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

JUDY A. ELLIS	:	CIVIL ACTION
	:	
v.	:	NO. 04-0363
	:	
JO ANNE B. BARNHART, Commissioner of Social Security	:	

MEMORANDUM AND ORDER

AND NOW, this 22nd day of February, 2005, upon consideration of the cross-motions for summary judgment filed by the parties (Doc. Nos. 8 and 11), the court makes the following findings and conclusions:

1. On April 10, 2000, Judy A. Ellis ("Ellis") filed for disability insurance benefits ("DIB"), under Title II of the Social Security Act, 42 U.S.C. §§ 401-433, alleging an onset date of January 11, 2000. (Tr. 40; 105-107). Throughout the administrative process, including an administrative hearing held on November 15, 2001, before an administrative law judge ("ALJ"), Ellis' claims were denied. (Tr. 4-7; 14-20; 38-69; 74-77). Pursuant to 42 U.S.C. § 405(g), Ellis filed her complaint on February 13, 2004.

2. In her decision, the ALJ concluded that Ellis has a severe impairment of fibromyalgia and a non-severe impairment of depression. (Tr. 15 ¶ 6-16 ¶ 1;19 Finding 3). The ALJ further found that Ellis' fibromyalgia did not meet or medically equal a listed impairment and that she retained the residual functional capacity ("RFC") to engage in light work, including her past work in the garment industry. (Tr. 16 ¶ 2; 17 ¶ 5; 19 ¶¶ 2-3; 19 Findings 4, 6 & 7).

3. 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 is "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 conclusion of the ALJ 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).

4. Ellis raises several arguments in which she alleges that the determination by the ALJ was not supported by substantial evidence. These arguments are addressed below. However, upon due consideration of all of the arguments and evidence, I find that the ALJ's decision is supported by substantial evidence.

A. First, Ellis argues that the ALJ erroneously rejected the opinions of her

treating physicians, Allen J. Samuels, M.D., Wayne Brotzman, M.D., Tilden B. Reeder, M.D., and her therapist, Robin Paulhamus and, instead, substituted the ALJ's own opinions. The ALJ did not reject the opinions of Ellis' treating physicians, as she found that Ellis' fibromyalgia was a severe impairment and recognized Ellis' depression. Instead, the ALJ discounted Ellis' claims regarding the extent to which her impairments disabled her based upon the medical evidence, which is within the purview of the ALJ. Hartranft, 181 F.3d at 362 (citing 20 C.F.R. § 404.1529(c)) (stating that the ALJ is required to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it). It is true that Drs. Samuels and Pollack suggested that Ellis could not work. (Tr. 146; 241-242). However, the ALJ is not bound by such opinions as the ultimate disability determination is reserved exclusively to the Commissioner. 20 C.F.R. § 404.1527(e)(1). Regardless, the ALJ discussed these opinions and noted that all of the studies performed by these physicians were normal, and found that these conclusions were not consistent with the doctors' treating records. (Tr. 18 ¶¶ 1, 5; 19 ¶ 1; 146).

Moreover, the ALJ adequately expressed her reasoning for her decision that Ellis was not totally disabled by her fibromyalgia and cited to substantial evidence in support thereof. Contrary to Ellis' suggestion, the ALJ also considered the evidence submitted after the hearing and there is no evidence that she ignored evidence.[1] See (Tr. 14 ¶ 1; 15 ¶ 3; 15 ¶ 6-16 ¶ 1; 17 ¶ 3) (discussing the post-hearing records). The ALJ noted that every MRI and EMG scan of Ellis' brain, spine and body was negative, that Ellis attended physical therapy sporadically for about two months until she dropped out of the program, and that she failed to pursue a rehabilitation program. (Tr. 15 ¶¶ 3-5; 17 ¶ 4; 18 ¶¶ 1-4; 146; 151; 152; 153; 155; 175-177; 185; 202; 221-222; 245; 248). The ALJ also reviewed Ellis' daily activities and noted that, although she only drives short distances, she is the primary driver of the household and that she cooks, runs the washer and dryer, shops, watches T.V., and helps take care of her mother and son. (Tr. 17 ¶ 3; 52-53; 131-135). Physical therapy records also record that Ellis was cleared to perform light work. (Tr. 18 ¶ 2; 182). Nancy Lembo, M.D. felt that Ellis did not have a neurologic cause for her complaints of pain and concluded that she would not hurt herself or do any further damage by performing her work and could return to unrestricted activity. (Tr. 18 ¶ 2; 180; 182). Finally, Dr. Gould, Ellis' neurologist, and Dr. Samuels, her rheumatologist, repeatedly reported that her findings were completely normal, (Tr. 18 ¶¶ 3-4; 151-153; 155; 175; 221), and Dr. Brotzman reported a completely normal neurologic examination on August 3, 1999. (Tr. 18 ¶ 6; 273-274).

Regarding Ellis' depression, the ALJ noted that on October 24, 2000, in a one-time psychiatric evaluation, Ellis was diagnosed with moderate depression related to chronic pain but that on a mental status exam she was found to be functioning well and that her treating source records consistently reported her mental status examinations as unremarkable. (Tr. 15 ¶ 6-16 ¶ 1; 153; 176; 243; 245; 277-278). The ALJ also noted that Ellis neglected to follow up on mental health treatment for a full year after it was recommended because she could not find a facility close enough to her and she had trouble "'getting into treatment.'"[2] (Tr. 15 ¶ 6-16 ¶ 1; 63). Ellis, herself, stated in a letter dated September 13, 2000, that her depression was under control with 20 mg. of Prozac per day.

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[1] Similarly, contrary to Ellis' assertion, the ALJ considered and noted her attempt to return to work. (Tr. 17 ¶ 2; 18 ¶ 5).

[2] Ellis characterizes her delay in receiving treatment and her failure to participate in rehabilitation and physical therapy programs as evidence of her poor condition. That is one way in which a reasonable person could view the circumstances. However, after considering the evidence and claimant's explanations a reasonable person could also conclude, as did the ALJ, that Ellis was dilatory. See S.S.R. 96-7p.

(Tr. 15 ¶ 6-16 ¶ 1; 80). Other records further corroborate that Ellis' depression was controlled. (Tr. 228; 259; 279). The ALJ also relied on a state agency medical consultant who found that Ellis' mental impairment was non-severe and on the report of a field office representative who had a face-to-face interview with Ellis wherein the representative found that there were no observable signs of the mental impairment and that she was, *inter alia*, bright and responsive. (Tr. 15 ¶ 6-16 ¶ 1; 117-120; 166). Finally, Ellis' therapist Ms. Paulhamus stated that she was doing well in treatment despite her pain, (Tr. 279-280; 283-284), and Ellis scored 29 out of 30 on a mini-mental status exam. (18 ¶ 3; 227).

As detailed above, the ALJ's conclusions regarding Ellis' impairments and the extent to which they limit her ability to work are supported by substantial evidence. That is not to say that there is not evidence which could have been used to find in Ellis' favor or that the evidence could not have been viewed or considered differently. Nonetheless, the standard that I must apply is not whether there is substantial evidence to find in favor of the plaintiff, but whether the decision of the ALJ is supported by substantial evidence. Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985). In this case, there was more than a mere scintilla of evidence by which a reasonable person could find, as the ALJ did, that Ellis' depression was not severe and that her fibromyalgia was not severe enough to prevent her from working at her prior employment. Therefore, the ALJ's decision must be upheld.

B. Ellis next contends that the ALJ failed to properly assess the evidence regarding her depression. Although a finding of non-severity is closely scrutinized by the court, it is still scrutinized under the substantial evidence standard. McCrea v. Comm'r of Soc. Sec. 370 F.3d 357, 360-361 (3d Cir. 2004). As indicated above, the ALJ's conclusion that Ellis' depression would have no more than a minimal effect on her ability to work, and, thus, was not severe, is supported by substantial evidence. S.S.R. 85-28. Furthermore, contrary to Ellis' suggestion, a psychiatric review technique form was adequately completed. (Tr. 166-174). The ALJ also properly followed 29 C.F.R. § 404.1520(e) and S.S.R. 96-8p by reviewing Ellis' limitations and stating her RFC. (Tr. 16 ¶3-17 ¶5). Therefore, Ellis' contentions to the contrary are incorrect.

C. Third, Ellis argues that the ALJ improperly discounted her credibility. "Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." Pysher v. Apfel, No. 00-1309, 2001 WL 793305, at *3 (E.D. Pa., July 11, 2001) (citing Van Horn v. Schweiker, 717 F.2d 871, 973 (3d Cir. 1983). Moreover, such determinations are entitled to deference. S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 271 (3d Cir. 2003). In this case, the ALJ noted, *inter alia*, that the medical records were completely unremarkable (with the exception of positive trigger points), that Ellis did not appear very motivated to receive treatment, and that she was capable of performing a wide variety of daily life activities. (Tr. 17 ¶ 1- 19 ¶ 1; 19 finding 5). As a result, the ALJ found that Ellis' allegations regarding her limitations were not totally credible. (Tr. 19 Finding 5). The ALJ's credibility assessment was supported by substantial evidence, and, thus, will be upheld.

D. Last, Ellis asserts that the testimony of the vocational expert ("VE") does not support the determination that she can return to her prior work. I disagree. Contrary to Ellis' argument, the ALJ properly incorporated Ellis' documented impairments into her questions to the VE and even made an allowance for a mental impairment. (Tr. 65-58); see Burns v. Barnhart, 312 F.3d 113, 123 (3d Cir. 2002) (finding that the question posed to the vocational expert must include impairments supported by medically undisputed evidence in the record.); Chrupcala v. Heckler, 829 F.2d 1269, 1276

(3d Cir. 1987) (stating that a hypothetical question posed to a vocational expert must specify all of a claimant's impairments that are supported by the record). Based upon the evidence and hearing testimony, the VE asserted that Ellis could perform her past work at the same levels that she performed it in the past. Specifically, the VE stated that Ellis had exclusively worked in the garment industry, primarily as a sewing machine operator, which, as worked by Ellis, was classified as "the lower level semi-skilled and light." (Tr. 66). The VE further stated that the other jobs Ellis had performed in the garment industry were "folder, sorters, [and] hemmers" which were classified as "unskilled and light." (Id.). Contrary to Ellis' contention, the VE did not state that Ellis' prior work had a Specific Vocational Preparation ("SVP") of 1 nor is there any reason from the record to make that assumption. See S.S.R. 00-4p (stating that unskilled work corresponds to an SVP of 1-2 and semi-skilled work corresponds to an SVP of 3-4). Lastly, the VE concluded that even assuming a limitation on moderate concentration due to a mental impairment, Ellis could still perform her past work because the positions are repetitive, simple one or two step jobs. (Tr. 67). The VE's testimony is not in conflict with the Dictionary of Occupational Titles and is supportive of the ALJ's decision. As a result, Ellis' argument must fail.

Upon careful and independent consideration, the record reveals that the Commissioner applied the correct legal standards and that the record as a whole contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby **ORDERED** that:

5. The motion for summary judgment filed by Judy A. Ellis is **DENIED**;

6. The motion for summary judgment filed by the Commissioner is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST JUDY A. ELLIS**; and

7. The Clerk of Court is hereby directed to mark this case as **CLOSED**.

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