

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

CARMEN L. RODRIGUEZ

:
:
:

v.

JO ANNE B. BARNHART,
Commissioner of the Social
Security Administration

NO. 01-CV-2582

MEMORANDUM AND ORDER

McLaughlin, J.

March 11, 2003

This action arises from the denial of the application of the plaintiff, Carmen L. Rodriguez, for Supplemental Security Income ("SSI") from December 1, 1993 to May 31, 1997 under Title XVI of the Social Security Act. The plaintiff's application for SSI benefits beginning December 1, 1993 was initially denied by the state agency responsible for disability determinations. Upon appeal, an Administrative Law Judge ("ALJ") held a hearing on June 21, 1996. The ALJ affirmed the agency's denial of benefits to the plaintiff on September 30, 1996. The plaintiff appealed this decision to the Appeals Council, which remanded the case to the ALJ for further consideration of her treating physician's opinion.

While the plaintiff's case was on appeal to the Appeals Council, the plaintiff filed a second application for **SSI** on June 9, 1997. This **SSI** application was granted, but it did not address whether Rodriguez was entitled to benefits prior to June 1, 1997. On March 20, 1998, upon the Appeals Council's remand, the ALJ again denied Rodriguez's claim for benefits; this became the final decision of the Commissioner.

The plaintiff brought this case on June 1, 2001, challenging her denial of **SSI** benefits from December 1, 1993 to June 9, 1997. After the plaintiff and Commissioner filed their motions for summary judgment, the case was referred to a United State Magistrate Judge for a Report and Recommendation ("R & R"). On October 21, 2002, the Magistrate Judge issued an R & R that the ALJ's findings were supported by substantial evidence and recommended that summary judgment be entered in favor of the Commissioner. The plaintiff has objected to the Magistrate Judge's R & R.

After consideration of the parties' motions and a careful review of the report and recommendation filed in this case, the objections filed thereto, and after conducting a review of the administrative record, the Court grants the plaintiff's motion and remands to the Social Security Administration for further proceedings consistent with this memorandum.

This Court must determine if there is substantial evidence to support the ALJ's findings of fact. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ~~Kent v. Schweiker~~, 710 F.2d 110, 114 (3d Cir. 1983); ~~Cotter v. Harris~~, 642 F.2d 700, 704 (3d Cir. 1981). The ALJ must state reasons for his findings of fact; otherwise, meaningful judicial review is precluded. Burnett v. Commissioner of SSA, 220 F.3d 112, 119 (3d Cir. 2000) (citing to Cotter v. Harris, 642 F.2d 700, 704-05 (3d Cir. 1981)).

The Court notes that the Commissioner must make a five-part sequential inquiry, as described in 20 C.F.R. § 416.920 (2000), to determine if a claimant is "disabled" under the Social Security Act, 42 U.S.C. § 423(a)(1)(D), and thus, is eligible for benefits. The sequential inquiry continues until a question is answered affirmatively or negatively in such a way that a decision can be made that a claimant is or is not disabled.

The third question in the inquiry is whether the claimant's listed impairment meets or equals one **of** the medical listings given in 20 C.F.R. § 404, Appendix 1. If a claimant meets a listing or if his or her condition is medically equivalent to a listing, then he or she is presumptively disabled, without consideration of age, education and work

experience. 20 C.F.R. § 416.920(d); see also Sullivan v. Bowen, 855 F.2d 67, 70 (3d Cir. 1988), aff'd sub nom. Sullivan v. Zebley, 490 U.S. 1064 (1989).

Ms. Rodriguez contends that she meets medical listing 9.09 (obesity).¹ Listing 9.09 was deleted in June 1997; but the parties agree that it should be applied to Ms. Rodriguez's case. Brief in Support of Plaintiff's Motion for Summary Judgment at 18-20; Defendant's Brief in Support of Motion for Summary Judgment at 8-10; Plaintiff's Objections to the Report and Recommendation at 2-3; see also Glenn v. Massanari, 2001 WL 1003075 at *2 (E.D. Pa. 2001) (finding that the deletion of listing 9.09 should be not be applied retroactively in certain cases); Supplemental Memorandum, Garbrick v. Apfel, No. 98-CV-609 (E.D. Pa. filed Dec. 8, 1999) (same).

The ALJ apparently agreed because he analyzed the plaintiff's claim under listing 9.09. The ALJ assumed that the plaintiff met the height/weight requirements of listing 9.09 and **so** the Court will as well.

¹ Listing 9.09, section A states: "Obesity. Weight equal to or greater than the values specified in ... Table II for females (100 percent above the desired level), and ... [h]istory of pain and limitation of motion in any weight-bearing joint or spine (on physical examination) associated with findings on medically acceptable imaging techniques of arthritis in the affected joint or lumbosacral spine." 20 C.F.R. Part 404, Appendix 1 (1997).

To satisfy the remaining requirements of listing 9.09A regarding history of pain and limitation of motion, Ms. Rodriguez presented the ALJ with both clinical and diagnostic evidence. As to the plaintiff's claim of a "history of pain," clinical examination notes describe that the plaintiff registered complaints of severe ongoing pain in her back, knees and leg on various occasions from 1991 to 1996. R. 146, 204, 208, 278, 335-37. Her treating physician recommended that Ms. Rodriguez become involved in a chronic pain program. R. 293, 345. A pain management evaluation described "multiple, multiple tender points which are diffuse in nature for the entire lumbosacral back, left buttocks, left thigh with some inconsistency with the upper level of the tender point in the thoracolumbar region." R. 347.

As to limitation of motion, plaintiff points to evidence from a physical therapy report from November 1992 indicating that the plaintiff had limited lumbosacral mobility. R. 145.

The sum total of the ALJ's discussion of whether the plaintiff met the remaining requirements of listing 9.09 is: "Even giving the claimant the benefit of the doubt that her weight is above the minimum established in the tables of listing 9.09, the claimant has failed to meet the other criteria of listing 9.09. In particular, the claimant has not established

that she has the required level of severity with respect to any **of** the following impairments: arthritis, hypertension, congestive heart failure, chronic venous insufficiency, or respiratory disease." R. 23.

The plaintiff argues that the ALJ has not sufficiently explained his finding in step 3 to meet the standard set forth in Burnett v. Commissioner of SSA. 220 F.3d at 119 (citing to Cotter, 64 F.2d at 704-05).

In his step 3 discussion, the ALJ did not address why the evidence **of** pain and limitation **of** motion from the plaintiff's arthritis failed to meet the criteria listed in 9.09A. Burnett requires an explanation for this finding of fact that allows for judicial review. Because the ALJ did not explain this finding, this Court cannot ascertain if there is substantial evidence to support his conclusion that the plaintiff did not meet the criteria in listing 9.09.

An explanation of his finding in step 3 seems particularly necessary because the ALJ found that the plaintiff had degenerative arthritis of the knees and lumbosacral spine in step 2. His step 2 finding raises the question of why the ALJ believed these diagnoses were accurate but did not accept the plaintiff's evidence regarding her pain and limitation of motion.

In addition, the plaintiff argues that the ALJ required

her to meet a higher standard than that stated in **9.09A**. She argues that listing **9.09A** requires that she prove that she has a history of pain and limitation of motion as described in Section **A**, but not any level of severity as to her pain or limitations. Because the **ALJ** stated in his decision that she did not meet "the required level of severity" for her arthritis, she argues that his language implies that he incorrectly required her to prove a level **of** severity.

The **ALJ** may have required Ms. Rodriguez to prove not just that she had a history of pain, but that the pain met an unknown level **of** severity. This additional requirement is inconsistent with the plain language of listing **9.09A**. Once the height and weight requirement is met, listing **9.09A** requires only "a history of pain" and "limitation **of** motion." **20 C.F.R. Part 404, Appendix 1 (1997)**. See Pitzer v. Sullivan, **908 F.2d 502, 505 (9th Cir. 1990)**. The listing does not say what level of pain or limitation must be established. The regulatory code also states that it is unnecessary to provide information about the intensity, persistence or limiting effects **of** a symptom required by a specific listing unless the listing states otherwise. **20 C.F.R. 404.1525(f)**.

The **ALJ's** lack of explanation for his finding that the plaintiff did not meet listing **9.09A's** criteria also hinders the

Court's review here. Nothing clarifies whether the ALJ actually held the plaintiff to an incorrect standard, or whether he used ill-chosen words but applied the correct standard.

The plaintiff also argues that the ALJ erred in his analysis of steps 4 and 5; but the Court will not decide those questions because the case must be remanded for the ALJ to consider step **3**.

An appropriate order follows.

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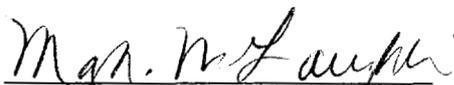
NO. 01-CV-2582

ORDER

AND NOW, this 11th day of March, 2003, upon
consideration ~~of~~ upon consideration of Plaintiff's Motion ~~for~~
Summary Judgment (Docket #10), and the Defendant's Motion for
Summary Judgment (Docket #13), the Magistrate Judge's Report and
Recommendation and the plaintiff's objections thereto, and having
reviewed the record, it is hereby Ordered and Decreed that the
Report and Recommendation is Not Approved, the Defendant's Motion
for Summary Judgment is Denied, and the Plaintiff's Motion for
Summary Judgment **is** Granted.

The case shall be remanded to the Social Security
Commissioner for further administrative proceedings for the
reasons given in a memorandum of today's date.

BY THE COURT:


MARY A. MCLAUGHLIN, J.