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

BLANCHE D. LEE,	:	
Plaintiff,	:	
	:	Civil Action No. 04-1767
JO ANNE B. BARNHART, Commissioner of Social Security,	:	
Defendant.	:	

J. William Ditter, Jr., S.J. April 6, 2006

MEMORANDUM AND ORDER

This is an action seeking judicial review of a decision by the Commissioner of Social Security that denied disability insurance benefits. In addition to alleging that evidence of her impairments was ignored, plaintiff asserts that a remand order of this court was disregarded by both the Social Security ALJ who heard the matter and Chief Magistrate Judge M. Faith Angell, who reviewed it. Having studied the entire record, I conclude that there is no merit in either contention. Thus, I grant the Commissioner's motion for summary judgment. Because of the unusual procedural history involved here, I will detail my evaluation of the claims so that there will be no question as to the reasons for this decision.

Background On July 23, 1997, plaintiff Blanche D. Lee applied for disability insurance benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-433, alleging disability since October 14, 1993. Lee's application was denied initially and on reconsideration. She filed a timely request for an administrative hearing, and on March 19, 1999, the ALJ denied benefits. The

Appeals Council denied review. On April 25, 2002, Lee then filed a complaint, docketed as 02-CV-2426, seeking judicial review of the final decision of the Commissioner. After Lee filed her motion for summary judgment, the Commissioner filed a motion to remand. On December 13, 2002, the Honorable Stewart Dalzell remanded this case to the Commissioner.

Upon receipt of Judge Dalzell's December 13, 2002 order, the Appeals Council reviewed the order and remanded the case to the ALJ for further proceedings. In its remand order, the Appeals Council directed the ALJ to further consider Lee's mental status, articulate reasons for the weight assigned to Dr. Waldron's opinion and the unaddressed portion of Dr. Tabby's opinion, consider Lee's residual functional capacity based on the updated record and seek further vocational testimony to supplement the ALJ's prior findings if appropriate.

A post-remand administrative hearing was held on November 19, 2003.[1] At that time Lee informed the ALJ that she had returned to full-time employment. Lee also amended her application to reflect a closed disability period from December 11, 1996, to July 1, 2002. Lee was again denied benefits by the ALJ, and she sought judicial review. When Lee filed her second complaint with this court on April 23, 2004, it was not marked related to her prior complaint and was given a new docket number, 04-CV-1767. This complaint was assigned not to Judge Dalzell, but to the Honorable John R. Padova and referred to the Honorable M. Faith Angell for a report and recommendation.

Judge Angell required the parties to file a joint statement of undisputed facts and Lee also filed a statement of objections to the findings of the ALJ. The Commissioner filed a response to Lee's objections. Judge Angell held oral arguments, and on May 13, 2005, recommended that the

[1]While her complaint was pending before Judge Dalzell, Lee filed a second application for benefits, this time requesting supplemental security income ("SSI"). This application was consolidated with her claim for DIB. At the remand hearing, Lee abandoned her application for SSI and amended her DIB claim to seek a closed period of disability.

court grant the Commissioner's motion for summary judgment and deny Lee's motion for summary judgment. Lee filed numerous objections to the report and recommendation. On August 10, 2005, Judge Padova did not adopt that recommendation and recommitted the case to Judge Angell for a revised report and recommendation. On August 18, 2005, Judge Angell recommended denying both parties' motions for summary judgment, reversing the decision denying benefits to the claimant and remanding the case to the Commissioner for further development of the record. On October 5, 2005, this case was reassigned to me.[2] I have decided not to follow Judge Angell's most recent recommendation but to consider the ALJ's findings and Lee's objections to them.

ALJ's Findings

After an extensive, initial hearing, the ALJ concluded on March 19, 1999, that Lee had a severe cervical disc disease impairment; however, she also determined that this impairment did not meet the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulation No. 4. Tr. 27. The ALJ found that Lee's mental impairment was not severe. *Id.* The ALJ decided that Lee could no longer perform her past relevant work, but had the residual functional capacity to perform semi-skilled, light/sedentary jobs and unskilled, light/sedentary assembly jobs where she does not lift more than 20 pounds occasionally or 10 pounds frequently; does not stand or walk for more than six hours per day or sit for more than six hours per day; and is able to shift between standing and sitting at 30-minute intervals at will. *Id.* The ALJ also found that the Social Security Administration

[2] In circumstances such as these, where a case is returned to this court after a remand, had it been marked as related, it would have been assigned to the same district judge, in this instance Judge Dalzell. That would have avoided some of the procedural problems, including whether the Commissioner had complied with the terms of his remand.

met its burden of establishing that there are jobs existing in the regional and national economy for which Lee would be able to make a successful vocational adjustment. Tr. at 26. With the help of the vocational expert, the ALJ listed such jobs including unskilled/light sedentary assembler and semi-skilled general office clerk. *Id.*

Following Judge Dalzell's remand on February 11, 2004, the ALJ issued her second opinion again reaching the same conclusion: Ms. Lee suffers from a severe muskuloskeletal impairment, but that impairment does not meet or medically equal any one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4; and Ms. Lee's mental impairment is non-severe. Tr. at 666.

Discussion

Lee contends that: (1) the ALJ failed to comply with Judge Dalzell's remand order in the first civil action; (2) the burden of showing that Lee could perform work other than her past relevant work shifted to the defendant; (3) in violation of the law the ALJ did not fully credit the treating physician's opinion; (4) in violation of the law the ALJ improperly discounted the limitation on Lee's upper extremities and disregarded the expert opinions of the treating neurologist and state agency review physician that plaintiff had such limitations; (5) the ALJ improperly dismissed Lee's mental impairments as non-severe; (6) the vocational expert's testimony does not support a denial of benefits; and (7) the ALJ discounted Lee's credibility based upon an improper analysis.

Standard

Well-known principles govern this matter. The role of this court on judicial review is to determine whether there is substantial evidence in the record to support the Commissioner's final

decision. The factual findings of the Commissioner must be accepted as conclusive, provided that they are supported by substantial evidence. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a mere scintilla but may be less than a preponderance. If the ALJ's conclusion 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.

Judge Dalzell's Remand Order

Lee complains extensively that the ALJ failed to comply with Judge Dalzell's December 13, 2002 order, and Judge Angell failed to address this non-compliance in her subsequent report and recommendation. I agree with Judge Angell, however, that "the ALJ was given *discretion* to address all alleged errors" upon remand. (emphasis provided). J. Angell's May 13, 2005 report and recommendation at n. 2. Judge Dalzell, in his December 13, 2002 order, said that the "ALJ can address all alleged errors in the decision." (emphasis provided). As it is used in this context, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "can": "to be able to do, make, or accomplish." Judge Dalzell used the word "can" rather than "shall" or "must." Shall is defined by Webster's as: "must." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085 (3d ed. 1993). Must is defined: "is commanded or requested to." *Id.* at 1492. While "must" or "shall" would not have given the ALJ discretion, it was no accident that Judge Dalzell used the word "can." He is noted for the clarity of his opinions, his command of the English language, and his careful choice of words. Had Judge Dalzell intended to require the ALJ to address the alleged errors, he would have used a word such as must or shall. Because he did not, I find no merit in Lee's argument.

Lee's Contention that Burden Shifted to Defendant to Prove that Claimant Could Perform Other Work

In her Brief in Support of Plaintiff's Motion for Summary Judgment, on page six, Lee states, "plaintiff proved her inability to return to her past work, thereby shifting to defendant the burden of showing that she could still perform other work." In the two pages that Lee uses to develop this statement, there is no argument or allegation. It seems that Lee was thinking aloud. She merely lays out the five step sequential evaluation process and states that the initial burden for proving the inability of the claimant to return to past relevant work lies on the claimant, and if she is successful, the burden shifts to the defendant to prove that the claimant could perform other work. Tr. at 6-7. I agree and therefore will not discuss this matter any further.

Lee's Contention that the ALJ Discounted and/or Misinterpreted Treating Physicians' Opinions

Lee alleges that the ALJ did not properly consider the opinions of Drs. Costello, Bell, and Tabby. *See* Plaintiff's MSJ at 8-14. This claim is contradicted by the record.

A treating physician's opinion is entitled to controlling weight when it is supported by medically acceptable clinical and laboratory diagnostic techniques and is consistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (2004). Although the treating physician's conclusion should be accorded great weight, it may be rejected if it is unsupported by sufficient clinical data, *Newhouse v. Heckler*, 753 F.2d 283, 286 (3d Cir. 1985), or contradicted by other medical evidence. *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999). "While the ALJ is, of course, not bound to accept physicians' conclusions, he may not reject them unless he first weighs them against other relevant evidence and explains why certain evidence has been accepted and why other evidence has been rejected." *Kent v. Schweiker*, 710

F.2d 110, 115 n.4 (3d Cir. 1983). Thus, the ALJ may choose to reject a treating physician's assessment if it is unsupported or conflicts with other medical evidence, the ALJ explains his reasons for rejecting the assessment, and he makes a clear record.

Dr. Costello was Lee's pain management physician. In a medical source statement regarding his patient's condition and limitations from December 11, 1996, through July 1, 2002, Dr. Costello listed the following as Lee's diagnoses: "lumbar spondylosis, lumbar radiculopathy, cervical spondylosis, brachial plexopathy, cervical radiculopathy, hypertension and chronic pain syndrome." Tr. at 983. Lee asserts that because the ALJ "refused to consider any issues other that [sic] those she identified in the Appeal's Council's remand order, the ALJ considered only one small portion of Dr. Costello's opinion: 'that the claimant had significant limitations in doing repetitive activities with her upper extremities.'" Plaintiff's MSJ at 12.

This claim is belied by the record. Contrary to Lee's position, the ALJ did consider issues other than those identified by the Appeal's Council's remand order. For instance, the ALJ carefully set forth why she did not credit the opinions of Dr. Costello, which was not required by the Appeals Council. Tr. at 24, 664-65.

Next, Lee contends that the ALJ overlooked her other alleged limitations such as standing, walking, sitting, lifting, and carrying. Plaintiff's MSJ at 12. The fact that the ALJ did not discuss every statement made by every doctor does not mean she did not consider them. However, in this instance, the ALJ did discuss Lee's limitations on standing, walking, sitting, lifting, and carrying. During the September 1998 hearing the ALJ questioned the vocational expert regarding whether there were jobs available in the national economy that Lee could perform taking into consideration her limitations of standing, walking, lifting, and sitting. Tr. at 74-77. The ALJ also noted these limitations in findings six and eleven. Tr. at 666-67.

Lee also alleges that the ALJ provided "no reasoning at all to explain her treatment of Dr. Costello's medical opinion" other than regarding repetitive motion of her upper extremities. Plaintiff's MSJ at 13. However, the ALJ discusses her reasons for rejecting Dr. Costello's opinion on pages 24, 664, and 665 of the transcript. Specifically, the ALJ explained that she did not accept Dr. Costello's opinion because his records did not support his conclusion. *Id.* at 665; *see also Newhouse,* 753 F.2d at 286; *Plummer,* 186 F.3d at 429; *Kent,* 710 F.2d at 115 n. 4. Another doctor, Dr. O'Shea, confirmed the content of Dr. Costello's records, further enforcing the ALJ's decision that it was Dr. Costello's *conclusion* that was incorrect, rather than his records. *Id.* at 664. Accordingly, I find no merit in plaintiff's claim about Dr. Costello.

Lee goes on to assert that the ALJ misinterpreted the significance of Lee's treating neurologist's (Dr. Tabby) findings. Plaintiff's MSJ at 14. I disagree. In his report, Dr. Tabby checked boxes that state that Lee can stand and walk for 2 to 6 hours per day and she can sit for less than six hours per day. Tr. at 312. On page 78 of the transcript the ALJ lays out her interpretation of the limitations that Dr. Tabby placed on Lee's ability to sit, stand, and walk: that Lee is able sit for up to six hours per day and she was able to stand/walk for up to six hours per day for a total of up to slightly less than twelve hours per day. Based on her residual functional capacity, the vocational expert testified that there were jobs available to accommodate Lee's limitations. More importantly, Lee's attorney did not attempt to change this interpretation on cross-examination of the vocational expert. *Id.* at 78-80. The ALJ specifically asked the vocational expert whether Lee was able to work considering the limitations supported by the record: her inability to lift more than twenty pounds, her need to alternate between sitting and standing, her inability to stand/walk for more than six hours per day. Tr. at 74-80. The ALJ also asked the vocational expert to take into consideration a severe mental impairment in the event

that Lee provided sufficient documentation to substantiate a severe mental impairment. Although Lee never provided such documentation the ALJ sought to include such alleged disability in an abundance of caution. Taking into consideration Lee's various limitations, the vocational expert suggested various jobs that would allow Lee to work, specifically those of general office clerk or assembler. *Id.* The ALJ's understanding of Dr. Tabby's notes and their consequences is reasonable and is supported by substantial evidence.

Lee also argues that because Dr. Tabby concluded that Lee was never able to stoop, she is precluded from performing even sedentary work under SSR 96-9p. Plaintiff's MSJ at 15. The ALJ did not find Dr. Tabby's one assessment in which he checked the "never" box as it related to Lee's ability to stoop, as sufficiently supported by the record. Tr. at 313. Therefore, the ALJ did not credit Dr. Tabby's finding that Lee was never able to stoop.

Further, Lee is incorrect in her interpretation of SSR 96-9p. According to SSR 96-9p, an inability to stoop significantly erodes the unskilled, sedentary occupational base and would usually require a finding that the person is disabled; however, such a finding is not absolute. First, "significantly erodes" and "usually requires a finding of disabled" does not mean that the claimant is automatically precluded from performing sedentary work. Second, and most importantly, an inability to stoop only affects unskilled sedentary occupations. *See* SSR 96-9p. The ALJ found that although Lee is unable to perform the full range of light work, she is capable of making an adjustment to work which exists in significant numbers in the national economy. Tr. at 28. Had the ALJ credited Dr. Tabby's single assessment that Lee cannot stoop, even though it is not supported by his other treatment notes, and accepting the vocational expert's testimony (Tr. at 74-80), Lee still would not be precluded from performing sedentary work. The ALJ found that the jobs Lee was capable of performing include semi-skilled/light jobs such as

general office clerk of which there are approximately 20,000 jobs available regionally and over 1,000,000 such jobs available nationally; and unskilled light/sedentary assembly jobs of which approximately 20,000 such jobs are available regionally and approximately 1,600,000 such jobs available nationally. *Id.* However, the ALJ stated on the record that unskilled positions would only become relevant if Lee produced additional records to establish that Lee suffered from a severe mental impairment. Tr. at 79. Lee never submitted such records and therefore the limitations of unskilled jobs never became relevant. Because Lee was able to perform semi-skilled jobs her inability to stoop has no bearing on her ability to work.

Lee's Contention that the ALJ Discounted Plaintiff's Upper Extremity Limitations and Disregarded Expert Opinions of Claimant's Treating Neurologist and State Agency Review Physician

As Lee contends, the ALJ did discount the opinion of Dr. Waldron, the state agency review physician. However, because Dr. Waldron was not a treating physician, his opinion was not entitled to controlling weight. *See Corley v. Barnhart*, 102 Fed.Appx. 752, 754 (3d. Cir. 2004). Dr. Waldron's opinion was only entitled to evidentiary weight to the degree it was supported by the overall record. As the ALJ explained in her February 2004 decision, Dr. Waldron's opinion was "superseded and rebutted by the overall evidence of record." Tr. at 664. Specifically, the ALJ referred to: 1) Lee's return to work as an airport screener which requires repetitive use of both arms; 2) the lack of carpal tunnel surgery since 1988; and 3) Lee's admission that she had only "mild" carpal tunnel syndrome in her left-hand. *See id.* Further, as discussed in more detail in the mental impairment section below, it was proper for the ALJ to consider Lee's return to work in determining whether she was disabled. *Robinson v. Bowen*,

1988 WL 2166, at *2 (E.D. Pa.), citing *Brown v. Weinberger*, 385 F.Supp. 780 (E.D. Mo. 1974), *aff'd per curiam*, 520 F.2d 1010 (8th Cir. 1975).

The ALJ devotes almost an entire page to explaining why she did not give controlling weight to the opinions of Drs. Tabby and Waldron. Tr. at 664. I find that the ALJ's conclusions are supported by substantial evidence.

Plaintiff's Alleged Mental Impairment

The ALJ's Reasons for Disregarding Dr. Bell's Opinion

Lee alleges that the ALJ "refused to credit the reports of Plaintiff's treating psychiatrist, George S. Bell, M.D." Plaintiff's MSJ at 13. Again, Lee alleges that the ALJ improperly injected her own lay opinion in assessing Lee's mental impairment. *Id.* and 24-25. Further, she alleges that the ALJ selectively cited only certain portions of Dr. Bell's reports and failed to mention or consider some of her limitations at all. *Id.* at 24. Lee also argues that the ALJ's consideration of the fact that she discontinued psychiatric treatment in 1998, and returned to work in 2002, was improper. *Id.* at 25. I will discuss each argument in turn.

First, Lee asserts that the ALJ refused to accept Dr. Bell's opinion as to her mental impairment. Plaintiff's MSJ at 13. On page 18 of the transcript (the ALJ's March 19, 1999 decision) the ALJ explains that she does not give Dr. Bell's opinion controlling weight because it is not supported by his treatment notes. Although Dr. Bell concluded that Lee was not employable due to her mental impairment, the ALJ noted Dr. Bell's "treatment notes reveal a focus on making claimant more comfortable with driving on the Roosevelt Boulevard and with asserting her independence from her parents with whom she lives." Tr. at 18. After reviewing Dr. Bell's treatment notes, I find that the ALJ's conclusion is supported by substantial evidence.

The majority of Lee's treatment notes focus on her fear of driving (especially on the boulevard) and her difficulties with her family. For instance, in thirteen out of the seventeen treatment notes Dr. Bell discussed Lee's fear of driving and/or her family problems.[3] *See* exhibit 29F. In nine of those thirteen treatment notes Lee's fear of driving and/or her family problems were the only issues discussed. *See id.* Overall, Dr. Bell's treatment focuses on making Lee more comfortable driving and more comfortable confronting her family situation. This is not to say that other issues were not mentioned; however, from a review of Dr. Bell's notes these two issues were certainly his focal point.

Dr. Bell's diagnosis that Lee suffers from dysthymic disorder and anxiety disorder, rather than major depressive disorder, *see* exhibit 29F, and after a relatively short period of outpatient therapy progressed, Tr. at 19, is a further reason to reject his opinion that Lee was unemployable. Lee's criticism of the ALJ's statement about dysthymia is unfounded. Specifically, Lee argues that the ALJ injected her own lay opinion by concluding that Dr. Bell's diagnosis of dysthymia indicates lesser severity. Plaintiff's MSJ at 13. Lee has misrepresented the nature of the ALJ's statement. The ALJ used a parenthetical, "(that is, a lesser level of depression than major depression)," Tr. at 18-19, to explain the definition of dysthymia to any lay person reading her opinion. DORLAND'S MEDICAL DICTIONARY states that dysthymia or dysthymic disorder are marked by symptoms that "have persisted for more than two years ***but are not severe enough to meet the criteria for major depressive disorder***." (emphasis supplied). Thus, the ALJ did not inject her lay opinion at all. She merely described dysthymia as it is defined by the medical community.

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[3] Dr. Bell's treatment notes are brief. Most of the notes are only several lines long. Obviously Dr. Bell noted the matters that were important from his session with the claimant.

Lee argues that the ALJ's statement that her "treatment notes showed progress in meeting her objectives," as well as the arguments discussed above, "does not suffice to refute the considered expert opinion of Dr. Bell." Plaintiff's MSJ at 13-14. This statement alone would not have been sufficient to counter the expert opinion of Dr. Bell; however, the ALJ devoted more than a page to explaining the evidence that did contribute to neutralizing Dr. Bell's opinion. Tr. 18-19. The fact that Lee's treatment notes evidenced her progress was just another reason the ALJ discussed when explaining how she reached her opinion that Dr. Bell's conclusion was not supported by his treatment notes.

Finally, Lee's return to full-time employment in 2002 is not only relevant, but significant. Tr. at 662. In a letter written by Dr. Bell on September 24, 1998, Dr. Bell says, "[t]he prognosis is poor. Due to [Lee's] impaired concentration, low energy level, and labile moods I believe that she is not employable." Tr. at 639. However, less than four years later, Lee returned to full-time competitive work as an airport screener, a job which requires significant contact with the public, as well as the ability to maintain concentration, often under stressful conditions. Dr. Bell's opinion about Lee's prognosis was proved incorrect. Interestingly, Lee only received psychiatric treatment for <u>one more visit</u> after this letter was written and there is no evidence that her physical condition drastically improved. *See* exhibit 29F. Although Lee was given the opportunity to submit additional evidence regarding her mental status, she did not do so. Tr. at 663. I conclude that the ALJ's discounting of Dr. Bell's opinions is supported by substantial evidence.

Lee's Other Criticisms of the ALJ's Findings

Lee contends that the ALJ injected her lay opinion by noting "that, *inter alia*, Plaintiff's

medication was 'routine.'" Plaintiff's MSJ at 13. The ALJ actually stated: "he [Dr. Bell] prescribed a routine anti-depressant, Zoloft." Tr. at 18. It is commonly known that Zoloft is an anti-depressant and regularly prescribed for the treatment of depression. Read in context, the ALJ was merely stating that when a doctor concludes that a patient should be prescribed anti-depressants, Zoloft is routinely prescribed, and not that Zoloft is a routine medication for any person.

Lee argues that the ALJ selectively cited only certain portions of Dr. Bell's reports and failed to mention or consider some of the claimant's limitations at all. Plaintiff's MSJ at 24. The fact that the ALJ did not mention every one of the limitations assessed by Dr. Bell does not mean that she did not consider them. The ALJ cited to those portions of Dr. Bell's reports that contradicted his opinion that Lee's prognosis was poor and she was unemployable. That does not mean that the ALJ did not consider all of the evidence before her. The ALJ stated that while she recognized that Dr. Bell determined that Lee was disabled due to a severe mental impairment, she "properly [did] not give that opinion controlling weight because it is not supported by Dr. Bell's treatment notes." *Id.* The ALJ merely went on to describe those of Dr. Bell's treatment notes that contradict his dire prognosis. Again, that is not to say that she did not consider all of the evidence before her. Dr. Bell's notes were part of the record and the ALJ discussed several of the treatment notes so there is no reason to believe that the ALJ did not review all of them.

Lee states in her Brief in Support of Plaintiff's Motion for Summary Judgment, "[t]he ALJ appeared to believe that because Ms. Lee was no longer treated by a psychiatrist after 1998 . . . the ALJ's first decision[4] was somehow vindicated." Plaintiff's MSJ at 25. Lee goes on to say, "[f]irst, Ms. Lee continued to suffer from depression after the termination of her treatment

[4] The March 19, 1999 opinion.

with Dr. Bell. The record shows that her neurologist, Dr. Tabby, continued to prescribe Zoloft from 1999 through 2001." *Id.* As I pointed out, however, Dr. Bell did not say Lee ever suffered from major depression, but rather from dysthymia and anxiety disorder. Secondly, Lee may have continued to suffer from this level of depression, but the ALJ could only conclude, in the absence of anything to the contrary, that Lee's condition had not worsened after Dr. Bell's last treatment. As the ALJ indicated in her first decision and as is noted in DORLAND'S MEDICAL DICTIONARY, there are varying degrees of depression. 548-49 (30 ed. 2003). However, not all forms of depression are so severe that a person is unemployable. Because Dr. Tabby continued to prescribe Lee Zoloft, but Lee was no longer seeing a therapist, it was logical for the ALJ to infer that the medication was enough to control Lee's dysthymia.

Lee argues that the ALJ improperly used her lay opinion in reaching her decision in this case. However, that is exactly what Lee asks of the ALJ with regard to her use of Zoloft. Lee contends that the ALJ should have inferred from her use of Zoloft, as prescribed by Dr. Tabby, without more, that she is so severely depressed as to be unemployable. Lee herself argues in other parts of her Brief in Support of Plaintiff's Motion for Summary Judgment that injecting such lay opinion is entirely inappropriate. The ALJ cannot be expected to make such an enormous analytical leap. Further, as the ALJ noted the "claimant was given the opportunity, both before and after the November 2003 hearing, to submit additional evidence regarding her mental status, but no additional evidence was submitted." Tr. at 663. Had Lee continued to see Dr. Bell for therapy, she would certainly expect the ALJ to consider that fact, so it follows that her discontinuance of therapy should be a consideration as well. Therefore, it was consistent and appropriate for the ALJ to take into account that Lee was not treated by a psychiatrist after 1998 when determining the severity of her mental impairment.

Finally, Lee argues that the ALJ's consideration of her return to work in 2002 was improper. Plaintiff's MSJ at 25. I disagree. The general rule is that the Commissioner "may consider work done by a claimant after the onset date as tending to show that the claimant was never disabled." *Robinson v. Bowen*, 1988 WL 2166, at *2 (E.D. Pa.), citing *Brown v. Weinberger*, 385 F.Supp. 780 (E.D. Mo. 1974), *aff'd per curiam*, 520 F.2d 1010 (8th Cir. 1975). There is a trial work provision exception that allows a claimant to return to work for up to nine months without it being considered against his or her ability to perform gainful activity. *Robinson*, 1988 WL 2166, at *2. Here, Lee worked as an airport screener from July 2002, until at least November 2003. Tr. at 664. This is seven months more than the maximum period a claimant may work to fall within the trial work provision exception. *Robinson*, 1988 WL 2166, at *2. Thus, Lee's return to work does not fall within the exception to that rule. The courts in *Robinson* and *Brown* make no distinction for claimants who argue that they were disabled for a closed period and I will not make that distinction. Therefore, the ALJ's consideration was proper.

In summary, the ALJ had ample reason to disregard Dr. Bell's opinion that Lee was unemployable and the ALJ ably explained her reasons for doing so.

Vocational Expert Testimony

At the first hearing, the ALJ asked the vocational expert whether there were jobs available in the economy that Lee was able to perform given her limitations in sitting, standing, walking and lifting. Lee contends that the ALJ improperly omitted Lee's non-exertional and mental limitations from this hypothetical, rendering the vocational expert's testimony unreliable.

As Lee stated herself, "a hypothetical question presented to a Vocational Expert

must include all of a claimant's impairments *which are supported by the record*." Plaintiff's MSJ at 27; (emphasis provided); *see also Corley v. Barnhart*, 102 Fed.Appx. 752, 754 (3d. Cir. 2004), citing *Chrupcala v. Heckler*, 829 F.2d 1269, 1276 (3d Cir. 1987); *Podedworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984). As explained above, the ALJ did not completely credit the opinions of Drs. Bell, Costello, and Tabby. Further, the ALJ found that the overall record did not support a finding of severe mental impairment, as discussed in more detail in the previous section of this opinion. Tr. at 19. Because the ALJ included those impairments which were supported by the record in the hypothetical she posed to the vocational expert and only omitted those that were not, I find no merit in Lee's argument in this regard.

The ALJ Discounted Lee's Credibility

Lee argues that the ALJ's reasons for discounting Lee's credibility were "wholly inadequate to support her conclusion." Plaintiff's MSJ at 29. However, the ALJ dedicated almost two full pages to explaining her reasons for doing so. Tr. at 20-22. The ALJ compared the doctors' records with Lee's testimony and pointed out significant discrepancies. *Id.* For example, the ALJ stated that while Lee "testified to severe, almost unremitting pain, confining her to frequent periods of bed rest, [such] testimony is not supported by the treatment records of Dr. Tabby or Dr. Costello." Tr. at 22. Further, the ALJ pointed out that Dr. Costello, a pain management specialist, reported that Lee had not seen him for a period of approximately eight months (from December 1996 to August 1997) because "her pain was quite well-controlled [sic]," *id*., further undercutting Lee's 1998 testimony that she was suffering from severe, almost unremitting pain. Tr. at 22, 42.

The ALJ did not overlook Lee's cervical disc problems. To the contrary, the ALJ

concluded that Lee's cervical disc impairment was severe. Tr. at 665-66. She stated that Lee has "***severe cervical disc disease*** with pain which has caused her to be in ongoing treatment with Dr. Costello for pain management [which] has continued even since she returned to work," however, she determined that although Lee could not return to her previous types of employment, she could return to at least light work. *Id.* (emphasis provided). Therefore, she did not dismiss the severity of Lee's disc disease, but to the contrary, she determined that Lee's cervical disc disease was severe enough that Lee could no longer perform her past work, but not so severe that she was precluded from all work.

Finally, Lee argues that the ALJ did not consider her long work history. Plaintiff's MSJ at 30. However, the ALJ did acknowledge Ms. Lee's work history. On pages 40 and 41 of the transcript (September 1998 hearing) the ALJ had Lee explain the last 15 years of her work history. The ALJ also acknowledged her receipt of Lee's work history report. *See* Tr. at 40. Further, in the November 2003 hearing, Lee's attorney stipulated that the ALJ "already reviewed [Lee's work history]" and agreed that there was no reason for the ALJ to inquire into it further. Tr. at 678. Therefore, I find that there is substantial evidence to support the ALJ's review of Lee's work history.

Conclusion

The ultimate decision by the ALJ that Lee's several impairments were not of sufficient severity to keep her from working is supported by substantial evidence. Accordingly, I grant the Commissioner's motion for summary judgment.

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

BLANCHE D. LEE, Plaintiff, JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	:	Civil Action No. 04-1767

ORDER

AND NOW this 6th day of April, 2006, upon consideration of the report and recommendation filed by the Honorable M. Faith Angell on August 18, 2005, in the Eastern District of Pennsylvania, and all responses thereto, IT IS HEREBY ORDERED:

1. The report and recommendation for remand is not approved and adopted;

2. The Commissioner's motion for summary judgment is GRANTED;

3. The plaintiff's motion for summary judgment is DENIED; and

4. The Clerk of Court is directed to close this case for statistical purposes.

BY THE COURT:

/s/ J. William Ditter, Jr.
J. WILLIAM DITTER, JR., S.J.