extra heavy" feeling. She testified that the pain has become a distraction. She also testified that the pain increases with activity and temperature extremes and that she keeps the right arm elevated to alleviate discomfort and swelling. R. at 41-49.

Connor's testimony is consistent with that of her husband and with her statements to her treating and examining physicians. It is also supported by medical evidence. For instance, Connor was diagnosed with bone spurs impinging on her elbow joint and ulnar and radial neuritis. Pain management is an objective resonating throughout Connor's treatment history, including her last examination by Dr. Fried in which Dr. Fried still cited the need to reduce Connor's pain and resolved to focus greater attention on her nerve problems, R. at 276. On January 3 and 15, 2000, when Dr. Fried conducted a functional capacity test and filled out the forms sent by the agency, he noted pain to be a factor limiting Connor's performance on such activities as pushing/pulling, carrying, and writing, and frequently to impair Connor's concentration. R. at 281-92. Finally, the agency physician who examined Connor to assess her functional capacity noted significant tenderness of Connor's right elbow and shoulder and that she appeared to hold her right arm in a "guarded position". R. at 203-04.

The ALJ must give due weight to all of a claimant's impairment-related symptoms, including pain. See 20 C.F.R. § 404.1529. Additionally, as our Court of Appeals has explained, a claimant's attestations of pain are entitled to "serious consideration", and if supported by medical evidence are entitled to "great weight" and may only be disregarded if there is contrary medical evidence on record. Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). The ALJ cites none, and thus his

decision to disregard complaints of pain is not supported by substantial evidence.⁸

The ALJ correctly took into account that Connor needs a job in which her right arm can be elevated. But he erred in declining to consider the functional restrictions the pain itself posed, as well as the effect of the pain on Connor's concentration, persistence, and pace, and the evidence that the pain increases with right-arm activity.

Second, the ALJ erred in failing to consider the functional limitations posed by the carpal tunnel syndrome of Connor's left arm. The ALJ found Connor to have carpal tunnel syndrome in her left hand, a finding every doctor who examined Connor shared.

The ALJ also found that carpal tunnel syndrome was an impairment that was non-severe. This finding was justified. An impairment is non-severe if "it does not significantly limit your physical or mental ability to do basic work activities." 20 C.F.R. § 404.1521(a). The left carpal tunnel syndrome did not

⁸ The ALJ mentions that Connor "does not take medications indicated for the treatment of severe pain and has not produced records corroborative of participation in a pain management program." R. at 16. In addition to being insufficient to refute medical evidence of pain, under Mason this reasoning is not persuasive in light of the record as a whole. Connor did participate in a pain management program. On August 16, 1999, Dr. Fried said "I feel she would benefit from a pain management person being on board" and on September 20, 1999, Connor went to MossRehab for pain management. R. at 199, 217-19. Furthermore, Connor used narcotic pain medication, such as Percocet, but tapered off due, in whole or part, to fear of addiction. Connor has gastro-intestinal intolerance to anti-inflammatory medication. R. at 41, 47-48, 51, 174, 196, 219.

appear to reduce Connor's range of motion or strength. What it amounted to was coldness, numbness, and tingling of the fingertips of her left hand, and pain, upon repeated use, of her left palm. The ALJ was entitled to find that this impairment of Connor's non-dominant arm did not significantly limit the ability to perform basic work activities.

Nevertheless, the ALJ committed reversible error by failing to consider the vocational effects of this non-severe impairment. Once a claimant is found to have a severe impairment, the ALJ must consider the functional limitations posed by all of the claimant's impairments, including those that are not severe, in assessing the claimant's functional capacity to engage in work. See 20 C.F.R. § 416.945(e); 20 C.F.R. § 916.923. This case dramatizes why. Carpal tunnel syndrome of one's non-dominant hand may ordinarily not be disabling, but when considered in combination with a severe impairment of the other hand, it may very well be.

The ALJ posed a hypothetical question to the vocational expert at the hearing that did not mention any functional restriction of Connor's left hand. See supra Part I.B. The ALJ also specified Connor's functional limitations in his written decision and did not mention any attributable to carpal tunnel syndrome, see R. at 17, ¶ 5. A hypothetical question to a vocational expert must embody all of the claimant's impairments. If it does not, the answer to the hypothetical question is not supported by substantial evidence. Chrupcala v. Heckler, 829

F.2d 1269, 1276 (3d Cir. 1987); Morales v. Apfel, 225 F.3d 319, 320 (3d Cir. 2000). Because the ALJ determined that Connor was able to engage in substantial gainful activity based upon the answer to a hypothetical question that did not reflect left carpal tunnel syndrome, the decision is not supported by substantial evidence.

The ALJ should have assessed Connor's ability to engage in substantial gainful activity in light of all her impairments, including carpal tunnel syndrome of her left hand. The symptoms of carpal tunnel syndrome included numbness and tingling of her fingertips and pain, upon repeated use, of the palm, of her left hand.

Finally, the ALJ neglected to specify to the vocational expert that Connor can only write with her right hand. But the vocational expert seemed to view her as ambidextrous. The vocational expert deemed Connor able to perform work as a receptionist, information clerk, shipping and receiving clerk, and inventory clerk because these jobs require use of only one hand, Connor's left hand. The other hand would remain elevated on a pillow. This testimony of the vocational expert that Connor is able to perform these jobs ignores the fact that all of them involve writing⁹, and Connor can only write with her right hand.

⁹ The vocational expert testified they involve writing. See supra Part I.B. See also O*NET, the Occupational Informational Network that is the online replacement of the Dictionary of Occupational Titles (DOT), listing tasks for these jobs as including recording information and preparing documents.

(continued...)

It is unclear how Connor can do any of these jobs when her right arm is severely restricted (as the ALJ put it, "there is very little ability to use that extremity") and supposed to be elevated on a pillow. For this reason as well, the finding of the ALJ that Connor is able to work as an inventory clerk, information clerk, shipping and receiving clerk, and receptionist is not supported by substantial evidence.

On remand, the ALJ should consider the functional ramifications of all of Connor's impairments, including left carpal tunnel syndrome, ascribe proper weight to Connor's complaints of pain, and bear in mind that the severe impairment affects Connor's dominant extremity.

⁹(...continued)

See O*NET, available at <http://www.onetcenter.org/overview.html>. The positions we examined are Receptionists and Information Clerks (O*NET 43-4171.00), Shipping, Receiving, and Traffic Clerks (O*NET 43-5071.00), and Stock Clerks-Stockroom, Warehouse, or Storage Yard (43-5081.03), the position listed as the most similar to "inventory clerks".

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ORDER

AND NOW, this 6th day of January, 2003, upon consideration of the parties' cross motions for summary judgment, the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, and plaintiff's Objections thereto, in accordance with the Memorandum issued this day, it is hereby ORDERED that:

1. Plaintiff's objections are SUSTAINED;
2. The Report and Recommendation is DISAPPROVED;
3. Plaintiff's motion for summary judgment is GRANTED insofar as the matter is remanded for further proceedings consistent with the Memorandum; and
4. Defendant's motion for summary judgment is DENIED.

BY THE COURT:

Stewart Dalzell, J.

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JUDGMENT

AND NOW, this 6th day of January, 2003, the Court having by Memorandum and Order issued this day (1) disapproved the Report and Recommendation of Magistrate Judge Hart, (2) granted in part plaintiff's motion for summary judgment, and (3) denied defendant's motion for summary judgment, in accordance with Shalala v. Schaefer, 509 U.S. 292, 113 S. Ct. 2625 (1993) and Kadelski v. Sullivan, 30 F.3d 399 (3d Cir. 1994), it is hereby ORDERED that:

1. JUDGMENT IS ENTERED in favor of plaintiff Sandra L. Connor and against defendant Jo Anne B. Barnhart;
2. The case is REMANDED to the Commissioner of Social Security for further proceedings consistent with the Memorandum; and
3. The Clerk shall CLOSE this civil action statistically.

BY THE COURT:

Stewart Dalzell, J.