

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

ORTAN M. LEWIS : CIVIL ACTION
: :
v. : :
: :
JO ANNE B. BARNHART, : NO. 03-4830
Commissioner of Social : :
Security : :

MEMORANDUM

Padova, J.

July 14, 2004

I. BACKGROUND

Plaintiff Ortan M. Lewis filed this action pursuant to 42 U.S.C.A. § 405(g), seeking judicial review of the final decision of Defendant Commissioner of Social Security Jo Anne B. Barnhart ("Commissioner"), denying her claim for supplemental security income benefits ("SSI") pursuant to Title XVI of the Social Security Act, 42 U.S.C.A. §§ 1381-1383. Both parties filed motions for summary judgment. Pursuant to Local Rule 72.1(d)(1)(C), the Court referred the case to Magistrate Judge Peter B. Scuderi for a Report and Recommendation. The Magistrate Judge has recommended that Plaintiff's Motion for Summary Judgment be denied and the Commissioner's Motion for Summary Judgment be granted. Plaintiff filed timely objections. For the reasons that follow, the Court sustains Plaintiff's objections and remands this matter to the Commissioner for reconsideration and further findings. Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

II. STANDARD OF REVIEW

Under the Social Security Act, a claimant is disabled if she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve (12) months." 42 U.S.C. §423(d)(1)(A); 20 C.F.R. §416.905(a). Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential evaluation to evaluate disability claims.¹ The burden

¹The five steps are:

(b) If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) When your impairment meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) When your impairment(s) does not meet or equal a listed impairment. If your impairment(s) does not meet or equal a listed impairment, we will assess and make a finding about your residual functional capacity based on all the relevant medical and other evidence in your case record, as explained in § 416.945. (See paragraph (g)(2) of this section and § 416.962 for an exception to this rule.) We use our residual functional capacity assessment at the fourth step of the sequential evaluation process

to prove the existence of a disability rests initially upon the claimant. 42 U.S.C. §423(d)(5). To satisfy this burden, the claimant must show an inability to return to her former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given her age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

There is an additional process for evaluating mental impairments. Plummer v. Apfel, 186 F.3d 422, 428-29 (3d Cir.

to determine if you can do your past relevant work (paragraph (f) of this section) and at the fifth step of the sequential evaluation process (if the evaluation proceeds to this step) to determine if you can adjust to other work (paragraph (g) of this section).

(f) Your impairment(s) must prevent you from doing your past relevant work. If we cannot make a determination or decision at the first three steps of the sequential evaluation process, we will compare our residual functional capacity assessment, which we made under paragraph (e) of this section, with the physical and mental demands of your past relevant work. (See § 416.960(b).) If you can still do this kind of work, we will find that you are not disabled.

(g) Your impairment(s) must prevent you from making an adjustment to any other work.

(1) If we find that you cannot do your past relevant work because you have a severe impairment(s) (or you do not have any past relevant work), we will consider the same residual functional capacity assessment we made under paragraph (e) of this section, together with your vocational factors (your age, education, and work experience) to determine if you can make an adjustment to other work. (See § 416.960(c).) If you can make an adjustment to other work, we will find you not disabled.

If you cannot, we will find you disabled.

20 C.F.R. §§ 416.920(b)-(g).

1999). These procedures require the ALJ to evaluate the claimant's "pertinent symptoms, signs, and laboratory findings to determine whether [the claimant has] a medically determinable mental impairment(s)." 20 C.F.R. § 416.920a(b)(1). If an impairment is found, the ALJ must rate the functional limitation resulting from such impairment based upon "the extent to which [claimant's] impairment(s) interferes with [his or her] ability to function independently, appropriately, effectively, and on a sustained basis" in the following four areas: "Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation." 20 C.F.R. §§ 416.920a(c)(2)-(3). If the claimant's mental impairment is severe, the ALJ then determines whether it "meets or is equivalent in severity to a listed mental disorder." 20 C.F.R. § 416.920a(d)(2). If the claimant's impairment is severe, but does not reach the level of a listed mental disorder, the ALJ then assess the claimant's residual functional capacity. 20 C.F.R. § 416.920a(d)(3).

Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support

a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971); Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). Substantial evidence is more than a mere scintilla, but may be somewhat less than a preponderance. Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir. 1983).

III. DISCUSSION

Lewis applied for SSI benefits on December 11, 2001, alleging a disability that began on July 26, 2001. (Tr. at 42.) She claimed to be disabled by the loss of her left eye, which was surgically removed and replaced with a prosthetic eye on August 2, 2001, after Lewis was stabbed in the eye with a knife. (Tr. at 55, 88-96.) She also suffers from asthma, hypertension and obesity and complains of pain in the area of her left eye that interferes with her ability to see, think and read. (Tr. at 76-77, 94-96.) She also claims to suffer from depression and has obtained counseling from the Crime Victim Center and her pastor. (Tr. at 115-16, 135-

38, 147-48.) At the time of the administrative hearing, Lewis was twenty-seven years old, five feet, nine inches tall, and weighed 280 pounds. (Tr. at 119-120). Lewis did not graduate from high school, leaving special education classes provided by the Chester County Intermediate Unit after the tenth grade. (Tr. at 61, 121.) She had two short term employment experiences prior to applying for supplemental security income. She worked part-time cleaning a Wendy's restaurant for four months in 1993-94, before leaving because of problems in school. (Tr. at 122-23.) She worked at a Veteran's Administration Hospital for two months in 1994-95 as a nursing aid, leaving after her mother died. (Tr. at 123-24.) That position also involved cleaning. (Tr. at 123.)

Plaintiff's application for SSI benefits was denied on April 12, 2002. (Tr. at 11, 20.) A hearing was held before Administrative Law Judge ("ALJ") Diane C. Moskal on December 9, 2002. (Tr. at 112.) Lewis and her grandmother, Mary Wright, both appeared and testified on Lewis's behalf at the hearing. (Tr. at 112.) A vocational expert, Dennis L. Mohn, also appeared and testified. (Tr. at 112.)

On February 7, 2003, the ALJ issued a decision denying Plaintiff's applications for benefits. (Tr. at 11-16.) The ALJ found that Lewis "has residuals of monocular vision, asthma, and hypertension, which conditions . . . are . . . severe." (Tr. at 15.) The ALJ further found that Lewis "has not demonstrated,

either singly or in combination, impairment which meets or equals the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulations No. 4." (Tr. at 15.) The ALJ rejected statements made by Lewis and Wright concerning Lewis' impairments and their impact on her ability to work to the extent they allege a level of impairment that exceeds what would be expected from the objective medical evidence. (Tr. at 15.) The ALJ also found that Lewis: "has the residual functional capacity to perform a limited range of light work;" "has no past relevant work;" has a limited education; and "would be capable of making a vocational adjustment to numerous jobs," significant numbers of which exist in the regional and national economy. (Tr. at 15-16.) The ALJ concluded that Lewis was not disabled. (Tr. at 16.) The Appeals Council denied Plaintiff's request for review; therefore, the ALJ's decision dated February 3, 2003, is the final decision of the Commissioner. See 20 C.F.R. §§ 404.1584(d), 416.984(d). Plaintiff then filed this action.

Plaintiff, both in her motion for summary judgment and in her objections to the Magistrate Judge's Report and Recommendation, argues that the ALJ erred by failing to fully and fairly develop the record by failing to obtain consultative examinations to evaluate her claim of depression; by failing to consider her obesity; and by improperly rejecting Lewis's and Wright's testimony regarding Lewis's depression.

A. Consultative Examination

The ALJ rejected Plaintiff's request for a consultative examination for depression during the December 9, 2002 hearing. The ALJ stated, at the outset of the hearing, that she only orders consultative examinations in rare situations, which this was not. (Tr. at 117.) The ALJ did not address Lewis's request for a consultative examination in her decision.

Lewis testified extensively concerning her emotional state during the hearing. She said that she had suffered from depression since she was attacked and lost her eye, though she initially tried to continue with her life as normal. (Tr. at 143-45.) She further testified that her depression became worse after the trial and sentencing of the woman who attacked her. (Tr. at 145.) She stated that she used to be outgoing, but, because of her depression, she no longer does anything and just stays in her room. (Tr. at 136.) She further stated that she used to try to get up and do things but now she just cries and goes to her room. (Tr. at 143.) She also testified that she doesn't leave the house except to go to church unless her grandmother takes her. (Tr. at 154.) She has not skated or gone to any movies, parties, or family functions because of her depression. (Tr. at 154.) Her grandmother has to get her out of bed, fix her hair, and help her with dressing because she just does not want to do anything. (Tr. at 154-55.)

Wright testified that, before she lost her eye, Lewis was a "very joyful girl" but will not leave her room now unless Wright makes her. (Tr. at 158.) Wright also stated that Lewis is sad and she sees her crying in her room. (Tr. at 158.) Wright stated that Lewis will sometimes go to the doctor a few blocks away by herself, but sometimes Wright has to walk with her. (Tr. at 159-60.)

Plaintiff also testified that she has sought treatment for her depression. She sought counseling for her depression from the Crime Victim Center and had spoken with a counselor from the Crime Victim Center by phone approximately every day for the year preceding the hearing. (Tr. at 147.) She also obtained counseling for her depression from her pastor beginning after her eye was removed. (Tr. at 135.) She was still counseling with her pastor and the Crime Victim Center in connection with her depression at the time of the hearing. (Tr. at 115, 135-37, 147.) Plaintiff also testified that she had spoken with her family doctor about her depression and that her doctor had suggested that she take medication for depression. (Tr. at 135.) She rejected this idea and opted to try counseling because her doctor told her that the medications were very addictive and she did not want to become hooked on medication. (Tr. at 135.) She further testified that she had been assigned to a counselor for her depression by the welfare office and was to begin counseling at the time of the hearing. (Tr. at 136-37.)

Plaintiff argues that the ALJ erred in refusing to obtain the requested consultative examination with regard to her depression and cognitive deficit. She relies on the regulations governing the ordering of consultative examinations by the government. The government may order a physical or mental examination if the application's "medical sources cannot or will not give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind. . . ." 20 C.F.R. § 416.917. The decision whether to order such evaluations depends on whether the information needed "is readily available from the records of your medical sources." 20 C.F.R. § 416.919a(a)(1). The regulations state that the following situations may require a consultative examination:

(b) Situations requiring a consultative examination. A consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim. Other situations, including but not limited to the situations listed below, will normally require a consultative examination:

- (1) The additional evidence needed is not contained in the records of your medical sources;
- (2) The evidence that may have been available from your treating or other medical sources cannot be obtained for reasons beyond your control, such as death or noncooperation of a medical source;
- (3) Highly technical or specialized medical evidence that we need is not available from your treating or other medical sources;
- (4) A conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved, and we are unable to do so by recontacting your medical source; or

(5) There is an indication of a change in your condition that is likely to affect your ability to work, or, if you are a child, your functioning, but the current severity of your impairment is not established.

20 C.F.R. § 416.919a(b). Plaintiff contends that the ALJ erred by failing to consider her request for a consultative examination on the grounds established in Section 416.919a(b) and, instead, refusing that request based upon a general unwillingness to order such examinations. The ALJ refused Plaintiff's request for a consultative examination at the outset of the hearing, prior to any testimony with respect to Lewis's mental health, and explained the basis of her decision not to order a consultative examination as follows:

ALJ: I don't do them and I'll tell you why. The regulations in my view make it very clear that, and this is both with physical impairments and mental impairments, the program's not supposed to pay on the basis of a diagnoses except in a really - well, terminal illness might be one exception, but generally speaking of course, we pay on the basis of people accessing medical treatment and what happens to them after they've been in that treatment. It's especially important in a program like this one where the Supreme Court upheld in the Walton case just last March that absolutely this is a program that does not have a short-term component to disability.

* * *

ALJ: Have things like antidepressant medications been tried? I doubt it here since

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ATTY: No.

ALJ: - she's not even - and a CE -

ATTY: No.

ALJ: - is not going to do anything but give a snapshot of how this person, who the CE has no treating experience with, how that person looked on the one time that the person walked into the CE's office. Now, as I often tell members of the bar when they request these CE's and I uniformly by the way in most instances, except for rare situations, I don't see this as a rare situation, deny them for the reason I'm stating the legal reasons I'm stating.

(Tr. at 116-17.)

The Court finds that the ALJ's denial of Lewis's request for a consultative examination was not made in accordance with the regulations governing such examinations; that there is a "conflict, inconsistency, ambiguity or insufficiency in the evidence" with respect to Lewis's claim of depression which must be resolved; and, consequently, that a consultative examination with respect to Lewis's mental health is justified in this case pursuant to 20 C.F.R. § 416.919a(b)(4). The Court further finds that the ALJ failed to consider whether Plaintiff has a mental impairment which affects her ability to work in accordance with 20 C.F.R. § 416.920a. See Plummer, 186 F.3d at 248-29. Accordingly, the Court finds that the ALJ erred by denying Plaintiff's request for a consultative examination based upon a general policy of denying such requests without considering the factors listed in 20 C.F.R. § 416.919a(b), sustains Plaintiff's objection to this aspect of the

Report and Recommendation, and remands this matter to the Commissioner for a consultative examination with respect to Lewis's mental health and for further consideration of whether she has a mental impairment pursuant to 20 C.F.R. § 416.920a.

B. Obesity

Plaintiff argues that the ALJ erred in failing to consider her obesity in determining whether she is disabled. Lewis testified that she is five feet nine inches tall and weighs 280 pounds. (Tr. at 119-120.) Although the medical report prepared by Dr. Robert Schmidt for the Pennsylvania Bureau of Disability Determination mentions Lewis's obvious obesity, the ALJ does not mention Plaintiff's obesity in her decision, let alone discuss how her obesity might affect her ability to perform light work. Moreover, the ALJ did not ask the vocational expert whether Lewis's obesity would impact on her ability to perform the jobs existing in the national and regional economy that he found she was able to perform. (Tr. at 161-65.) Accordingly, the Court finds that the ALJ erred by failing to discuss Plaintiff's obesity, sustains her objection to this aspect of the Report and Recommendation, and remands this matter to the Commissioner for reconsideration of all of the relevant probative medical evidence, including Lewis's obesity and claims of depression, and for further findings in accordance with Fargnoli v. Massinari. See Fargnoli v. Massinari, 247 F.3d 34, 43-44 (3d Cir. 2001) (finding that an ALJ's failure to

consider all of the relevant medical evidence in his decision is grounds for remanding for such consideration).

C. Rejection of Testimony

Plaintiff argues that the ALJ improperly rejected her testimony, and that of her grandmother, Mary Wright, with respect to her limitations. The ALJ reported her findings as follows:

I do not find claimant or her grandmother's testimony as to the extent of her limitations credible in view of the extremely routine medical evidence of record and in view of claimant's own testimony as to her activities which are more varied than her alleged limitations would permit. Based on all the foregoing, it is found that allegations made by claimant as to a degree of limitation greater than that objectively demonstrable, are not credible. She retains the residual functional capacity to perform a limited range of light work as noted.

(Tr. at 14.) Although the ALJ does not specify what testimony she rejected, it appears that this statement refers to Lewis's claims of depression, as Lewis has not undergone any mental health evaluation and her claims of depression are supported solely by her testimony and that of her grandmother. "The ALJ may disregard subjective complaints when contrary evidence exists in the record. The ALJ must, however, provide reasons for doing so." Pysher v. Apfel, Civ. A. No. 00-1309, 2001 WL 793305, at *3 (E.D. Pa. July 11, 2001) (citations omitted). In this case, the ALJ disregarded Lewis's subjective complaints of depression, and the testimony of her grandmother supporting those subjective complaints, on the

grounds that there was no medical evidence of record to support such complaints, while also denying Plaintiff's request for a consultative examination which would provide medical evidence either confirming or denying the existence of the condition about which she complained. Plaintiff's objection to this aspect of the Report and Recommendation is sustained and this matter is remanded to the Commissioner for reconsideration of Lewis's and Wright's credibility in light the consultative examination to be performed with respect to Plaintiff's claims of depression.

IV. CONCLUSION

For the reasons stated above, the Court sustains Plaintiff's objections to the Magistrate Judge's Report and Recommendation and remands this matter to the Commissioner for reconsideration and further findings. The Court grants summary judgment in favor of Plaintiff and denies Defendant's motion for summary judgment. An appropriate order follows.

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ORDER

AND NOW, this 14th day of July, 2004, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Peter B. Scuderi, **IT IS HEREBY ORDERED** that:

1. Plaintiff's objections to the Report and Recommendation (Docket No. 15) are **SUSTAINED**;
2. This matter is remanded to the Commissioner for reconsideration and further findings consistent with this Memorandum.
3. The Plaintiff's Motion for Summary Judgment (Doc. No. 8) is **GRANTED**;
4. The Commissioner's Motion for Summary Judgment (Doc. No. 11) is **DENIED**.

BY THE COURT:

John R. Padova, J.

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O R D E R

AND NOW, this 14th day of July, 2004, in accordance with the Court's separate Order dated July 13, 2004, granting Plaintiff's Motion for Summary Judgment and remanding the case to the Commissioner of the Social Security Administration in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with the Memorandum dated July 13, 2004, pursuant to Kadelski v. Sullivan, 30 F.3d 399 (3d Cir. 1994), and Federal Rule of Civil Procedure 58, **IT IS HEREBY ORDERED** that **JUDGMENT IS ENTERED** in favor of Plaintiff, Ortan M. Lewis, and against Defendant, Jo Anne B. Barnhart, Commissioner of the Social Security Administration.

BY THE COURT:

John R. Padova, J.