

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

PATRICIA A. BRUBAKER	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 05-76
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

MEMORANDUM AND ORDER

AND NOW, this 29th day of December, 2005, upon consideration of the cross-motions for summary judgment (Doc. Nos. 5 and 6) the Court makes the following findings and conclusions:

A. On September 14, 2002, Patricia A. Brubaker, (“Brubaker”) applied for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) under Titles II and XVI, respectively of the Social Security Act, (“Act”) 42 U.S.C. §§ 401-433, 1381-1383f. (Tr. 48-50; 441-442). Throughout the administrative process, including an April 15, 2004, hearing before an administrative law judge (“ALJ”), Brubaker’s claims were denied. (Tr. 4-6; 13-15; 16-22; 25; 26-29; 443-446; 447; 461-474). Pursuant to 42 U.S.C. § 405(g), Brubaker appealed to this Court.

B. The ALJ found Brubaker’s sprains, strains, and right frozen shoulder syndrome to be severe, but found that none of Brubaker’s impairments were severe enough to meet or medically equal any of the listed impairments. (Tr. 18 ¶ 14; 21 Finding Nos. 3, 4);¹ 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that Brubaker could return to her past relevant work, and was not disabled. (Tr. 17 ¶ 4; 20-21 ¶ 29, 32; 21-22 Finding Nos. 8, 9). In the alternative, the ALJ found that Brubaker had the residual functional capacity (“RFC”) to lift and carry twenty pounds, engage in prolonged standing, walking and sitting, with a limitation in her ability to reach overhead. (Tr. 20 ¶ 25; 22 Finding No. 6). With the testimony of a vocational expert (“VE”), the ALJ further concluded that Brubaker was able to make an adjustment to other work. (Tr. 21 ¶ 30).

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.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (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,

¹ Paragraphs are numbered chronologically seriatim as they appear throughout the ALJ’s decision.

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. Brubaker raises several arguments that the ALJ's determination was legally and factually erroneous. However, this Court finds that there is no legal error in the ALJ's decision and that there is substantial evidence in the record to support the conclusions of the ALJ.

1. Brubaker complains that the ALJ failed to fully develop the record and fulfill his heightened duty to an unrepresented claimant. She claims that had she been represented her attorney would have asked to keep the record open until a future independent medical exam had been completed. When a claimant is unrepresented by counsel at an administrative hearing, the ALJ owes a duty to help the claimant develop the administrative record with special care. Early v. Heckler, 743 F.2d 1002, 1008 (3d Cir. 1984) (citing Dobrowolsky v. Califano, 606 F.2d 403, 407 (3d Cir. 1979)). In other words, the ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." Reefer v. Barnhart, 326 F.3d 376, 379-380 (3d Cir. 2003) (citations omitted) (remanding when the ALJ failed to further investigate an impairment elicited at the hearing but which was not documented in the record). Where a lack of counsel prejudices a claimant or causes the hearing to be marked by unfairness, remand is necessary. Gauthney v. Shalala, 890 F. Supp. 401, 410 (E.D. Pa. 1995) (remanding where the ALJ failed to elicit testimony about the details of plaintiff's functional limitations); but see Hobson v. Apfel, No. 00-346, 2001 WL 34368379, at * 6-7 (D. Del. Feb. 28, 2001) (affirming where the ALJ gave claimant ample time to provide additional information about activities, but claimant failed to do so); Callahan v. Acting Commr' of Soc. Sec., No. 97-32331, 1998 WL 388374, at * 7 (D.N.J. Jun. 30, 1998) (affirming the ALJ's decision where the ALJ questioned claimant about treatment, symptoms, activities, medications, and functional limitations). A claimant is prejudiced where the record "reveals evidentiary gaps which result in prejudice to the claimant." Gauthney, 890 F. Supp. at 410. Since there are no prescribed procedures that an ALJ must follow, determining if the ALJ has complied with his obligation to take a "heightened level of care" in developing the record must be decided on a case by case basis. Reefer, 326 F.3d at 379-380.

Here, the ALJ's actions appear to meet the threshold of a probing inquiry as required by Reefer. 326 F.3d at 379-380. Although the thirteen page hearing testimony is unusually short and the ALJ's questions are limited, the testimony here involves the type of elicitation necessary to uncover Brubaker's functional limitations. (Tr. 461-474). The ALJ asked, "Tell me the problems you're experiencing that interfere with your ability to work" and the dialogue between the ALJ and Branson reveals information regarding her activities (Tr. 468-467), her symptoms (Tr. 469; 471-473), and her functional limitations. (Tr. 468; 471-472). Finally, the record contains detailed information about the same symptoms that Brubaker addresses at her hearing including muscle pain (Tr. 67-72; 139-140; 428-429; 439; 440), weakness on the right side (Tr. 73-82; 93-98; 102-117; 116-117; 129-136; 156-159; 262-263), head pain and complications therefrom (Tr. 73-82; 93-98; 99-101; 102-117; 118-121; 129-136; 143; 153-154; 156-159; 262-263), shoulder pain (Tr. 73-82; 99-101; 102-117; 139-140; 141; 142; 147-158; 155; 156-159; 161-164; 264-268; 439; 440), fatigue and sleep issues (Tr. 80; 129-136), and head tremors (428-429). With all of these details available to the ALJ, it is evident that there is no evidentiary gaps in the record, and therefore, a remand is not necessary.

2. Brubaker next argues that good cause exists for submitting a May 3, 2004, independent medical exam of David Weiss, D.O. (Attachment to Doc. No. 5) after the record was closed. She submits that the court may consider additional evidence submitted to the Appeals Council if there is good cause for the delay in its submission. Generally, when a claimant seeks to rely on evidence that was not before the ALJ, the District Court may remand to the Commissioner, but only if the evidence is new and material *and* if there was good cause for not having been presented previously to the ALJ. Fisher v. Massanari, 28 Fed. Appx. 158, 159 (3d Cir. 2002) (citing Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001)).

Brubaker has failed to demonstrate good cause for the delay in submitting the independent medical exam. At her hearing Brubaker waived her right to representation (Tr. 463-464) but she was not prejudiced by a lack of counsel. (see paragraph 1 *supra*). Although this exam is dated May 3, 2004, and the ALJ's decision is dated May 17, 2004, Brubaker was aware at her April 15, 2004, hearing that the ALJ needed to receive all relevant medical evidence. (Tr. 464). In fact, a brief discussion regarding the completeness of the record occurred at the hearing during which Brubaker expressed her assumption that the ALJ had everything because "nothing was done in a year and a half." (Tr. *Id.*). Because her comment reflects her awareness that evidence obtained just eighteen days later would be extremely important to the ALJ, Brubaker cannot claim good cause for the delay. Furthermore, it is evident from the record that counsel's November 18, 2004, memorandum presented to the Appeals Council discusses the additional evidence but denied review on the basis that it would not have changed the ALJ's decision. (Tr. 3; 4-6; 456-457). Since Brubaker cannot show that this evidence was not presented earlier for good cause, I did not consider this evidence in my review. Fisher, 28 Fed. Appx. at 160.

3. Brubaker next argues that the ALJ may not disregard competent medical evidence and substitute his own medical judgment over Brubaker's medical providers. In making his RFC determination the ALJ may not disregard medical opinions and base his decision solely on his own impressions of the claimant. Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988). In addition, when assessing those medical opinions, 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); 416.927(d)(2); see also Social Security Ruling, ("SSR") 96-8p, 1996 WL 374184, at * 7.

Here, the ALJ did not impermissibly substitute his opinion for Brubaker's medical providers but properly considered all of the medical evidence of record and weighed the relative worth of the evidence before rendering his decision. (Tr. 19 ¶ 22). Also, the ALJ's decision to reject the employability opinion of Dr. Thomas E. Greene, M.D., Brubaker's treating physician,² was appropriate for the reasons stated by the ALJ in his decision. (Tr. 20 ¶ 24). Not only are such decisions reserved for the Commissioner, 20 C.F.R. §§ 404.1527(e); 416.927(e) but there are internal inconsistencies within Dr. Greene's reports. Specifically, the 2002 opinions (Tr. 103; 106;

² Because Brubaker alleges improper treatment by the ALJ of her *medical providers*, I note that the ALJ's decision does not reflect consideration of the detailed reports in the record provided by Michael J. Kaye, D.C. A chiropractor's opinion is not an acceptable medical source entitled to controlling weight and the ALJ's consideration of such individual's is discretionary. Harcraft, 181 F.3d at 361; 20 C.F.R. §§ 404.1513 (d)(1); 416.913(d)(1).

108; 110; 111) reflect improvement in several areas and suggest that Brubaker's impairments would only temporarily interfere with her ability to work, while the later 2004 report (Tr. 439), reflects without explanation, a decrease in capability, no overall improvement, and notes that she was now unemployable. Because the ALJ's decision to decrease the weight afforded to Dr. Greene is supported by substantial evidence and legally sound, the ALJ's consideration of the medical providers was proper.

4. Brubaker's fourth argument asserts that the ALJ's credibility determination is not supported by substantial evidence and that the ALJ's failure to explain his credibility findings is reversible error. Specifically, Brubaker complains that the ALJ did not consider relevant factors, such as her statements, her demeanor, evidence of treatment including physical therapy and injections, her physicians' opinions regarding her credibility, her long work history, and her good faith attempts to work. Brubaker further complains that claimants hobbies and housework cannot be used to demonstrate that she is not credible. Generally, credibility determinations are for the ALJ to make. Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). In other words, the ALJ can reject a claimants subjective complaints on the basis that plaintiff is not credible, as long as the underlying reasoning for such a finding is explained and supported by evidence in the record. Duncan v. Sullivan, 786 F. Supp. 466, 470 (E.D. Pa. 1992); SSR 96-7p, 1996 WL 374186.

Here, although indirectly, the ALJ did explain his credibility determination by incorporating the body of his entire decision. (Tr. 22 Finding No. 5). By reading the decision it is evident that the ALJ witnessed Brubaker's testimony, and therefore, her demeanor. (Tr. 18 ¶ 1; 151). He noted in his decision that he considered evidence of treatment including physical therapy (Tr. 18 ¶ 11) and steroid injections (Tr. 18 ¶ 12). The ALJ's consideration of the opinions of Dr. Bree and that of the Disability Determination Service are adequately discussed in the ALJ's decision (Tr. 18-20 ¶¶ 16-20; 23) and the ALJ makes clear that he has rejected Dr. Green's opinion about Brubaker's employability, but not about credibility. (Tr. 20 ¶ 24). Although the ALJ does not specifically address her long work history and good faith effort to work, the record, which was reviewed by the ALJ, references this information (Tr. 72; 469) and an ALJ is not required to discuss every piece of evidence in the record. Walker v. Comm'r of Soc. Sec., 61 Fed. Appx. 787, 788-789 (3d Cir. 2003). In addition, an ALJ is not required to equate a long work history with credibility. Stroman v. Barnhart, No. 03-4045, 2004 U.S. Dist. LEXIS 15372, at *15 (E.D. Pa. Jul. 28, 2004) (citing Dobrowolsky, 606 F.2d 403). The ALJ also notes his consideration of Brubaker's daily activities in accordance with 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii); 416.929(c)(3)(i)-(vii). (Tr. 18 ¶ 15). Finally, the ALJ's decision reflects consideration of Brubaker's symptoms, pain and medical opinions which reflect the ALJ's judgment about the nature and severity of her impairments. (Tr. 19 ¶ 22). Because I can infer from the decision what the ALJ relied upon in making his credibility determination, I find his conclusion that Brubaker was not credible follows the spirit of the law, and therefore, remand is not necessary.

5. Brubaker next argues that the ALJ ignored competent medical evidence regarding her impairments, making his reliance on an incomplete hypothetical grounds for reversal. Generally, a hypothetical must reflect all of the claimant's impairments. Ramirez v. Barnhart, 372 F.3d 546, 552 (3d Cir. 2004). However, in eliciting testimony from a VE, the ALJ's hypothetical

need not contain every impairment alleged by the claimant, but must only convey all of the claimant's *credibly* established limitations. Rutherford v. Barnhart, 399 F.3d 546, 554 (3d Cir. March 3, 2005).

The ALJ found Brubaker's allegations regarding her limitations to be not totally credible. (Tr. 22 Finding No. 5). Therefore, a hypothetical which excludes Brubaker's subjective complaints, but accommodates her credible impairments is proper.³ Finally, even if the hypothetical was flawed, Brubaker did not allege, and this Court does not find, error with the ALJ's step four determination that Brubaker can return to her past relevant work, which renders harmless any potential error at step five.

6. Lastly, Brubaker argues that plaintiff's combination of impairments would meet or equal a listing. Although, Brubaker argues that the ALJ failed to consider her impairments in combination, it is evident from his decision that the ALJ followed this directive, and therefore remand, is not necessary on this ground. (Tr. 18 ¶¶ 10, 14).

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

1. The motion for summary judgment by the claimant is **DENIED**;
2. The motion for summary judgment by the defendant is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST PATRICIA A. BRUBAKER**; and
3. The Clerk of Court is hereby directed to mark this case closed.

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

³ The ALJ's hypothetical includes the ability to lift twenty pounds, stand and walk six hours in an eight hour work day, and a limitation in terms of range of motion in the right shoulder. (Tr. 470). These limitations reflect the limitations of record which the ALJ found to be credible. (Tr. 19- 20 ¶¶ 20, 23; 270-271; 272-279).

