

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

THELMA HENRY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 03-CV-6158
JOANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
Defendant.	:	

Diamond, J.

March 1, 2005

MEMORANDUM

Plaintiff Thelma Henry has moved for Summary Judgment, seeking to overturn the decision of the Commissioner of Social Security denying her claim for Supplementary Security Income. I deny Plaintiff's Motion.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff is 50 years old, and has a high school education. (Tr. 42, 78, 121). She has previously worked as a cook, nurse's aide, and clerk. (Tr. 82). She lives at home with her son. (Tr. 41, 104).

On February 7, 2002, Plaintiff applied for SSI, alleging that she has been disabled since January 1, 2002 due to a thyroid gland problem, Graves' disease, depression, and anxiety. 42 U.S.C. § 1381-83; (Tr. 73, 81). Following denial of her application, Plaintiff requested a hearing before an Administrative Law Judge. On March 6, 2003, the ALJ held a hearing at which Vocational Expert Nancy Harter and Plaintiff testified. (Tr. 35-66). On March 14, 2003, the

ALJ concluded that the Plaintiff was not disabled, finding that she retained the Residual Functional Capacity to perform medium level work, and so could hold a significant number of jobs existing in the regional and national economies. (Tr. 25, 26). On September 9, 2003, the Appeals Council denied review of the ALJ's decision, which, thus, became final. (Tr. 5-8).

After Plaintiff brought suit in this Court, both she and the Commissioner filed cross motions for summary judgment. The matter was referred to a Magistrate Judge, who, on January 12, 2005, recommended that I deny Plaintiff's Motion, grant the Commissioner's Motion, and affirm the decision of the Commissioner denying benefits. On January 21, 2005, Plaintiff filed her Objections to the Report and Recommendation.

STANDARD OF REVIEW

In reviewing an ALJ's decision, the District Court must determine whether the ALJ's findings of fact are supported by substantial evidence. See Montes v. Apfel, No. 99-2377, 2000 U.S. Dist. LEXIS 4030, *2 (E.D. Pa. Mar. 27, 2000) (citing Richardson v. Perales, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1972)). The definition of "substantial evidence" is well known: "that which would be sufficient to allow a reasonable fact finder to reach the same conclusion; while it must exceed a scintilla, it need not reach a preponderance of the evidence." Id. at *2; see also Jesurum v. Sec'y of U.S. Dept. Of Health and Human Services, 48 F.3d 114, 117 (3d Cir. 1995). The ALJ must consider all relevant evidence in the record, and provide some indication of the evidence he rejected, and why he rejected it. See Weir v. Heckler, 734 F.2d 955, 933 (3d Cir. 1984).

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also

Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c) (2004); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

DISCUSSION

Plaintiff's pleadings are not a model of clarity. Plaintiff apparently objects to the Magistrate's conclusions: (1) that substantial evidence supports the ALJ's finding that Plaintiff failed to show that she was impaired; and (2) that the hypothetical question the ALJ posed to the Vocational Expert was proper. Plaintiff also contends that the ALJ and the Magistrate should have concluded that she was disabled because she suffered from chronic fatigue syndrome and fibromyalgia.

I. The ALJ's Determination that Plaintiff is not Impaired

Plaintiff argues that the Magistrate erred in concluding that substantial evidence supports the ALJ's finding that Plaintiff was not impaired as defined in the Listing of Impairments §§ 4.03, 9.02, 9.04, and 12.04 in 20 C.F.R. Part 404, Subpart P, Appendix 1. The Listing includes impairments "severe enough to prevent a person from doing any gainful activity," regardless of age, education, or work experience. 20 C.F.R. § 416.925(a). See Sullivan v. Zebley, 493 U.S. 521, 532, 107 L. Ed. 2d 967, 110 S. Ct. 885 (1990). To make out a Listed Impairment, Plaintiff must prove that she satisfies all the criteria of the Impairment. Sullivan v. Zebley, 493 U.S. at 530-531; Sims v. Barnhart, 309 F.3d 424, 428 (7th Cir. 2002). The decision as to whether her

condition meets or equals a listed Impairment must be based on “medical findings . . . supported by medically acceptable clinical and laboratory diagnostic techniques.” 20 C.F.R. § 461.926(b).

The ALJ extensively analyzed whether Plaintiff’s psychological impairment met the criteria of Listing 12.04 -- Affective Disorders. Citing to Plaintiff’s ability to pay her bills, take care of her personal grooming, communicate well, and get along with her neighbors, the ALJ concluded that Plaintiff had only mild limitations in her daily living activities and social functioning. (Tr. 20). Further, the ALJ noted that Plaintiff never experienced “episodes of decompensation,” or met any of the Listing’s “C” criteria. (Tr. 20). Finally, the ALJ found that no physician made a diagnosis that met or was equivalent in severity to the criteria of a listed Impairment, nor was such a finding suggested by the medical evidence in the record. (Tr. 19); see also Dumas v. Schweiker, 712 F.2d 1545, 1553 (3d Cir. 1983) (the Commissioner is “entitled to rely not only on what the record says, but also on what the record does not say”) (citations omitted); Lane v. Comm’r of Soc. Sec., 100 Fed. Appx. 90, 95 (3d Cir. 2004) (unpublished opinion). Accordingly, substantial evidence supports the ALJ’s finding that Plaintiff failed to meet the criteria for § 12.04.

The ALJ expressly stated that he considered Plaintiff’s thyroid disorder under the listings in § 9.00 -- Endocrine System -- but found no evidence that it met the criteria of any of the listings in that section. To prove an impairment of the endocrine system under §§ 9.02 and 9.04, Plaintiff must show:

9.02 Thyroid Disorders. With:

A. Evaluate the resulting impairment under the criteria for the affected body system.

9.04 Hypoparathyroidism. With:

- A. Severe recurrent tetany; or
- B. Recurrent generalized convulsions; or
- C. Lenticular cataracts.

20 C.F.R. Part 404, Subpart P, Appendix 1 (2005).

Plaintiff presented no objective medical evidence to show that she meets any of these criteria. Rather, she relied on her own testimony that she suffers from weakness, tiredness, apathy, and “pain and weakness in both of her lower extremities.” (Pl. Brief in Support of Motion for Summary Judgment at 2). Plaintiff also testified, however, that she does not take pain medication, nor has she ever undergone physical therapy for the pain. (Tr. 51). Moreover, the ALJ did not believe Plaintiff, noting his reservations as to whether Plaintiff’s subjective complaints of pain are “fully creditable.” (Tr. 22). In these circumstances, substantial evidence certainly supports the ALJ’s determination that Plaintiff fails to meet or equal the requirements of Listed Impairments 9.02 and 9.04. See Dumas, 712 F.2d at 1553; Lane, 100 Fed. Appx. at 95.

Finally, Plaintiff claims that she meets the criteria under Listed Impairment 4.03 -- Hypertensive Cardiovascular Disease. Yet, the record contains no objective medical evidence that Plaintiff suffered from any cardiovascular disease that met or equaled the criteria under Section 4.03. Significantly, Plaintiff has never received treatment for a cardiovascular condition. Further, in her original application for Social Security, Plaintiff did not state that she had a cardiovascular condition. (Tr. 68, 73, 81). Indeed, during her hearing before the ALJ, Plaintiff stated that she did not suffer from any other diagnosed medical problems besides depression, anxiety, and Graves’ disease (which, in turn, caused her thyroid problems). (Tr. 54). Finally, to the extent Plaintiff is asserting that her claim under Listed Impairment § 4.03 should be analyzed under § 11.04, she has failed to show either a vascular accident, or significant and persistent

disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dextrous movements or gait. Accordingly, as Plaintiff failed to present evidence that she suffered from a medically determinable condition, the ALJ was not required to analyze Plaintiff's claim under § 4.03.

II. The ALJ's Hypothetical Question

At the hearing below, the ALJ asked the Vocational Expert the following hypothetical:

Q: If you assume a person of the same age, education, and work background as Ms. Henry and assume that that person could perform medium, light, or sedentary work provided that it required no more than simple, routine tasks, would work be possible?

(Tr. 61). Plaintiff argues that this question “did not proffer all of the facts . . . enumerated in the record from pages 1 thru 72.” (Objections ¶ 8). Plaintiff does not state which “facts” on pages 1 through 72 were improperly omitted from the hypothetical question.

In formulating the hypothetical question, the ALJ took into account all Plaintiff's limitations that he found to be credible and medically supported. The ALJ stated that he had “reservations, as to whether the claimant's assertions concerning her impairments, and their impact on her ability to work, can be considered fully creditable.” (Tr. 22). The ALJ also noted the absence of objective medical evidence that Plaintiff's impairments are as severe as claimed, and that her daily activities “negate the conclusion that [she] has disabling pain, fatigue, or other physical or mental symptoms.” (Tr. 22). Accordingly, in formulating the hypothetical question, the ALJ included all the limitations he deemed credible and medically-supported. This was certainly permissible. Randolph v. Barnhart, No. 03-3582, 2004 U.S. App. LEXIS 19146, *18 n.9 (8th Cir. Sept. 13, 2004) (citation omitted); Ridenbaugh v. Barnhart, 57 Fed. Appx. 101, 105-

106 (3d Cir. 2003) (unpublished opinion); Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987); Hundley v. Heckler, Civ. No. 85-4133, 1986 U.S. Dist. LEXIS 23638, *5 (E.D. Pa. Jun. 26, 1986) (a reviewing court must defer to the ALJ's credibility determinations where supported by substantial evidence).

Further, the ALJ based the hypothetical on his assessment of Plaintiff's Residual Functional Capacity, finding that Plaintiff was capable of medium level work, limited to simple routine tasks. In assessing Plaintiff's RFC, the ALJ considered "all symptoms, including pain, [and] . . . side-effects of any pain medication . . . functional restrictions . . . and the claimant's daily activities." (Tr. 21). Thus, by including the RFC in the hypothetical question, the ALJ actually considered all limitations imposed by Plaintiff's impairments. (Tr. 21).

Plaintiff further contends that the ALJ should have "thrown out" the hypothetical question he asked, and relied instead on an alternative hypothetical that "more truthfully mirrored the [Plaintiff's] condition." (Objections at ¶ 18):

Q: [I]f Ms. Henry's testimony regarding the amounts which she can lift and carry and the lengths of time that she can sit, stand, and walk before she needs to rest, stop doing what she's doing or lying down is credited, would work be possible?

(Tr. 63).

Once again, the ALJ was not required to include in his hypothetical those parts of Plaintiff's testimony he did not believe. Randolph, 2004 U.S. App. LEXIS 19146, *18 n.9; Ridenbaugh, 57 Fed. Appx. at 105-106; Chrupcala, 829 F.2d at 1276.

III. Fibromyalgia and Chronic Fatigue Syndrome

As I have noted, in both her SSI application and her testimony before the ALJ, Plaintiff stated that her only diagnosed medical problems were depression, anxiety, and Graves' disease.

(Tr. 54, 68, 73, 81). Nonetheless, in her Objections, Plaintiff contends that the ALJ and Magistrate erred in failing to conclude that Plaintiff's chronic fatigue syndrome and fibromyalgia rendered her disabled. (Objections ¶¶ 5, 15, 16). It is apparent that, having failed to convince the ALJ that she was disabled, Plaintiff is seeking now to advance different theories of impairment. During the hearing below, Plaintiff's counsel and the ALJ noted that in a different benefits application, Plaintiff had referred to various possible medical problems:

Plaintiff's Counsel: -- however, there is an earlier file, which I thought you had, because that was the copy that I had, which includes a lot of information about her --

ALJ: I do not have any earlier --

Plaintiff's Counsel: -- thyroid.

ALJ:-- file. I know that there was an earlier file back in '98, which, frankly, while it might be historically helpful, wouldn't necessarily bear on the functional capacity during the relevant period.

Plaintiff's Counsel: Right.

ALJ: This is a Title XVI only case, and, therefore, principally the period of February 2002 to the present is what I'm going to be looking at --

Plaintiff's Counsel: Okay.

ALJ: -- predominantly. Not that history doesn't help us --

Plaintiff's Counsel: Okay.

ALJ: -- get a feel for presence but --

Plaintiff's Counsel: The only reason I mentioned it is there are a number of articles in the records from a neurologist and that refer to her problems with her arms where he gives a possible diagnosis of fibromyalgia or Chronic Fatigue Syndrome, which is not documented in the current file at all. And that's the only reason that -- because she still has a problem with her arms. That's the only reason I mentioned the prior file.

ALJ: Well, again, that --

Plaintiff's Counsel: And, if you'd like, I can copy the --

ALJ: -- was in '98, so, I guess, the question I have for you is all evidence that reasonably bears on the current period is what I'm interested in. And so, for example, if there are no reasonably recent records relating to problems in physical --

Plaintiff's Counsel: Okay.

ALJ: -- or mental functioning, I'm not exactly sure what a diagnosis, for example, of fibromyalgia in 1998 is going to for me in deciding what, if anything, Ms. Henry can do today.

(Tr. 38-39).

At the hearing, Plaintiff did not present any evidence to show that she *currently* suffered from chronic fatigue syndrome or fibromyalgia. On July 19, 2003, however, some four months after the ALJ denied Plaintiff's claim, she submitted a June 23, 2003 letter from Dr. Robert Slater suggesting that Plaintiff has suffered from chronic fatigue syndrome for the last seven years. Because the letter was submitted (and written) months after the ALJ rendered his decision, he did not consider it.

Plaintiff is now represented by new counsel, who initially argued that the ALJ should have considered Plaintiff's claims of chronic fatigue syndrome and fibromyalgia. (Objections ¶¶ 5, 15, 16; Telephone Conference 2/18/05 at 2, 5). New counsel subsequently acknowledged, however, that there was no claim or evidence submitted to the ALJ regarding either disorder. (Telephone Conference 2/24/05 at 4). Accordingly, new counsel "revised" his contention, now arguing that prior counsel should have conducted a more thorough investigation to determine if such evidence existed and, if it did, should have presented it to the ALJ. (Telephone Conference

2/24/05 at 4-6, 9). New counsel asks me to remand to the ALJ so that he may consider this evidence, whatever it may turn out to be. (Telephone Conference 2/24/05 at 10-11).

The Third Circuit has held that I may not consider evidence that was not presented to the ALJ unless “good cause” is shown for the failure to present the evidence. Fouch v. Barnhart, 80 Fed. Appx. 181, 186 (3d Cir. 2003) (unpublished opinion); Matthews v. Apfel, 239 F.3d 589, 594 (3d Cir. 2001). Further, Plaintiff is obligated to demonstrate a reasonable possibility that the evidence would have affected the ALJ’s decision. Szubak v. Sec. of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984); Hailey v. Barnhart, Civ. No. 03-4869, 2005 U.S. Dist. LEXIS 1492, *4 (E.D. Pa. Jan. 31, 2005).

In her sworn testimony below, Plaintiff denied the existence of any diagnosed medical conditions except anxiety, depression and Graves’ disease. (Tr. 54). Plaintiff waited until months after the ALJ rejected her application to raise any claim of chronic fatigue syndrome or fibromyalgia -- conditions that prior counsel discussed with the ALJ but chose not to pursue. This failure to present evidence at the administrative hearing is not “good cause” justifying its consideration now. Fouch, 80 Fed. Appx. at 186 (holding that where a claimant cannot explain why he failed to present evidence at a time when it could be considered by the ALJ, the claimant cannot satisfy the “good cause” requirement). Moreover, it appears that Dr. Slater’s letter is not even material: Dr. Slater mentions a variety of symptoms -- “severe fatigue, difficulty with concentration, and occasional sore throat” -- almost all of which the ALJ considered fully at the hearing below. (Tr. 19, 20, 22); Ortiz v. Barnhart, Civ. No. 02- 6046, 2004 U.S. Dist. LEXIS 8994, *32 (E.D. Pa. Mar. 24, 2004) (requiring that the evidence being “proffered is in fact ‘new’ and not merely cumulative of what already existed in the record”) (citing Szubak, 745 F.2d at

833).

In sum, Plaintiff offers no other “new evidence” to support her belated claim of chronic fatigue syndrome and fibromyalgia. Rather, she seeks a remand so that she may investigate and present such evidence, assuming it exists. Such a speculative request cannot remotely justify reopening an administrative record. Buckner v. Heckler, 580 F. Supp 1536, 1542 (W.D. Mo. 1984) (“To attempt to reevaluate plaintiff’s condition . . . with “new” evidence would be inherently hypothetical and speculative.”). This is especially true here, where Plaintiff denied at the hearing below the existence of the medical conditions she now seeks to explore.

CONCLUSION

The ALJ’s finding that Plaintiff failed to meet the listing of impairments in §§ 4.03, 9.02, 9.04, and 12.04 is amply supported. Further, the hypothetical question presented to the Vocational Expert was proper as it reflected the ALJ’s credibility determinations. Finally, I will not remand so that Plaintiff can pursue speculative and dubious claims that she abandoned below. Accordingly, I adopt the Magistrate’s Report and Recommendation and grant Defendant’s Motion for Summary Judgment. An appropriate Order follows.

Date

Paul S. Diamond, J.

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

THELMA HENRY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 03-CV-6158
JOANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
Defendant.	:	

Order

AND NOW, this 1st day of March, 2005, upon consideration of the cross-Motions for Summary Judgment, the Report and Recommendation of Magistrate Judge Peter B. Scuderi, and Plaintiff's Objections to the Report and Recommendation, it is ORDERED and DECREED:

1. Plaintiff's Objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;

3. Plaintiff's Motion for Summary Judgment is DENIED; and

4. Defendant's Motion for Summary Judgment is GRANTED.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.