

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

SARUON LOK,	:	CIVIL ACTION
	:	
Plaintiff,	:	
v.	:	
	:	
JO ANNE BARNHART,	:	NO. 04-3528
	:	
Commissioner, Social	:	
Security Administration	:	

MEMORANDUM

Baylson, J.

September 19, 2005

Plaintiff, Saruon Lok, seeks judicial review of the decision of the Commissioner of the Social Security Administration denying her claim for disability benefits under Title VII of the Social Security Act, 42 U.S.C. §§ 401-433. Presently before this Court are the parties' cross-motions for summary judgment. Plaintiff filed a reply brief; Defendant did not.

I. Background and Procedural History

A. History of Plaintiff's Treatment for Physical Impairments

Plaintiff was born on July 1, 1950 (R. at 85). She has previous employment experience as a dishwasher (R. at 98). Plaintiff has not worked since February, 1988 (R. at 98) and she is unable to speak English (R. at 116). In June 2000, Plaintiff was diagnosed with intervertebral disc space narrowing and hypertrophic spur formations (R. at 176). From November 2000 through July 2002, Plaintiff sought treatment of chronic back pain with several different physicians (see R. At 144-146).

From September through December 2002, Plaintiff was treated for back and leg pain by Dr. Glenn Miller (R. at 210). In June of 2002, an orthopedic surgeon, Dr. Andrew Collier, examined Plaintiff and concluded that Plaintiff was suffering from sciatica on the left hand side (R. at 234). During this period in 2002, Plaintiff also saw an SSA consultative examiner, Dr. Raul Yankelevich. Dr. Yankelevich noted Plaintiff's chief complaints of back pain, migraines and chest pain (R. at 182). Dr. Yankelevich reported that the physical examination of Plaintiff was normal (R. at 182-84). Plaintiff also visited a cardiologist, Dr. Brody, in July 2002. Dr. Brody's examination revealed that Plaintiff was "well-appearing" physically and had "no particular chief complaints" (R. at 202). Dr. Brody noted mild symptoms of GERD and that an x-ray revealed "poor inspiration" (R. at 203).

In September 2002, Plaintiff was referred by Dr. Collier to Dr. Miller for a lumbar epidural injection (see R. at 207-22). Dr. Miller, who diagnosed Plaintiff with lumbar radiculopathy, performed a total of three injections from September through November 2002. During a January 2003 visit to Plaintiff's primary treating physician, Dr. Thongchai Vorasingha, Plaintiff complained of neck pain, headaches and blurred vision. (R. at 196). Dr. Vorasingha treated Plaintiff's neck pain with a muscle relaxant.

In June 2003, Plaintiff sought treatment from Dr. Eileen Carpenter (R. at 337-41). At this time Plaintiff complained of leg pain, neck pain, loss of sensation on the left side and chest pain. Plaintiff saw Dr. Carpenter on five more occasions between June 2003 and February 2004. Throughout these visits, Plaintiff continued to complain of back, leg and neck pain. On July 7, 2003, Dr. John Fornace conducted a stress test (R. at 342). This test, which was terminated due to Plaintiff's fatigue, was negative for ischemia, but detected mild abnormalities in the left

ventricle and left atria. On July 31, 2003, Dr. Carpenter prescribed chest pain medication because Plaintiff continued to complain of chest pain and an echo cardiogram revealed some “diastolic dysfunction” (R. at 339).

B. History of Plaintiff’s Treatment for Mental Illness

Plaintiff began treatment at the JFK Community Mental Health Center in December 2002. At this time, Plaintiff complained of depression, crying spells and suicidal thoughts (R. at 248); Plaintiff was subsequently diagnosed by her treating psychiatrist, Dr. Joaquin Canalson, with depressive type psychosis and dependent personality disorder. (R. at 254).

In May 2003, Plaintiff received psychiatric treatment at the Wedge Medical Center (see R. at 314-29). Plaintiff’s treating psychiatrist there was Dr. Minda Magundayao. Plaintiff complained of hearing voices, depression, sleeplessness, crying spells, and anxiety (R. at 314). Plaintiff’s primary diagnosis was major depression, recurrent with psychosis (R. at 319).

C. Procedural History

Plaintiff applied for Supplemental Security Income (“SSI”) on April 19, 2002, claiming disability as of April 12, 2002.¹ Following initial denial of Plaintiff’s application, Plaintiff timely requested a hearing before an Administrative Law Judge (“ALJ”). A hearing was held before an ALJ on April 1, 2003 (R. at 263-85), and on April 7, 2003 the ALJ issued a decision denying Plaintiff’s application (R. at 58-68). On July 18, 2003, the Appeals Council remanded the case to the ALJ to “complete the administrative record” (R. at 73).

On February 18, 2004, the same ALJ conducted a second hearing (R. at 286-308), and on

¹ Plaintiff initially claimed the onset of disability as of August 1, 1995 (R. at 85), but later amended the onset date to reflect the date of April 12, 2002 (R. at 267).

February 24, 2004 the ALJ issued a second decision denying Plaintiff's application for SSI benefits (R. at 10-27). On May 27, 2004, the Appeals Council denied Plaintiff's request for review (without opinion), making the Commissioner's decision to deny benefits final (R. at 5). Plaintiff subsequently sought judicial review of the Commissioner's decision in this Court, and filed a motion for summary judgment on January 25, 2005 (Doc. No. 12). Defendant filed a cross-motion for summary judgment on February 24, 2005 (Doc. No. 13).

II. Contentions of the Parties

A. Did the ALJ Fail to Follow the Directives of the Appeals Council and Established SSA Policies?

In her Motion for Summary Judgment, Plaintiff contends that, following remand by the Appeals Council, the ALJ failed to give adequate consideration to the order of the Appeals Council. Specifically, Plaintiff contends that the ALJ erred when he failed to conduct mental and orthopedic consultative examinations, as suggested in the report by the Appeals Council. (Pl's Br. at 9.) Plaintiff asserts that in the second ALJ report, the ALJ did not even address the issue of why these consultative examinations were not done. (Pl's Br. at 10).

Plaintiff also claims that the ALJ erred by failing to give appropriate consideration to the SSA rulings explicitly referenced and commended by the Appeals Council. The two rulings at issue are Ruling 85-16 and Ruling 96-8p. Both of these rulings pertain to the proper analysis of residual functional capacity for mental impairments. Plaintiff asserts that the ALJ, contrary to the specific direction of the Appeals Council, failed to follow the approach set out in these two rulings. (Pl's Br. at 10).

Defendant asserts that the ALJ's decision was supported by substantial evidence and that

the ALJ complied with the remand order of the Appeals Council. Specifically, Defendant contends that the ALJ sought clarification from Dr. Vorasingha and that although Dr. Vorasingha would not clarify his opinion, the record was nevertheless fully developed based on new records provided by Plaintiff at the second ALJ hearing. (Def's Br. at 16). Defendant further contends that the ALJ was not required to order additional consultative examinations because at the second hearing Plaintiff's newly provided medical records were sufficient for the ALJ to make a disability determination.

B. Did the ALJ Misrepresent Facts in the Record and Fail to Accord Appropriate Weight to Plaintiff's Treating Physicians?

Plaintiff's other primary contention is that the ALJ erroneously substituted his own medical judgment for that of Plaintiff's treating physicians and psychiatrists. (R. at 16). Specifically, with regard to Plaintiff's herniated discs, Plaintiff asserts that the ALJ entirely ignored the disability opinions authored by Plaintiff's treating physician. Additionally, Plaintiff asserts that the ALJ improperly dismissed or ignored the diagnostic test results and specific courses of treatment adopted by Plaintiff's treating physicians (Pl's Br. 17-19).

Defendant asserts that the ALJ properly assessed Plaintiff's mental and physical limitations. With respect to Plaintiff's mental limitations, Defendant asserts that the ALJ properly gave no weight to the opinion of the second of the two treating psychiatrists, Dr. Magundayao. Defendant claims that the opinion of Dr. Magundayao was inconsistent with Plaintiff's symptoms as well as Plaintiff's testimony (Def's Br. at 20-21). With respect to Plaintiff's physical limitations, Defendant asserts that the ALJ discounted the opinion of Plaintiff's treating physician, Dr. Vorasingha, because it was inconsistent with his own treatment notes and other

evidence in the record (Def's Br. at 24-25).

III. Legal Standard

A. Disability Determinations

The Social Security Administration applies a five step sequential evaluation to determine if an applicant qualifies for SSI. See, e.g., Burns v. Barnhart, 312 F.3d 113 (3d Cir. 2002); Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999); Williams v. Sullivan, 970 F.2d 1178, 1180-81 (3d Cir. 1992); see also 20 C.F.R. § 404.1520. In Plummer, the Third Circuit explained the five-step sequential evaluation process promulgated by the Social Security Administration to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520. The Court explained:

In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. § [404.]1520(a). If a claimant is found to be engaged in substantial activity, the disability claim will be denied. In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. 20 C.F.R. § 404.15209©)). If the claimant fails to show that her impairments are "severe," she is ineligible for disability benefits.

In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. 20 C.F.R. § 404.1520(d). If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. 20 C.F.R. § 404.1520(d). The claimant bears the burden of demonstrating an inability to return to her past relevant work.

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. 20 C.F.R. § 404.1520(f). The ALJ must show there are other jobs existing insignificant numbers in the

national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled. See 20 C.F.R. § 404.1523. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Plummer, 186 F.3d at 428.

Congress has authorized the Commissioner "to make findings of fact, and decisions as to the rights" of any individual applying for disability benefits. 42 U.S.C. § 405(b)(1). The Commissioner is also required to resolve any discrepancies between the medical evidence and a claimant's subjective complaints. 42 U.S.C. § 416.929.

B. Judicial Review of Disability Determinations

The Social Security Act provides for judicial review of any "final decision of the Commissioner of Social Security" in a disability proceeding. 42 U.S.C. § 405(g). The district court may enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Id. However the Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." Id. (emphasis added). The ALJ's findings of law, however, are subject to plenary review. See Wright v. Sullivan, 900 F.2d 675, 678 (3d Cir. 1990); Podedworny v. Harris, 745 F.2d 210, 221 n.8 (3d Cir. 1984). Accordingly, this Court's scope of review is "limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact." Schwartz v. Halter, 134 F.Supp.2d 640, 647 (E.D. Pa. 2001).

Substantial evidence has been defined as "more than a mere scintilla" or "such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). The substantial evidence standard “is deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence.” Schaudeck v. Commissioner of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999).

IV. Discussion

A. The Remand Order of the Appeals Council

After the ALJ denied Plaintiff’s application for benefits on April 7, 2003 (see R. at 55), the Appeals Council vacated the decision and remanded the case to the ALJ for further proceedings and gathering of evidence (see Order of Appeals Council, R. at 72). The order of the Appeals Council identified the following issue for the ALJ to address:

The hearing decision finding that the claimant has not severe impairment is not supported by substantial evidence. An MRI on June 21, 2002 showed small central herniations at L4-5 and L5-S1. The claimant is diagnosed with depressive type psychosis with suicidal thoughts and is treated with antidepressant and antipsychotic medications.

The Administrative Law Judge noted that Dr. Thongchai Vorasingha, treating physician, “repeatedly has offered his opinion since February 2000, that the claimant will be temporarily incapacitated for approximately six months.” The Administrative Law Judge found that Dr. Vorasingha’s opinion was unconvincing and that “he never offered any statement of reasons in support of his opinions other than to check boxes on a form and note diagnoses.” However, there is no indication in the record that Dr. Vorasingha was recontacted for additional evidence or clarification of his opinions pursuant to 20 C.F.R. 416.912 and Social Security Ruling 96-5p. Therefore, further consideration of claimant’s mental and orthopedic impairments is warranted.

(R. at 72) (internal citations omitted). On remand, the Appeals Council directed the ALJ to take the following steps:

¶ “Obtain additional, updated evidence concerning Plaintiff’s mental and herniated lumbar disc impairments in order to complete the administrative record in accordance with regulatory standards concerning consultative examinations and existing medical evidence (20 CFR 416.912-913).” The order noted that additional evidence “may include, if warranted and available, a mental status consultative examination and medical source statements about what claimant can still do despite the impairments.”

¶ “Recontact Dr. Vorasingha for additional evidence or clarification of his recent opinion pursuant to 20 CFR 416.912 and Social Security Ruling 95-5p.”

¶ “Give further consideration to the claimant’s maximum residual functional capacity (“RFC”) and provide appropriate rationale with specific references to evidence of record in support of the assessed limitations (20 CFR 416.945 and Social Security Rulings 85-16 and 96-8p).” (R. at 73).

B. The Second Decision of the ALJ

On February 24, 2004, following another hearing on February 18, 2004, the ALJ issued a second order denying Plaintiff’s application for benefits (R. at 13). In reviewing the evidence, the ALJ made the following finds in concluding that the Plaintiff was not disabled (R. at 26):

1. Plaintiff has not engaged in substantial gainful employment since 1987;
2. Plaintiff has major depression, a personality disorder and degenerative disease of the lumbar spine but does not have an impairment or combination of impairments listed in or medically equal to one listed in Appx. 1, Subp. P, Reg. No. 4, Sections 1.04, 12.04 and 12.08;
3. Plaintiff’s statements concerning her alleged impairments and their effect on her ability to work are only partially credible;
4. Plaintiff retains the RFC for medium work requiring only simple, routine tasks;

5. Plaintiff has no prior relevant work;
6. Plaintiff was 48 years old at the alleged onset date, which is defined as a younger person, and is now 50 years old, which is defined as a person closely approaching advanced age;
7. Plaintiff has a 10th grade education obtained in Cambodia, does not read or write English and lacks transferable skills;
8. Given the RFC set forth above, the Plaintiff's age, educational background and work experience, the vocational testimony establishes that Plaintiff is able to make an adjustment to occupations that exist with significant numbers of jobs in the regional and national economies;
9. Plaintiff has not been under a "disability," as defined in the Social Security Act, since the alleged onset date.

In reviewing the ALJ's decision, the Court finds that the ALJ's procedures were not consistent with the remand order of the Appeals Council. Although the Commissioner does not dispute this, it argues the ALJ's findings are themselves based on substantial evidence. The Court disagrees. Plaintiff's motion for summary judgment will be granted and Defendant's motion for summary judgment will be denied, and the matter will be remanded.

C. Upon Remand, the ALJ Failed to Follow the Order of the Appeals Council

The regulations provide that "the administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council's remand order." 20 C.F.R. § 416.1477(b). The Appeals Council directed the ALJ to obtain additional evidence concerning Plaintiff's mental impairment and Plaintiff's herniated disc impairments. Specifically, the Appeals Council mandated the ALJ to recontact Dr. Vorasingha for additional evidence or clarification of his opinion. The Appeals Council further instructed the ALJ that the requisite additional evidence "may include" an orthopedic

consultative examination and/or a mental status consultative examination.

It is undisputed that Dr. Vorasingha was uncooperative in responding to requests for clarification. Plaintiff, however, asserts that the unavailability of Dr. Vorasingha, coupled with the fact that the ALJ rejected all of the newly gathered evidence obtained for the purpose of the second hearing (R. at 309-344), required the ALJ to conduct consultative examinations in order to complete the administrative record.

The additional evidence provided by Plaintiff prior to the second hearing included an RFC and clinical notes prepared by Plaintiff's treating psychiatrist, Dr. Magundayao. The RFC prepared by Dr. Magundayao consisted almost entirely of "poor" ratings. (R. at 310-13). The RFC, which was prepared on January 24, 2004, concluded that Plaintiff could not "manage benefits in . . . her own best interest." (R. at 313). The additional records also included clinical notes from the Wedge Medical Center. These notes reflect that in May 2003, Plaintiff complained of depression, sleeplessness, crying spells, hearing voices and anxiety (R. at 314). These notes also reflect that under the care of Dr. Magundayao, Plaintiff continued to take antipsychotic and antidepressive medications (e.g., R. at 319). The additional records also included the clinical notes of Dr. Eileen Carpenter, which reflected Plaintiff's complaints of leg, chest and neck pain (R. at 337).

The ALJ rejected Dr. Magundayao's opinion because it was contrary to the medical record and Plaintiff's own daily activities. (R. at 23-24). The Court interprets the Appeals Council's remand Order to have required a consultative exam under the circumstances presented, including the unavailability of the original treating physician for a clarifying opinion.

The Order of the Appeals Council explicitly noted that the ALJ's original finding that

Plaintiff was not disabled was not supported by substantial evidence (R. at 72). The Appeals Council required that the ALJ recontact the treating physician for clarification and suggested that the ALJ utilize consultative examiners to further clarify the record. Because the treating physician was unwilling to provide further clarification, it was incumbent upon the ALJ to obtain clarification from other sources, namely consultative examiners. Not only was such a course implied in the remand order of the Appeals Council, but it is also written into the regulations, under the heading “Need for consultative examination,” as follows: “If the information we need is not readily available from the records of your medical treatment source, or we are unable to seek clarification from your medical source, we will ask you to attend one or more consultative examinations at our expense.” 20 CFR 416.912(f). It is clear that due to the lack of cooperation on the part of Dr. Vorasingha, the information required by the Appeals Counsel and sought by the ALJ was not available. Both the regulations and the remand Order, therefore, required the ALJ to seek the necessary information from alternative sources, and the circumstances required use of one or more consultative examiners.

Although Defendant insists that the additional records provided by the Plaintiff sufficiently augmented the record to provide substantial evidence which supports the ALJ’s findings, the Court agrees with Plaintiff that such an argument is specious where the ALJ did not credit any of the new evidence as credible. Under the ruling of the Appeals Counsel that substantive evidence was lacking to support the first decision by the ALJ, the mere addition of a medical report which the ALJ found not credible did not satisfy the Appeals Council’s remand Order. The ALJ’s task was to secure new believable evidence. Absent any creditable new evidence, the ALJ remains in the same position as he was at the conclusion of the first

hearing—that is, lacking substantial evidence on which to base a finding.

V. Conclusion

For the foregoing reasons, this Court concludes that the ALJ failed to complete the administrative record as required by the Appeals Council and thus the ALJ's finding that Plaintiff is not disabled was not based on substantial evidence. However, because the Court finds that the record does not necessarily show Plaintiff is disabled, and reversal of the ALJ's decision is not warranted, the case will be remanded to the Commissioner to address this issue.

An appropriate Order follows.

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

SARUON LOK,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
	:	
JO ANNE BARNHART,	:	NO. 04-3528
	:	
Commissioner, Social	:	
Security Administration	:	

ORDER

AND NOW, this 19th day of September, 2005, after careful and independent consideration of the parties' cross-motions for summary judgment, and review of the record, it is hereby ORDERED that:

1. The Commissioner's Motion for Summary Judgment (Doc. No. 13) is DENIED;
2. The Plaintiff's Motion for Summary Judgment (Doc. No. 12) and to Remand is GRANTED;
3. The case is remanded to the Commissioner of Social Security pursuant to Sentence 4 of §205(g) of the Social Security Act for further proceedings consistent with this opinion; and
4. The Clerk shall close this case.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.