

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

ROSILYN T. PURVIS	:	CIVIL ACTION
	:	
v.	:	NO. 06-1226
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

**MEMORANDUM AND ORDER**

AND NOW, this 21<sup>st</sup> day of December, 2006, upon consideration of the cross-motions for summary judgment<sup>1</sup> filed by the parties (Doc. Nos. 9 and 10), the court makes the following findings and conclusions:

1. On November 25, 2002, Rosilyn Purvis (“Purvis”) filed for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) under Titles II and XVI, respectively, of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383f, alleging an onset date of November 11, 2002.<sup>2</sup> (Tr. 64-66; 206-10). Throughout the administrative process, including an administrative hearing held on April 16, 2004 before an administrative law judge (“ALJ”), Purvis’ claims were denied.<sup>3</sup> (Tr. 6-8; 11-23; 35-39). Pursuant to 42 U.S.C. § 405(g), on March 23, 2006, Purvis filed her complaint in this court seeking review of that decision.

2. In his decision, the ALJ concluded that Purvis had severe impairments consisting of degenerative disc disease of the lumbar spine, obesity, and depressive disorder. (Tr. 18 ¶ 1; 24 Finding 3).<sup>4</sup> The ALJ further concluded that Purvis’ impairments did not meet or equal a listing and that she had the residual functional capacity (“RFC”) to perform light work with simple 1 to 2 step instructions. (Tr. 18 ¶ 3; 22 ¶4; 24 Findings 4, 6). The ALJ determined that Purvis was not disabled. (Tr. 23 ¶ 4; 24 Finding 9).

3. 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 is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson

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<sup>1</sup>The procedural order provides that the parties shall file cross-motions for summary judgment. (Doc. No. 4). Thus, the court will construe plaintiff’s memorandum brief (Doc. No. 9) and defendant’s motion for summary judgment and response to request for review of plaintiff (Doc. No. 10) as cross-motions for summary judgment.

<sup>2</sup>Purvis’ attorney for the hearing in front of the ALJ filed a pre-hearing brief arguing that Purvis should be found disabled with an onset date of February 14, 2002, the date of Purvis’ second work-related injury. (Tr. 16 ¶ 2; 268). However, Purvis performed substantial gainful activity until November 11, 2002. (Tr. 17 ¶¶ 3-4; 204-05).

<sup>3</sup>A subsequent application for benefits resulted in a finding of disability from September 1, 2005 onwards. (Doc. No. 9, Exhibit 3).

<sup>4</sup>All numbered paragraph references to the ALJ’s decision begin with the first full paragraph on each page.

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). Substantial evidence is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988). If the conclusion of the ALJ 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).

4. Purvis, who is *pro se*, raises two arguments in which she alleges that the determinations by the ALJ were either not supported by substantial evidence or were legally erroneous. Additionally, defendant raises the issue of allegedly new evidence. These arguments are addressed below. However, upon due consideration of all of the arguments and evidence, I find that the ALJ's decision is legally sufficient and supported by substantial evidence.

A. Defendant asserts that the evidence submitted to the Appeals Council does not warrant a sixth sentence remand. 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: (1) the evidence is "new and not merely cumulative of what is already in the record" and (2) material; and (3) the claimant shows that there was good cause for not previously presenting the evidence to the ALJ. Szubak v. Sec. of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984); 42 U.S.C. § 405(g); Fisher v. Massanari, 28 Fed. Appx. 158, 159 (3d Cir. 2002) (citing Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001)). Implicit in the requirement that the evidence be material is that the new evidence must concern the time period for which benefits were denied and not a subsequent deterioration of a condition that was not previously disabling. Szubak, 745 F.2d at 833. While the case was pending before the Appeals Council, Purvis' attorneys sent additional evidence dated October 12 and 13, 2004 and May 7, 2005. (Tr. 27-31; 821-26). Although Purvis' attorneys at the administrative level stated some of the evidence is "new and confirming" of Purvis' complaints, no good cause was provided for not timely submitting such evidence to the ALJ.<sup>5</sup> (Tr. 821-22; 825). Additionally, the evidence is not material because it consists of evaluations, deemed to be current, from four to eleven months after the ALJ's decision which reflect a possible progression of Purvis' impairments demonstrated by Purvis taking medication for her depression and decreased sensation in her lower extremities. (Tr. 31; 303; 543; 554; 823; 871). Since no good cause was provided, the evidence appears to reflect subsequent deteriorations, and it would not be consistent with public policy to remand as a result of this evidence, a remand is not warranted in this case. See Matthews, 239 F.3d at 595.

B. Purvis alleges that the ALJ failed to properly assess her credibility. "Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." Pysner v. Apfel, No. 00-1309, 2001 WL 793305, at \*3 (E.D. Pa. July 11, 2001) (citing Van Horn v. Schweiker, 717 F.2d 871, 973 (3d Cir. 1983)). Moreover, such determinations are entitled to deference. S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Pursuant to the regulations, the ALJ uses a two pronged analysis to make a credibility determination. See 20 C.F.R. §§ 404.1529; 416.929. The ALJ must first determine if there

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<sup>5</sup>The court acknowledges that good cause is not required for the Appeals Council to consider new and material evidence, however, the court looked to the letters by Purvis' former attorneys that accompanied the evidence in question because the letters encompass the only explanation provided. See 20 C.F.R. §§ 404.970(b); 416.1585(a).

is an underlying medically determinable impairment that could reasonably be expected to produce the alleged symptoms. See 20 C.F.R. §§ 404.1529(c)(1); 416.929(c)(1). If the ALJ finds that such an underlying condition exists, the ALJ must then decide to what extent the symptoms actually limit the claimant's ability to work. See Id.

As for Purvis' complaints of depression, despite the fact that the record reflects Purvis had normal mood, thought processes, and perception, she was diagnosed with major depression. (Tr. 488; 489; 504; 532; 533; 534; 535; 536; 539). However, as the ALJ noted, Purvis has refused to take the anti-depressant medicine that was prescribed to her<sup>6</sup> and she was assessed with a GAF of 60 and 70, denoting mild to moderate symptoms. (Tr. 19 ¶ 1). In deciding that Purvis' depression could be accommodated with a limitation of simple 1 to 2 step instructions, the ALJ observed that Purvis lived on her own and was able to do "significant activities of daily living" such as going to Jehovah's witness meetings three times a week, which ranged in length from an hour to and hour and forty-five minutes, and sometimes walked around proselytizing with them. (Tr. 19 ¶1; 22 ¶ 1; 847). Since the objective medical evidence and evidence in the record do not reflect as serious a limitation as Purvis alleges, substantial evidence supports the ALJ's decision to partially discount her testimony and include a non-exertional limitation of simple 1 to 2 step instructions in the RFC to account for her allegations of difficulty with instructions and memory.

In regard to reports of pain, the ALJ is required to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it. Hartranft, 181 F.3d at 362 (citing 20 C.F.R. § 404.1529(c)). Although it is noted in the record that a diagnosis of mild degenerative disc disease could give rise to complaints of severe lower back pain, as the ALJ noted, even in 2004, the record reflects the range of motion of Purvis' lumbar spine was normal, and she had normal sensation and motor strength with no lumbar spasms or tenderness (Tr. 21 ¶¶ 2-3; 424; 543; 554). In 2003, her pain was reasonably well controlled with pain medication she could only take twice a week because of her kidney problems. (Tr. 436; 482; 863). Although in 2004 Eric Williams, M.D. ("Dr. Williams") recommended that Purvis receive epidural injections or nerve root blocks for her pain, the ALJ discounted this recommendation, noting this was after Purvis reported that her intermittent back pain had developed into pain and paresthesias down her left leg despite clinical findings not reflecting a worsening of her impairment. (Tr. 21 ¶ 2; 554-555). Thus, despite the fact that her diagnosis of degenerative disc disease could give rise to severe pain, substantial evidence supports the ALJ's decision to discount Purvis' reported pain because the objective medical evidence does not support her allegations of increased pain during the time period in question and Purvis was able to control the pain with medication.

C. Finally, Purvis argues that the ALJ was incorrect in determining she could perform light exertional work. The ALJ noted that in 2003 a consultative examiner determined Purvis could occasionally lift 50 pounds, frequently lift 25 pounds, and could stand/walk for 6 hours. (Tr. 22 ¶ 1; 420; 434). Despite the fact that the examinations of Purvis in 2004 found she had normal range of motion in the lumbar spine, normal sensation and motor strength, and no lumbar spasm or tenderness, an examining doctor, Dr. Williams, determined Purvis could occasionally lift 10 pounds, frequently lift less

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<sup>6</sup>20 C.F.R. § 416.930(b) provides that "If you do not follow the prescribed treatment without a good reason, we will not find you disabled." Purvis testified that she took Zoloft for 2 or 3 days and then stopped because she was scared of what effect it might have on her. (Tr. 871).

than 10 pounds, and could stand/walk for less than 2 hours in a workday.<sup>7</sup> (Tr. 543; 548; 554). The ALJ noted Dr. Williams made these findings despite the fact that his “examination was remarkable for the absence of significant abnormal clinical findings to substantiate the claimant’s complaints.” (Tr. 21 ¶ 2). After noting that the clinical examination from 2003, upon which the consultative examiner relied, and the clinical examination from 2004 both reflected normal ranges of motion, sensation, reflexes, muscle strength, the ALJ determined that the exertional RFC assessed by the consultative examiner would be relied on with the exception of the weights she could lift, since the ALJ determined that lifting 10 pounds frequently and 20 pounds occasionally was more reasonable given Purvis’ impairments. (Tr. 21 ¶¶ 2-3; 22 ¶ 1; 420; 429; 543). Since Dr. Williams’ findings were not consistent with the rest of the medical record, the ALJ did not err in discounting his conclusions. See 20 C.F.R. §§ 404.1527; 416.927. The ALJ’s assessment of Purvis’ RFC is supported by substantial evidence.

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 Rosilyn Purvis is **DENIED**;

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

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

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

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<sup>7</sup>The court notes, in spite of her allegation in 2003 that she could only sit for 20 minutes, in 2004, Dr. Williams found her sitting was not affected by her impairments and the ALJ noted she sat “very still” during her “long hearing, without frequent changes of position or other signs of physical and/or emotional distress.” (Tr. 21 ¶1; 549).