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

LATIFA HICKS, A MINOR by her	:	
P/N/G BARBARA BETHEA,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL	:	NO. 04-CV-4888
SECURITY,	:	
Defendant		

J. William Ditter, Jr., S.J. March 24 , 2006

MEMORANDUM AND ORDER

Barbara Bethea filed this action on behalf of her daughter, Latifa Hicks, under 42 U.S.C. §1383 (c)(3), requesting review of the Commissioner's denial of a claim for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act ("Act"). The parties have filed cross-motions for summary judgment. For the reasons that follow, I find the decision of the Administration Law Judge ("ALJ") that Latifa was not disabled under the Act is supported by substantial evidence. Accordingly, the motion of the plaintiff will be denied, and the motion of the defendant will be granted.

1. Factual and Procedural History

On April 30, 2002, Bethea filed an application for SSI on behalf of her minor daughter alleging Latifa had a learning disability and tantrums. Her application was denied. A timely request for an administrative hearing was filed, and an evidentiary hearing was held on August

11, 2003. Latifa and her father, Reginald Hicks, were present and represented by counsel. Hicks testified on behalf of his daughter. (Tr. 28-49).

Latifa was born on June 18, 1993, and was ten years old at the time of the administrative hearing. She was attending elementary school and participating in special education classes. As a first grade student, Latifa was referred for a comprehensive evaluation report ("CER") by the School District of Philadelphia because of her learning difficulties. (Tr. 113-17). According to the CER, Latifa had repeated kindergarten and had difficulty mastering basic learning concepts and remaining focused. Latifa was given the Wechsler Intelligence Scale for Children and she tested in the deficient range.[1] Latifa demonstrated a mild need for specialized training and was provisionally assessed with mild mental retardation. (Tr. 114). According to the CER, it was "very likely that Latifa's preoccupation with her family's medical issues and consequent stress [were] impeding her healthy development." *Id.* Hicks reported Latifa was able to print her name, sing the alphabet, pick up books to read on her own, identify the value of coins, and use basic tools, including a microwave oven. (Tr. 117). Latifa was also able to label her feelings, had a group of friends, and had a best friend. *Id.*

A state agency psychologist, Henry Weeks, Ph.D., completed an assessment of Latifa on October 24, 2002. (Tr. 118-23). Based on the limited information in the file, Dr. Weeks determined Latifa did not meet or equal a listed impairment; in fact, Dr. Weeks was unable to conclude that Latifa had mild mental retardation. (Tr. 121). Consistent with the CER, Dr. Weeks noted further functional assessments were required to confirm this diagnosis. (Tr. 114, 118). There is nothing in the record to indicate these functional assessments were performed;

[1] Latifa's verbal intelligence quotient ("I.Q.") was 62 (deficient), her performance I.Q. was 71 (borderline), and her full scale I.Q. was 64 (deficient).

however, her diagnosis has remained mild mental retardation. A May 2003 Individualized Educational Program ("IEP") report indicates Latifa continued to qualify for special instruction because of "mild mental retardation and achievement significantly below academic level." (Tr. 130). Latifa did not exhibit any behaviors that would impede her learning, and she was able to work independently. *Id.* Further, Latifa was described as very helpful and a good peer tutor and book buddy with younger students. *Id.* Latifa did not require an extended school year. (Tr. 138, 140). Her special education services included small group and one-to-one instruction, as needed, and peer tutoring. (Tr. 139). These services were provided on a part-time (41-60 %) basis in the regular education setting. *Id.*

At the hearing, Hicks testified Latifa has some behavioral problems in addition to her learning difficulties. Hicks testified Latifa was a happy child (Tr. 40), but she also got frustrated reading (Tr. 36); often fought with other children (Tr. 38); and had disciplinary problems at school (Tr. 42). Latifa's mother had arranged for Latifa to participate in an intake interview for psychiatric services, but Hicks was unable to provide any details. (Tr. 44). The ALJ left the record open for three weeks to permit counsel to supplement the record with further information concerning this psychiatric evaluation. (Tr. 46-48). There is nothing in the school district records to indicate Latifa had any significant behavioral or disciplinary problems.

After consideration of the state agency evaluation, the educational assessments, and Hicks' testimony, the ALJ concluded Latifa was not disabled. (Tr. 23). Although the ALJ found Latifa's mild mental retardation a severe impairment, he concluded it did not meet or equal any listed impairment in 20 C.F.R. pt. 404, subpt. P, app. 1, nor was it functionally equivalent to a listed impairment. Bethea requested review by the Appeals Council which denied the request, thereby making the ALJ's decision the final decision of the Commissioner. (Tr. 4-7). Having

exhausted her administrative remedies, Bethea filed a complaint with this court seeking review of the Commissioner's decision.

2. Standard of Review

The role of this court on judicial review is to determine whether there is substantial evidence in the administrative record to support the Commissioner's final decision. *Doak v. Heckler*, 790 F.2d 26, 28 (3d Cir. 1986); *Newhouse v. Heckler*, 753 F.2d 283, 285 (3d Cir. 1985). The factual findings of the Commissioner must be accepted as conclusive, provided that they are supported by substantial evidence. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 390 (1971). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Steadman v. SEC*, 450 U.S. 91, 99 (1981), (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Dobrowolsky v. Califano*, 606 F.2d 403, 406 (3d Cir. 1979). It is "more than a scintilla, but may be less than a preponderance." *Woody v. Secretary of Health and Human Services*, 859 F.2d 1156, 1159 (3d Cir. 1988).

The Social Security Administration has adopted a system of sequential analysis for the evaluation of child disability claims. This three-step evaluation is codified in 20 C.F.R. § 416.924.[2] The Act provides that a child claimant is disabled if she is: "suffering from any

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[2] These steps are as follows:

1. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or age, education, or work experience. 20 C.F.R. § 416.924(b).

2. If your impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, we will find that you do not have a severe impairment and are, therefore, not disabled. 20 C.F.R. § 416.924(c).

3. Your impairment must meet, medically equal, or functionally equal in severity a listed impairment in Appendix 1. 20 C.F.R. § 416.924(d).

medically determinable physical or mental impairment which causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than twelve months." 20 C.F.R. § 416.906.

A claimant may prove she is disabled in three ways: 1) if her condition "meets" a listed impairment as shown by a diagnosis and manifestation of symptoms indicated for that impairment, 20 C.F.R. § 416.925(d); 2) if her condition "medically equals" a listed impairment, i.e., the claimant's impairment does not present all the symptoms of a listed impairment or her impairment is not described in the listings, but there are other medical findings that are of equal medical significance to one or more of the listings, 20 C.F.R. § 416.926(a)(1)(ii); or 3) if her condition is functionally equivalent to a listed impairment, 20 C.F.R. § 416.926a. To satisfy her burden of proof under the functionally equivalent standard, the claimant must show that she suffers from "no less than two marked limitations" or one "extreme limitation" within six domains of functioning.[3] 20 C.F.R. § 416.926a(a).

In pursuing a disability claim under the Act, the burden is solely upon the claimant to prove the existence of a disability. 42 U.S.C. § 423(d)(5). The claimant must provide the medical evidence which indicates that there is an impairment and the extent of its severity. Id. In order to determine whether a child is disabled, the ALJ considers all relevant evidence including medical evidence, test scores, school records, and information from people who know the child and can provide evidence about functioning, such as the child's parents, caregivers, and teachers. 20 C.F.R. § 416.924a(a).

3. Discussion

[3] These domains are: 1) acquiring and using information; 2) attending and completing tasks; 3) interacting and relating with others; 4) moving about and manipulating objects; 5) caring for yourself; and 6) health and physical well-being. 20 C.F.R. § 416.926a(b)(i)-(vi).

Latifa contends the decision of the ALJ is not supported by substantial evidence because: 1) the record established she meets or equals a listed impairment (mental retardation); and 2) the ALJ should have obtained a medical opinion to determine whether she meets a listed impairment.

The ALJ concluded that Latifa was not disabled at step three of the sequential analysis. First, the ALJ found Latifa was not engaged in substantial gainful activity. Second, the ALJ considered Latifa's May 2001 intelligence testing scores, and her May 2003 IEP, and concluded Latifa had one severe impairment, mild mental retardation. However, the ALJ found that Latifa's impairments did not meet the listing for mental retardation. *See* 20 C.F.R., pt. 404, subpt. P, app. 1, § 112.05. Finally, the ALJ determined Latifa's limitations were not the functional equivalent of any listed impairment.

The introductory paragraphs to "112.00 Mental Disorders" explain how to apply the listings. Listing 112.05 (Mental Retardation) contains six sets of criteria. If an impairment satisfies the diagnostic description in the introductory paragraph and any one of the six sets of criteria, [the Commissioner] will find that the child's impairment meets the listing. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 112.00A. Listing 112.05 Mental Retardation is "characterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning." The required level of severity for this disorder is met when the requirements in one of the six sets of criteria (A, B, C, D, E or F) are satisfied. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 112.05.

Latifa agues that she meets the § 112.05D criteria for mental retardation. To meet this listing, a child must satisfy a two-prong test: 1) an I.Q. of 60 through 70, and 2) a physical or other mental impairment imposing an additional and significant limitation of function. See 20 C.F.R. pt. 404, subpt. P, app. 1, § 112.05D. Latifa meets the I.Q. requirements, but she must also establish an additional impairment that causes more than minimal functional limitations, i.e., is a

"severe" impairment, as defined in 20 C.F.R. § 416.924(c). Thus, Latifa must establish a severe impairment apart from her low I.Q. scores.

Here, the ALJ properly concluded that Latifa had not met the second prong of § 112.05D. Although she had problems learning, there is nothing in the record to indicate a cause for her learning difficulties other that her mild mental retardation. Bethea's assertion that Latifa's learning disabilities are separate and distinct from her metal retardation is not persuasive. However, there is nothing in the record that would indicate any additional diagnoses. In the absence of any evidence to the contrary, the ALJ reasonably concluded that learning deficits were the result of her mild mental retardation, not a separate disability. *See Brown v. Comm'r of Soc. Sec.*, 311 F. Supp. 2d 1151, 1161 (D.C. Kan. 2004) (finding a learning disability was not a distinct and separate diagnosable impairment for purposes of meeting the second prong of Listing 112.05D).

Bethea also contends that the record supports a finding of a severe mental impairment based on sporadic references to anger or stress in the CER, Hick's testimony, and counsel's representation at the hearing that Latifa was receiving mental health treatment. Bethea asserts "the ALJ implicitly found that [Latifa] suffers from a severe mental impairment when he ruled that [she] had a less than marked limitation in the domain of interacting and relating with others, noting that she 'often misbehaves at home, annoys her siblings and quarrels with other children.'" Bethea contends this moderate limitation in Latifa's ability to deal with others would satisfy the second prong of § 112.05D. Bethea's characterization of the findings of the ALJ is incomplete and misleading. The ALJ clearly found only one severe impairment - mild mental retardation. A finding of less than marked limitation in Latifa's ability to interact and relate with others is clearly not sufficient to establish a severe impairment.

Alternatively, Bethea argues that the ALJ should have called a medical expert to consider whether the record supported a diagnosis of a separate learning disability or a potential psychiatric impairment (based on stress resulting from her mother's health problems and testimony that she was to undergo a psychiatric evaluation). This contention is without merit.

Bethea had every opportunity to meet her burden to establish Latifa's disability. The ALJ gave her additional time to provide records of any psychiatric testing or treatment she received, and no records were ever provided. The ALJ offered to assist, if needed, in obtaining any existing records, and no assistance was requested. Moreover, on the record before the ALJ, it was reasonable to conclude that no consultative examination was necessary. The ALJ relied on the opinion of the state agency psychologist to evaluate Latifa's claim.[4] At best, Latifa evidenced only a "less than marked" limitation in the domain of interacting and relating with others, and I agree with the ALJ that "her performance in this category is closer to no limitation than to a marked degree of limitation." (Tr. 20). The ALJ's determination is supported by substantial evidence.

Because the ALJ properly weighed the evidence and determined that Latifa was not disabled, I deny Bethea's motion for summary judgment, and grant the Commissioner's motion for summary judgment. The appropriate judgment and order follows.

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[4] Bethea's assertion that Dr. Weeks was not qualified to render an opinion because his curriculum vitae was not admitted into the record was waived because she never objected to his qualifications before the ALJ. Moreover, the Commissioner has provided Dr. Week's curriculum vitae with her motion for summary judgment and I find him qualified.

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COMMISSIONER OF SOCIAL	:	NO. 04-CV-4888
SECURITY,	:	
Defendant		

JUDGMENT AND ORDER

AND NOW, this 24th day of March, 2006, it is HEREBY ORDERED:

1. Plaintiff's motion for summary judgment is DENIED.

2. Defendant's motion for summary judgment is GRANTED.

Judgment is ENTERED in favor of Jo Anne B. Barnhart, Commissioner of Social Security and against Latifa Hicks, a minor by her P/N/G Barbara Bethea.

IT IS SO ORDERED.

/s/ J. William Ditter,Jr.
J. William Ditter, Jr., S.J.