

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

SUSAN L. MARTIN : CIVIL ACTION
: :
: :
v. : NO: 05-2884
: :
JO ANNE B. BARNHART,
Commissioner of Social Security

MEMORANDUM AND ORDER

AND NOW, this 22nd day of May 2006, upon consideration of the cross-motions for summary judgment (Doc. Nos. 8 and 9), and the reply brief thereto (Doc. No. 11), the Court makes the following findings and conclusions:

A. On September 15, 2003, Susan L. Martin (“Martin”) 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. 47-50; 287-289). Throughout the administrative process including a January 12, 2005, hearing before an administrative law judge (“ALJ”), Martin’s claim was denied.¹ (Tr. 34-35; 36-40; 290; 291-295; 300-337). Pursuant to 42 U.S.C. § 405(g) Martin then sought judicial review in this Court.

B. The ALJ found Martin’s back disorder, urinary frequency, and obesity to be severe. (Tr. 18 ¶¶ 10-12; 23 Finding No. 2),² but found that they were not severe enough to meet or medically equal any of the listed impairments. (Tr. 19 ¶ 20; 23 Finding No. 3); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that Martin could not perform her past relevant work, but was not disabled, and had the residual functional capacity (“RFC”) to perform less than the full range of light work. (Tr. 19 ¶ 23; 21 ¶ 35; 23-24 Finding Nos. 5, 10, 11). With the testimony of a vocational expert (“VE”), the ALJ further concluded that Martin was able to perform other jobs that exist in the national economy. (Tr. 23 ¶¶ 43-44; 24 Finding No. 11).

C. The Court has plenary review of legal issues, but reviews the ALJ’s factual findings to

¹At the hearing Martin amended her alleged onset date from April 22, 2000, to September 5, 2003, causing her to remain insured for DIB benefits only until December 31, 2000. (Tr. 304-306). Therefore, only Martin’s SSI claim was before the ALJ and in turn before this Court.

² Paragraphs are numbered chronologically seriatim as they appear throughout the ALJ’s decision.

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, 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. Martin 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. Martin first argues that the ALJ did not properly employ the guidance provided by SSR 83-12. 1983 LEXIS 32. The purpose of SSR 83-12 is to clarify the policies applicable when using the Medical Vocational Rules in Appendix 2 of Subpart P of Part 404 (“the Grids”). Pursuant to 83-12, where a claimant’s RFC does not fit neatly into one of the ranges of exertion, (sedentary, light, medium, or heavy) a claimant’s occupational base may be affected, and may not represent a significant number of jobs. 1983 SSR LEXIS 32 at *3. Therefore, the ALJ must consider the extent of erosion to the base and assess its significance. Id.

According to Martin, her exertional level falls between two rules, sedentary and light because the ALJ found that she lacks the ability to perform the full range of light work. (Tr. 19 ¶ 23; 21 ¶ 35; 23-24 Finding Nos. 5, 10, 11). Martin therefore asserts that pursuant to the Adjudicative Guidance section of SSR 83-12 the ALJ must equitably consider the degree to which her diminished exertional capacity would affect her occupational base. 1983 SSR LEXIS 32, at * 4-6. The Adjudicative Guidance section provides that an exertional capacity that is only slightly reduced, likely indicates a sufficient remaining occupational base, whereas an exertional capacity that is significantly reduced may “indicate little more than the occupational base for the lower rule and could justify a finding of ‘Disabled’.” Id. at *5-6. Finally, where a claimant’s exertional impairments are “somewhere ‘in the middle’”, and the decision involves “more difficult judgments”, testimony from a VE is recommended. Id. at * 6. Furthermore, the policy statement in this ruling requires the ALJ to “consider the extent of any erosion of the occupational base,” and “[w]here the extent of erosion of the occupational base is not clear, the adjudicator will need to consult a vocational resource.” Id. at * 4;see also SSR 96-9p, 1996 SSR LEXIS 6, at * 19.³

Here, the testimony of the VE provides the equitable consideration which Martin complains is missing. With the testimony of a VE, the ALJ found that although Martin’s limitations do not allow her to perform a full range of light work, she is capable of making a

³ In addition to her other arguments Martin attempts to argue that she is capable of less than the full range of sedentary work. (Cf. Pl.’s Brief at p. 7); (see paragraph 3 infra).

successful adjustment to work existing in significant numbers in the national economy. (Tr. 19 ¶ 23; 21 ¶ 35; 23 ¶ 43-44; 23- 24 Finding Nos. 5, 10; 11; 328). Because Martin’s exertional capacity is “somewhere ‘in the middle’” and in any event “not clear” the ALJ properly abided by the policy of SSR 83-12 by obtaining the testimony of a VE. 1983 SSR LEXIS 32, at * 4-6; see Boone v. Barnhart, 353 F.3d 203, 210 (3d Cir. 2004) (recognizing that “a VE can provide a more individualized analysis as to what jobs the claimant can and cannot perform than does a determination of the claimant’s remaining occupational base.”). Here, the ALJ specifically notes that he has called upon the assistance of a VE because Martin’s ability to perform a full range of work has been impeded by her impairments. (Tr. 22 ¶ 42). Because the ALJ has complied with SSR 83-12, there is no error. 1983 SSR LEXIS 32, at * 4-6.

2. Second, Martin argues that the ALJ erred in using rule § 202.11 (referring to light work) instead of rule § 201.10 (referring to sedentary work) as a framework for deciding whether Martin was disabled. Appendix 2 of Subpart P of Part 404. Martin claims that the VE’s testimony reflects that she is “limited to those light jobs which could be performed as sedentary jobs.” (Pl.’s Brief at p. 10). She complains that it would be “incongruous for an ALJ to find that a claimant has an occupational base which is ‘little more’ than the lower rule and then to conclude that she is not disabled by employing the higher rule as a framework.” (Pl.’s Brief at p. 12).

The ALJ did not use the wrong rule as a framework and Martin’s characterization of the VE’s testimony is flawed. The record and the testimony of the VE do not suggest that Martin is capable only of sedentary work, but reflect that Martin is capable of light work. (Cf. Tr. 75-77; 173-181; 234; 250-251; 260; 275; 308; 316; 319; 320). Martin admitted that light work would be more suitable for her when she testified at the hearing that she could not perform a job in which she would be seated for the whole day, but could perform a job that required her to walk and stand more than two hours. (Tr. 323-324). Finally, the VE’s testimony indicated that Martin’s limitations would allow her to perform, for example, the three light jobs testified to which accommodated Martin’s need for a sit/stand option.⁴ (Tr. 330). Therefore, ALJ properly employed Rule 202.11 as a framework.

3. Third, Martin argues in reliance upon Boone that the need for alternate sitting or standing would preclude most unskilled sedentary or light work. In Boone, the Court concluded that the VE’s testimony did not constitute substantial evidence that Boone could perform a significant number of jobs in the economy. 353 F.3d at 211. Although the Court recognized that

⁴ The record highlights some other factors that suggest that the light work framework (with a sit/stand option) is a more suitable framework through which Martin may be analyzed since: Martin notes that she can only sit for thirty to sixty minutes at a time, changing positions to accommodate her back and knees every ten to fifteen minutes (Tr. 76; 318); and that she is not comfortable sitting up which requires her to alternate sitting down with lying down or reclining. (Tr. 319; 321; 324-325). However, mixed with these statements are various inconsistencies including her testimony that she can sit long enough to attend a movie with friends, as long as she can sit on the aisle to quickly reach a bathroom (Tr. 320); and also that she can only walk twenty minutes without sitting, and can only stand for 45 minutes at a time. (Tr. 319). However, because there is substantial evidence that a light framework with a sit/stand option is appropriate for Martin, there is no error.

VE testimony “can provide a more individualized analysis,” in that case the VE identified three examples of jobs that Boone could perform, but all three conflicted with the Dictionary of Occupational Titles (“the DOT”). *Id.* at 206-208. In the face of unreliable VE testimony and the fact that Boone was limited only to unskilled, sedentary work, with an inability to perform repetitive hand movements and a sit/stand option, the Third Circuit Court of Appeals concluded that the Commissioner had not met her burden of proving that Boone could perform a significant number of jobs in the economy. *Id.* at 211. In contrast, the present record and the testimony of the VE, support the notion that Martin’s need for a sit/stand option does not preclude her from performing light work as found by the ALJ. (Tr. 323-325; 326-337; see also paragraph 2 supra). The VE specifically noted that the jobs she selected were jobs that Martin could perform because she could “sit or stand to perform the job or at any time get up and stand and sit.” (Tr. 331).⁵ Because the record and testimony reflect that Martin can perform a substantial number of jobs existing in the national economy, there is no error.

4. Next, Martin asserts that the limited number of light jobs identified by the ALJ does not reflect a substantial number of occupations. She argues that the three jobs identified by the VE are improperly characterized by the ALJ as “examples ”of work Martin could perform, since the ALJ did not ask for examples nor did the VE refer to the jobs listed as examples. (Tr. 24 Finding No 11; 328). However, the VE explicitly agrees in her testimony that it is “fair to assume there are other light jobs.” (Tr. 332). Clearly, her testimony was not intended to provide a complete list of occupations available to an individual with Martin’s limitations. See Rutherford v. Barnhart, 399 F.3d 546, 551 & 557 (3d Cir. 2005). Because the VE listed two suitable jobs as examples, it cannot be said that the light occupational base is significantly eroded, and there is no error.

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

5. The motion for summary judgment filed by Susan L. Martin is **DENIED**;

⁵ Generally it is the ALJ’s responsibility to resolve “apparent unresolved” conflicts between the VE’s testimony and the DOT, and to “inquire, on the record, as to whether or not there is such consistency.” SSR 00-4p, 2000 WL 1898704 at * 2. In this case the Commissioner concedes that Martin cannot perform one of the jobs listed by the VE. (Def.’s Brief at p. 16). Although this misstep by the VE raises concern that the ALJ has violated SSR 00-4p, the ALJ fulfilled his duty to inquire on the record whether there was consistency between the VE and the DOT by noting in his decision that he found no conflict and the VE so testified there was none. (Tr. 22 ¶ 27; 328). Finally, there is no actual conflict to resolve since the existence of the two suitable remaining jobs make this error harmless. Rutherford, 399 F.3d 546, 553 (3d Cir. 2005) (refusing to remand where stricter compliance with a social security ruling would not have changed the outcome of the case).

6. The motion for summary judgment filed by the Commissioner is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST SUSAN L. MARTIN**; and

7. The Clerk of Court is hereby directed to mark this case as **CLOSED**.

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