

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

PAMELA SMETHERS	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 03-6814
	:	
JO ANNE B. BARNHART,	:	

MEMORANDUM AND ORDER

AND NOW, this 22nd day of February, 2005, upon consideration of the cross-motions for summary judgment (Doc. Nos. 7, 12 and 14) the Court makes the following findings and conclusions:

A. On November 1, 1996, Pamela Smethers, (“Smethers”) applied for disability insurance benefits (“DIB”) under Title II of the Social Security Act, (“Act”) 42 U.S.C. §§ 401-433. (Tr. 50-52). Throughout the administrative process, including a March 16, 1998, hearing before an administrative law judge (“ALJ”), Smethers’s claims were denied. (Tr. 7-9, 30-36, 41-43). Pursuant to 42 U.S.C. § 405(g), Smethers appealed to this Court and, on July 24, 2001, the Honorable Charles R. Weiner, remanded the case specifically directing that the medical opinions of two physicians be addressed to determine what, if any, controlling weight should be afforded to their assessments that Smethers was disabled. (Tr. 320-331). On remand, the ALJ held hearings on April 16, and July 16, 2003. (Tr. 253-318).¹ On September 29, 2003, the ALJ again concluded that Smethers was not disabled, and this appeal followed. (Tr. 226-237).

B. The ALJ found Smethers’s degenerative disc disease of the cervical spine, fibromyalgia, and asthma to be severe. (Tr. 232 ¶ 18, 236 Finding No. 3). The ALJ concluded that none of Smethers’s impairments considered singly or in combination met or equalled any of the listed impairments. (Tr. 232 ¶ 18, 236 Finding No. 4); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that Smethers could not perform her past relevant work, but was not disabled, and had the Residual Functional Capacity (“RFC”) to perform less than the full range of light work. (Tr. 230 ¶ 4, 235 ¶ 31-32, 236 ¶ 36, 237 Finding Nos. 7, 8, 12, 13, 14). With the testimony of a Vocational Expert (“VE”), the ALJ further concluded that Smethers was able to make an adjustment to work that exists in significant numbers in the national economy including, an office helper, a ticket taker, a survey worker, and a cashier II. (Tr. 236 ¶36, 237 Finding No. 13).

¹ Smethers filed a second DIB claim on March 10, 2000. (Tr. 373-375). The ALJ consolidated this claim with Smethers’s November 1996 DIB claim. (Tr. 229-255).

C. The Court has plenary review of legal issues, but reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 401 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ's conclusion is supported by substantial evidence, this Court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

D. Smethers raises several arguments that the ALJ's determination was erroneous. I find that the ALJ made several legal errors warranting remand.

1. Smethers argues that the ALJ improperly rejected the opinions of three of her treating physicians, Erik Von Keil, D.O., Susan M. Levine, M.D., and Albert D. Abrams, M.D. She argues that if the above physicians were credited, a finding of disability would be required.

Generally, more weight is given to treating sources if their opinions are well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. §404.1527(d)(2); see also Social Security Ruling, ("SSR") 96-8p, 1996 WL 374184, at * 7. Although, the opinion of Dr. Von Keil was properly accorded little or no probative weight, the ALJ did err in assessing the weight to be assigned to Drs. Levine and Abrams. (Tr. 234 ¶¶ 25-26). See Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991) (holding that physicians' opinions that are conclusory and unsupported by the medical evidence are not controlling).

a. Dr. Levine

Smethers argues both that the ALJ has substituted her opinion for that of Dr. Levine and that the reason the ALJ discounted her opinion is premised upon a perceived conflict between the evidence regarding Chronic Fatigue Syndrome ("CFS") offered by Dr. Levine and the testimony of medical expert, Brad Rothkopf, M.D.² Although the ALJ cites reasons for not affording Dr. Levine full controlling weight, it appears that the ALJ has substituted her own lay opinion for that of an expert in CFS. Because the ALJ's reasons for affording her little or no weight are minor and since Dr. Levine's opinion is well-supported and not inconsistent with the record, the case must be remanded to assess the proper weight to be afforded to Dr. Levine. See 20 C.F.R. § 404.1527(d)(2).

The minor inconsistencies supporting Dr. Levine's reduced weight concern the time period during which CFS must be documented under SSR 99-2p and the dates on which Smethers consulted with Dr. Levine by phone instead of visiting her in person. (Tr. 233-234 ¶ 23). Since Dr. Levine's documentation conflicts with Smethers's own accounts of the

² Dr. Rothkopf is a non-examining, non treating physician, who admitted in his testimony, "I am not an expert of CFS." (Tr. 283).

dates of some of the office visits, the ALJ found that “Dr. Levine is trying to bolster her opinion, through mere repetition of what few examinations occurred.” (Tr. 234 ¶ 25). It is not possible from the record to discern the truth of this assessment, especially since the ALJ finds that neither Smethers nor Dr. Levine to be credible. (Tr. 234-235 ¶¶ 25, 28). The ALJ also discredited Dr. Levine for stating in 1998 that Smethers met the CDC criteria for CFS, while reporting entirely normal results in August 2000 and October and November 2001. (Tr. 233-234 ¶¶ 23-24). This cannot undermine Dr. Levine’s opinion that Smethers suffers from CFS because, as noted in the Commissioners own CFS policy, sufferers often have normal test results. SSR 99-2p, 1999 WL 271569, at n.4. Furthermore, neither Dr. Levine, nor any of Smethers’s treating physicians suggested that she was malingering.

Contrary to the ALJ’s characterization, Dr. Rothkopf’s testimony generally supports the notion that Smethers suffers from CFS and/or fibromyalgia. (Tr. 281-302). In addition, the record contains overwhelming medical evidence consistent with Dr. Levine’s opinion that Smethers suffers from CFS and/ or fibromyalgia and the ALJ does not suggest in her decision that Dr. Levine’s opinion is inconsistent with the medical evidence of record. (Tr. 229-237). The scant contrary evidence does not contradict Dr. Levine’s diagnosis, but merely documents that Smethers’s symptoms required light work restrictions or opined that Smethers complaints concerning her impairment were not consistent with clinical findings. (Tr. 130, 494-501, 632-661). Despite these modest inconsistencies, the ALJ utilized a potential discrepancy in Dr. Rothkopf’s testimony to reduce the amount of weight afforded to Dr. Levine. (Tr. 233-234 ¶¶ 20-25).³

The ALJ’s reasons for affording Dr. Levine so little weight are unavailing. Because I cannot tell whether Dr. Levine has attempted to bolster her opinion and cannot ascertain whether Smethers consultations were in person or by phone, I must defer to the ALJ’s impression of these facts. However, even assuming the accuracy of the ALJ’s bases for affording little weight to Dr. Levine, her bases for reduction are minor and, in as much as they amount to a credibility assessment, cannot serve to “override the medical opinion of a treating physician that is supported by the record.” Morales, 225 F.3d at 318. Because the ALJ’s decision to reduce the weight afforded to Dr. Levine rested upon administrative and minor bases, I conclude that the ALJ has substituted her opinion for that of Dr. Levine. As such, although Dr. Levine’s opinion may justifiably be reduced of controlling weight, treating physicians’ opinions are entitled to be given deference and should not be rejected. 20 C.F.R. § 404.1527; SSR 96-2p, 1996 WL 374188, at * 4. Accordingly, upon being remanded to re-weigh Dr. Levine’s opinion, the ALJ is required to incorporate the length, frequency, nature, extent of the treatment relationship; supportability; consistency; and specialization as required by 20 C.F.R. § 404.1527 (d)(2)-(d)(6). Although the frequency of the treatment relationship was clearly considered as part of the SSR 99-2p analysis (see footnote 3 below), the remaining factors, notably Dr. Levine’s expertise in CFS (Tr. 290, 540-542), have not yet been considered. See Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999) (citations omitted) (stating that a cardinal principle guiding disability determinations is that the ALJ accord treating physicians’ reports great weight, especially “when

³ It is unclear whether Dr. Rothkopf is attempting to suggest that a CFS and/or fibromyalgia patient is required to be examined at the end of every six months or periodically throughout six months. (Tr. 289-290).

their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time.”).

b. Dr. Abrams

The ALJ further erred in affording Dr. Abrams no controlling weight. (Tr. 234 ¶¶ 26). Dr. Abrams's reports are well-supported and not inconsistent with other evidence in the record. Each of the reasons the ALJ gives for discounting Dr. Abrams opinion is erroneous.

For instance, the ALJ suggests that Dr. Abrams has not set out the CFS criteria and recorded minimal physical findings. (Tr. 234 ¶ 26). Despite this, a review of Dr. Abrams records indicates that Smethers met the CDC definition for CFS and the statutory test for establishing a medically determinable impairment under the Act. (See ¶ 2 below). As a part of her rationale for affording Dr. Abrams less weight the ALJ points out, inaccurately, that Dr. Abrams most recent examinations were performed in January 2002 and August 2002 stating, “claimant's visits to his office appear to have been intermittent which would not provide him with significant clinical data to make a diagnosis of CFS under CDC and SSR 99-2p criteria.” (Tr. 234 ¶ 26).⁴ However, a review of Dr. Abrams reports demonstrates that the ALJ ignored office visits on February 10, 2003, and March 14, 2003 (Tr. 606, 616, 617). Finally, the ALJ mischaracterized Dr. Rothkopf's testimony in a way that suggests that he disapproves of Dr. Abrams assessment of Smethers. In the testimony, Dr. Rothkopf merely states that Dr. Abrams “is looking at it a little differently.” (Tr. 290). Dr. Rothkopf goes on to explain that when Dr. Abrams “calls it CFS—he's also treating or believes that Mrs. Smethers suffers from fibromyalgia and documents the number of trigger points.” (Tr. 291). Because the ALJ's bases for discounting Dr. Abrams opinion are in error and because his opinion is well-supported and consistent with the record, Dr. Abrams should have been afforded controlling weight.

2. Smethers next asserts that the ALJ's handling of the third step was legally inadequate. Because I find the ALJ's handling of the step two to be legally inadequate with respect to Smethers's CFS, step three is therefore procedurally inadequate and legally inadequate in its failure to compare Smethers's CFS, by itself, to pertinent listings in determining medical equivalence.⁵

If an impairment can be shown, as Smethers's can, to meet both the CDC and statutory definition of CFS under the act, it must be a medically determinable severe impairment. Under 99-2p, CFS is a medically determinable impairment that can be the basis for a finding of disability when it is accompanied by medical signs or laboratory findings. The current CDC

⁴ The Court notes that the ALJ determined that last date that Smethers was insured for disability benefits was December 31, 2001. (Tr. 230 ¶ 5). However, the consultations with Dr. Abrams that post-date December 31, 2001, are relevant because they establish a pattern of consultation which goes to the weight to afford Dr. Abrams and because it counters the ALJ's assertion that office visits were too intermittent to provide him with sufficient clinical data to make a diagnosis of CFS. (See Tr. 234 ¶ 26 referencing the ALJ's notation that the record does not document any visits since 2002).

⁵ The Court notes that the ALJ noted in her analysis that she compared fibromyalgia to the pertinent listings. (Tr. 232 ¶ 18).

definition for CFS requires the concurrence of four or more of the following symptoms, all of which must have persisted or recurred during six or more consecutive months of illness and must not have predated the fatigue: self reported impairment in short-term memory or concentration severe enough to cause substantial reduction in previous levels of occupational educational, social or personal activities; sore throat; tender cervical or axillary nodes; muscle pain; multi-joint pain without joint swelling or redness; headaches of a new type, pattern or severity; unrefreshing sleep; and postexertional malaise lasting more than twenty-four hours. SSR 99-2p, 1999 WL 271569, at * 1-2. The statutory and regulatory provisions of the Act require that there must be one or more of the following medical signs or clinically documented over a period of at least 6 consecutive months to establish a medically determinable impairment: palpably swollen or tender lymph nodes on examination; nonexudative pharyngitis; persistent, reproducible muscle tenderness on repeated examinations, including the presence of positive tender points; or any other medical signs that are consistent with medically accepted clinical practice and are consistent with the other evidence in the case record.

Here, the ALJ does not even include CFS in her list of medically determinable and severe impairments.⁶ If symptoms are found to cause more than a minimal effect on an individual's ability to perform basic work activities, the ALJ must find that the claimant has a severe impairment. Newell v. Comm'r of Soc. Sec., 347 F.3d 541, 546 (3d Cir. 2003). In addition to the ALJ's own acknowledgment that Smethers's "symptoms may meet the criteria for CFS" (Tr. 235 ¶ 30), the reports of Dr. Abrams alone satisfy the CDC definition by documenting four of eight symptoms during six or more consecutive months between November 1, 1996, and December 31, 2001, and demonstrate, over a period of six months, the medical signs and laboratory findings required by SSR 99-2p including: swollen or tender lymph nodes; nonexudative pharyngitis; and muscle tenderness or positive tender points.⁷ Therefore,

⁶ It is unclear from her decision whether the ALJ has combined CFS with fibromyalgia, calling them both fibromyalgia. (Tr. 232 ¶ 18). This distinction is important because, it is unclear whether the ALJ has found CFS to be a medically determinable and severe impairment. On one hand, it appears that the ALJ has considered them together, indirectly then finding CFS to a medically impairment that is severe. (Tr. 233-324 ¶¶ 21-30). This scenario is bolstered by the fact that she considers CFS in assessing RFC, where the ALJ must consider only limitations and restrictions that result from a individual's medically determinable impairments. SSR 96-8p, 1996 WL 374184, at * 1-2. However, I have assumed for the purpose of this analysis that she has not considered them together because: she treats CFS as if it is a separate entity from fibromyalgia throughout the decision; SSR 99-2p sets forth an analysis for CFS, but does not mention fibromyalgia; and because it is clear from Dr. Rothkopf's testimony, upon which she relies, that while the two diseases overlap, they may not be the same. (Tr. 233-235 ¶¶ 21-30, 292). See Holiday v. Barnhart, 76 Fed. Appx. 479, 481 (3d Cir. 2003) and Canales v. Barnhart, 308 F. Supp. 2d 523, 525 (E.D. Pa. 2004) (both finding claimants' fibromyalgia and CFS impairments each to be severe); see also SSR 99-2p, 1999 WL 271569, at n. 3.

⁷ In addition to a specific diagnosis of CFS Dr. Abrams documents the following: in 1996, swollen glands, lymphadenopathy, jaw swelling, submandibular lymphadenopathy, chronic tender salivary glands, diffuse pain and tenderness, difficulty sleeping, severe fatigue, and abnormal sleep (Tr. 107-108); in 1997, memory loss, fullness in salivary glands, diffuse pain, fatigue and trouble sleeping (Tr. 141-147); in 1998, tenderness in all joints, and severe sleep disorder (Tr. 155-156); in 2000, arthralgias and myalgias (chills, fever, muscle cramping, and aching and fatigue), low back pain, muscle pain, myopathy, myositis (muscle inflammation), severe headaches, myofascial pain, classic trigger points, tender back, sleep disorder, fatigue, and weak arm (Tr. 456-457, 588-590); in 2001, trigger

Smethers's CFS should have been found to be a severe medically determinable impairment. Therefore, the case must be remanded to incorporate Smethers's medically determinable and severe impairments at steps three-five.⁸ See McCrea v. Comm'r of Soc. Sec., 370 F.3d 357, 361 (3d Cir. 2004) (stating that any doubt as to whether this showing has been made should be resolved in favor of the claimant).

3. Smethers's final argument is that the ALJ failed to comply with SSR 00-4p. Smethers contends that she cannot perform the jobs of office helper, ticket taker, survey worker, and cashier II because the occupational requirements of those jobs exceed her mental capabilities (reasoning development). She argues that a reasoning development level of two or three, necessary for all four jobs, conflicts with both the ALJ's limiting Smethers to "simple 1-2 step tasks." (Tr. 235 ¶ 31). When there is an apparent unresolved conflict between the VE's testimony and the DOT, the ALJ must derive a reasonable explanation before relying on VE evidence. SSR 00-4p, 2000 WL 18198704, at * 2. Without a clarification on the record regarding this apparent conflict, I must remand the action for explanation.

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner did not apply the correct legal standards and that the record does not contain substantial evidence to support the ALJ's findings of fact and conclusions of law. As a result, the action must be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g).

Therefore, it is hereby **ORDERED** that:

1. The motion for summary judgment by Pamela Smethers is **GRANTED**; to the extent that the matter is remanded for further proceedings consistent with this order.
2. The motion for summary judgment by the defendant is **DENIED**.

points, pain, insomnia, sleep disorder, arthralgias (Tr. 558, 587); in 2002, diffuse pain and weakness (Tr. 555-556); in 2003 myofascial pain syndrome, does not sleep well, and chronic fatigue. (Tr. 606).

⁸In her brief, Smethers points out the following problems with the ALJ's analysis which should be remedied upon remand at steps three and four:

Step Three: Inasmuch as CFS is not a listed impairment, an individual with CFS alone cannot meet the listings. However, 99-2p requires the ALJ to compare the findings in Smethers's case to pertinent listings to determine if medical equivalence exists. 1999WL 271579 at * 4. Where the individuals with CFS have related psychological manifestations, such as Smethers's depression, consideration should be given to whether the impairment meets or equals the mental disorders listings. *Id.* Smethers argues that the findings in her case should have been compared to any pertinent listing but, in particular, to Listing 12.04.

Step Four: SSR 96-8p requires the ALJ to discuss her work limitations on a function by function basis and express RFC in exertional levels only after providing a narrative explanation of each function.

3. I direct this matter to be reviewed by a different ALJ since her analysis has twice been problematic for this Court. See Khon v. Barnhart, No. 03-5122, 2004 U.S. Dist. LEXIS 17781, at * 31 (E.D. Pa. Sept. 3, 2004).
4. The Clerk of Court is hereby directed to mark this case closed.

LOWELL A. REED, JR., S.J.