

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

NANCY SURIANO	:	CIVIL ACTION
	:	
v.	:	NO. 06-3615
	:	
MICHAEL J. ASTRUE, ¹	:	
Commissioner of Social Security	:	

MEMORANDUM

LOWELL A. REED, JR., Sr. J.

June 25, 2007

Before the court for consideration is plaintiff's brief and statement of issues in support of request for review (Doc. No. 10) and defendant's response (Doc. No. 14). The court makes the following findings and conclusions:

1. On November 20, 1990, Nancy Suriano ("Suriano") filed for supplemental security income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f, alleging an onset date of June 5, 1990. (Tr. 89-91). Suriano's claims were denied after her first hearing on May 15, 1992 by an administrative law judge ("ALJ"). (Tr. 22-34; 93; 96; 98-99; 100; 203-11; 214-15). Pursuant to 42 U.S.C. § 405(g), on July 15, 1993, Suriano filed her complaint in this court seeking review of that decision. On September 24, 1993, in response to the Commissioner's motion to remand because no transcript could be prepared, the Honorable Jan E. DuBois filed an order remanding the case for further administrative action pursuant to sentence six of 42 U.S.C. § 405(g). After Suriano's second hearing on July 14, 1994, the ALJ denied benefits and the Appeals Council remanded, stating the record needed to include treatments notes and testing from Suriano's treating doctor and current consultative exams. (Tr. 312-20; 439-40). The third hearing on June 20, 1997 resulted in the Appeals Council remanding because the entire record was destroyed. (Tr. 570-71; 586-600; 613-14). The ALJ again

¹On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Michael J. Astrue has been substituted for former Commissioner Jo Anne Barnhart as the defendant in this lawsuit.

denied benefits after Suriano's fourth hearing on June 13, 2002, however, the Honorable Jan E. DuBois remanded the case pursuant to 42 U.S.C. § 405(g), sentence four, finding that the ALJ failed to provide a sufficient analysis of the evidence and Suriano's ability to perform work on a regular and continued basis. (Tr. 9-10; 11-23; 916-36; 941-43). The resultant supplemental administrative hearing was held on September 7, 2005 before an ALJ, after which Suriano's claims were again denied. (Tr. 845-48; 852-66). Pursuant to 42 U.S.C. § 405(g), on August 17, 2006, Suriano filed her complaint in this court seeking review of that decision.

2. In his decision, the ALJ concluded that Suriano had severe impairments consisting of depression, chronic fatigue syndrome, degenerative joint disease, degenerative disc disease, anxiety, obesity, fibromyalgia, history of migranes, and a pain disorder. (Tr. 857 ¶ 5; 857 Finding 2).² The ALJ further concluded that Suriano's impairments did not meet or equal a listing, that she had the residual functional capacity ("RFC") to perform unskilled, sedentary work consisting of one to two step instructions with low to moderate stress, that did not require more than a low to moderate ability to concentrate, had no fixed quotas, did not require work around hazardous machinery or heights, and gave her a sit/stand option. (Tr. 858 Finding 3; 859 Finding 4). Thus, the ALJ determined that Suriano was not disabled. (Tr. 865 ¶ 3; 865 Finding 10).

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 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

² All numbered paragraph references to the ALJ's decision begin with the first full paragraph on each page.

a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 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. Suriano raises four arguments in which she alleges that the determinations by the ALJ were either not supported by substantial evidence or were legally erroneous. 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. Suriano first argues that the ALJ rejected the opinions of her treating physicians without explanation and the ALJ substituted his opinions for the opinions of Suriano's treating physicians. A treating physician is only provided controlling weight when his or her opinion is well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. § 416.927(d)(2).

With regard to James Nash, M.D. ("Dr. Nash"), the ALJ "relied heavily" on Dr. Nash's diagnosis of chronic fatigue syndrome, however, he assigned "limited weight" to Dr. Nash's opinion that Suriano had severe energy loss and fatigue, which caused Suriano to need to rest several times a day. (Tr. 859 ¶4; 862 ¶ 1). The ALJ explained that although the record establishes that Suriano has some energy loss and fatigue, the medical evidence does not support the extent of energy loss and fatigue that Dr. Nash reported. (Tr. 862 ¶ 1). The court notes that the only record from Dr. Nash in the 1,115 page record was a 1994 report written by Suriano's attorney for Dr. Nash' signature. (Tr. 309-11). Since Dr. Nash did not have any objective medical findings supporting the statement that Suriano had severe energy loss and fatigue, Dr. Nash was clearly relying on Suriano's subjective complaints. As discussed *infra*, the ALJ's decision that Suriano's subjective complaints were not fully credible was supported by substantial evidence. In a similar case where an ALJ discounted a treating

physician's opinion regarding the severity of his patient's complaints of CFS because they were based on the patient's subjective complaints and therefore not well-supported by clinical findings, the Third Circuit found that substantial evidence supported the ALJ's determination. Holiday v. Barnhart, 76 Fed. Appx. 479, 482 (3d Cir. 2003). Thus, the ALJ's decision in this case to reject Dr. Nash's statement regarding the severity of Suriano's energy loss and fatigue is supported by substantial evidence.

As for Richard Mellinger, M.D. ("Dr. Mellinger"), the ALJ stated that he assigned "great weight" to Dr. Mellinger's opinion that Suriano had degenerative joint disease and fibromyalgia, due to the treatment relationship between Dr. Mellinger and Suriano and the fact that those opinions are well supported and consistent with the record. (Tr. 857 ¶ 7; 861 ¶ 4). As for Dr. Mellinger's conclusion that Suriano is permanently disabled, the ALJ rejected it as being not supported or adequately explained. (Tr. 861 ¶ 4). I note that the ultimate disability determination is reserved for the ALJ and a treating physician's opinion on that topic is not entitled to any special significance. 20 C.F.R. § 416.927(e); SSR 96-5p. Dr. Mellinger found Suriano to be permanently disabled on March 3, 1999, despite the fact that Dr. Mellinger repeatedly noted her physical exam was within normal limits and he was very aware of her issues with narcotics and lying.³ (Tr. 518; 519; 619; 767; 770; 771; 772; 775; 776; 787; 795; 831; 976; 978; 997; 998; 999; 1000; 1004; 1005). Since substantial evidence supports the ALJ's finding that Suriano is not disabled, the ALJ did not improperly discount Dr. Mellinger's opinion in this regard.

The ALJ assigned "limited weight" to the opinions of Frank Noonan, D.O. ("Dr. Noonan") because of their internal inconsistency. (Tr. 862 ¶ 3). Dr. Noonan, a general

³I also note that the medical expert at the June 13, 2002 hearing made a point of telling the ALJ that he did not think Dr. Mellinger was aware of how much child care would actually be reflected in the record when he signed the form that Suriano was permanently disabled. (Tr. 72).

practitioner, wrote a note on April 9, 1991 stating that because of Suriano's severe fatigue, she "would not be able to handle even a cashier type job." (Tr. 167). When Dr. Noonan filled out a medical source statement a little more than three months later on July 25, 1991, Dr. Noonan indicated Suriano could perform a limited range of sedentary work. (Tr. 173-74). I note that Dr. Noonan's opinion regarding whether or not Suriano can work and what her RFC is is not a medical opinion and not entitled to any special significance. 20 C.F.R. § 416.927(e). Since Dr. Noonan's opinions regarding the severity of Suriano's fatigue, like Dr. Nash's opinions, are not supported by objective evidence and Suriano is not fully credible, the ALJ's decision to give limited weight to Dr. Noonan's inconsistent opinions is supported by substantial evidence.

Suriano also takes issue with the fact that the ALJ stated that he assigned "significant weight" to most of the opinions of Robert Garvin, DO ("Dr. Garvin"), but failed to explain which opinions he did not assign significant weight to or mention a comment Dr. Garvin made in 2000 that "the patient is drowsy and tired all day." (Tr. 862 ¶ 4). "The ALJ must consider all the evidence and give some reason for discounting the evidence she rejects." Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999). However, "[t]here is no requirement that the ALJ discuss in its opinion every tidbit of evidence included in the record." Hur v. Barnhart, 94 Fed. Appx. 130, 133 (3d Cir. 2004). Although it is true that Dr. Garvin noted that he was switching Suriano from Elavil to Serzone because Suriano was "drowsy and tired all day," the ALJ did not reject any of Dr. Garvin's opinions and there was no need to mention this statement regarding a subjective complaint because it did not serve to support or undermine Suriano's credibility or disability. (Tr. 664).

Although Suriano's argument is unclear, Suriano appears to object to the fact that the ALJ rejected the opinion of the medical expert at the fourth hearing in favor of the opinions

of her treating licensed psychologist, Michael Shires, MA (“Mr. Shires”). “Where, as here, the opinion of a treating physician conflicts with that of a non-treating, non-examining physician, the ALJ may choose whom to credit but ‘cannot reject evidence for no reason or for the wrong reason’ ” Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) (quoting Plummer, 186 F.3d at 429). Mr. Shires concluded that Suriano suffered from depression, anxiety, and a pain disorder, not somatoform disorder, whereas, the medical expert, Dr. Brown, testified that the most applicable listing would be 12.07, the somatoform listing. (Tr. 69; 858 ¶ 1). However, Dr. Brown did not find that Suriano met 12.07, since he felt there was a “huge issue of credibility” that he was not in a position to evaluate. (Tr. 70). The ALJ stated that he rejected Dr. Brown’s opinion in favor of Mr. Shires’ opinion because of their treatment relationship. Thus, the ALJ did not err in accepting Mr. Shires’ opinion over Dr. Brown’s.

The ALJ noted that Steven Katz, DO (“Dr. Katz”), after decreasing the dosage of Xanax and Methadone, explained on August 23, 2005 that his goal was “to further decrease the medication in hopes of increasing her functionality.” (Tr. 861 ¶ 3; 1072). From that statement, the ALJ “glean[ed]” that Suriano’s decreased functioning was “in a large part attributable to the amount of medications” she was taking. (Tr. 861 ¶ 3). After noting that the pain management practice Suriano was going to see would no longer prescribe Suriano pain medication, that Suriano’s husband had told him she was performing daily living activities and little else, and that Dr. Katz was ordering laboratory tests to “rule out any untoward drug effect,” the ALJ’s conclusion was hardly a substitution of his own opinion for that of Dr. Katz. The ALJ assigned “limited weight” to Dr. Katz’ opinion on July 26, 2005 that there were no signs of substance abuse, because the ALJ found that to be inconsistent with the rest of the record, including Dr. Katz’s statements in August discussed *supra*. (Id.). Since the record clearly reflects Suriano’s overuse of narcotics and that doctors and pharmacists were very concerned about

Suriano's use of narcotics, especially her attempts to get narcotics from more than one doctor at a time, substantial evidence supports the ALJ's decision to reject Dr. Katz' inconsistent statement.

Suriano also argued that the ALJ erred in rejecting the opinion of a R.N.C., who stated that Suriano was "not educated for any kind of specific work, so it would be difficult for her to get out and even support herself, let alone deal with all of the financial difficulties of the family." (Tr. 268; 862 ¶ 2). An R.N.C. is considered to be an "other source" that the ALJ may also use evidence from to show the severity of impairments and how the impairments affect the person's ability to work. See 20 C.F.R. § 416.913. The ALJ noted that the R.N.C. was not considered an "acceptable medical source" and assigned "limited weight" to the R.N.C.'s conclusion, because the ALJ found it unclear how the R.N.C. reached the conclusion and found the R.N.C.'s conclusion was not supported by the evidence. (Tr. 862 ¶ 2). This conclusion is supported by substantial evidence.

B. Second, Suriano alleges that the ALJ erred by not explaining which parts of SSR 99-2p applied to Suriano and which parts did not. SSR 99-2p explains that chronic fatigue syndrome ("CFS") can, "when accompanied by appropriate medical signs or laboratory findings" be a medically determinable impairment that can be the basis of a disability finding and "provides guidance for the evaluation of claims involving CFS." 1999 WL 271569, at *1. The ruling also states that "[c]laims involving CFS are adjudicated using the sequential evaluation process, just as for any other impairment." (Id at 3). In response to the remand order, the ALJ noted that he considered SSR 99-2p and found that Suriano suffered from CFS after considering Dr. Nash's opinion and the two of the bases listed in SSR 99-2p.⁴ (Tr. 859 ¶ 4). The ALJ noted that he considered Suriano's CFS in the rest of the

⁴The bases the ALJ considered are listed in SSR 99-2p as "examples of medical signs that establish the existence of a medically determinable impairment," and they are "[p]ersistent, reproducible muscle tenderness on repeated examination, including the presence of positive tender points" and "[a]ny other medical signs that are

steps and acknowledged that the purpose of SSR 99-2p was to provide claimants with CFS a “full and thorough evaluation of that disorder in their disability claim.” (Tr. 860 ¶ 1). The Third Circuit has found that an ALJ does not have a duty to even mention SSR 99-2p in his decision and there is no reason to remand on the basis of SSR 99-2p as long as the ALJ “by and large comported with the approach set forth” in SSR 99-2p and followed the five step evaluation. Holiday, 76 Fed. Appx. at 482. Since the ALJ clearly considered SSR 99-2p and Suriano’s CFS in his five step evaluation, the decision regarding the effects of CFS on Suriano is not legally erroneous on this basis.

C. Third, Suriano argues that the ALJ’s finding that she could do sedentary work is not supported by substantial evidence because the ALJ relied on VE testimony that was inconsistent with the DOT, SSR 83-12, and did not constitute an adequate explanation. SSR 00-4p provides that the ALJ has a duty to inquire on the record whether or not there is an inconsistency, and if there is a conflict between the DOT and the testimony of the VE, the ALJ “must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information.” 2000 WL 1898704, at 2. SSR 00-4p also states that a reasonable basis for an explanation of such conflicts regarding information about a particular occupation’s requirements may be “from a VE’s or VS’s experience in job placement or career counseling.” (Id.). SSR 83-12 provides that unskilled jobs are “particularly structured so that a person cannot ordinarily sit or stand at will,” however, where a sit/stand option is required, a vocational expert or specialist “should be consulted to clarify the implications for the occupational base.” 1983 WL 31253, at *4. The ALJ included in his hypothetical to the VE that the work would have to be unskilled,

consistent with medically accepted clinical practice and are consistent with the other evidence in the record.” See SSR 99-2p, at *3.

sedentary with a sit/stand option. (Tr. 907-09). After the VE listed occupations intended to accommodate the restrictions in the ALJ's hypothetical, the ALJ asked the VE if his testimony was consistent with the DOT, to which the VE responded it was with the exception of allowing a sit/stand option. (Tr. 911-12). The VE went on to explain that he felt the occupations he listed would allow for a sit/stand option based on his "understanding of the essential job duties of the particular occupations [he] references and whether sitting, standing, or changing position would have an effect on the productivity in those jobs." (Tr. 912). Thus, the ALJ's decision is consistent with SSRs 00-4p and 83-12, and is not a basis for remand. See SSRs 00-4p, 83-12; Henderson v. SSA, 87 Fed. Appx. 248, 252-253 (3d Cir. 2004); Boone v. Barnhart, 353 F.3d 203, 210 (3d Cir. 2003) ("[W]e shall not interpret SSR 83-12 to mandate reversal whenever the ALJ does not set out specific findings concerning the erosion of the occupational base if, as here, the ALJ has received the assistance of a VE in considering the more precise question whether there are a significant number of jobs in the economy that the claimant can perform."); Adams v. Barnhart, No. 02-2365, 2004 WL 632704, at *2-3 (E.D. Pa. Jan. 29, 2004) (finding that where a VE explained why the listed sedentary occupations would allow for a sit/stand option, the ALJ could rely on this testimony).

D. Fourth, Suriano alleges that the ALJ failed to properly assess her credibility and erred by not fully explaining his partial rejection of her father's testimony. "Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." Pysher 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. § 416.929. The ALJ must first determine if there is an underlying medically determinable impairment that could reasonably be expected to produce the alleged symptoms. See 20 C.F.R. § 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. The ALJ is also 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)).

The ALJ determined that Suriano's medically determinable impairments could reasonably be expected to produce the alleged symptoms of chronic pain and fatigue, however, the ALJ found that Suriano's statements regarding the intensity, duration, and limiting effects of her symptoms were not entirely credible. (Tr. 863 ¶ 2). Philip Rodenberger, M.D. ("Dr. Rodenberger"), one of her treating physicians, stated on November 22, 1993, that "despite the extensiveness of her somatic complaints, she does not appear to be somebody who is in a lot of physical distress." (Tr. 267). On June 28, 1994, the doctor in the ER, Stanley Price, M.D. ("Dr. Price"), stated that Suriano was determined to be "in more emotional rather than physical distress." On June 6, 1996, Thomas Westphal, M.D. wrote to Dr. Mellinger after examining Suriano that she was taking too much Vicodin, most likely lies about the amount of Vicodin she takes, has a chemical dependency on Vicodin, and found it possible that taking Suriano off Vicodin would result in significant pain relief, resulting in Suriano only needing to exercise to resolve her back issues. (Tr. 499-500). Despite her complaints of pain and problems with her concentration and memory, exams throughout the alleged period of disability were normal with the exception of positive straight leg raises, some tenderness, disc herniation, mild disc bulges, and mild narrowing of disc space, and by 2002, mild obstructive sleep apnea. (Tr. 269; 442; 444-45; 446; 456; 499; 517; 521; 640; 642; 643; 671; 674; 718; 723; 725; 729; 735; 767; 770; 771; 772; 787; 791; 798;

799; 800; 807-08; 811-12; 835; 999; 1047; 1051; 1054; 1058; 1059; 1097-98; 1099).

The court does note that Steven Katz, DO (“Dr. Katz”) did treat Suriano for sacroiliac pain, spasms, and limited motion of lumbar spine that were confirmed by positive objective tests in 2003, however, with treatment Dr. Katz repeatedly noted that Suriano was doing fairly well and was relatively functional. (Tr. 1073; 1074; 1077; 1078; 1081; 1085; 1088; 1091; 1093; 1094; 1095). Additionally, despite Suriano’s testimony that she falls asleep while driving, the record reflects that she drove her husband to work, for some of the period of alleged disability, and her daughters to daily methadone treatment. (Tr. 50; 678; 747). Suriano has an extensive history of requesting more narcotics than were prescribed for various reasons ranging from claiming the bottle was lost or stolen to reporting she was in a car accident and that her pain was a 9 out of 10, without grimacing at all from the pain. (Tr. 456; 514; 518; 519; 522; 524; 529; 664; 776; 789; 792; 793; 794; 795; 796; 1006; 1007). Suriano also has a history of taking more narcotics than she was prescribed and taking her husband’s narcotics to supplement her own, which led to doctors and pharmacists expressing concern and reprimanding Suriano. (Tr. 500; 507; 511; 516; 518; 519; 521; 658; 664; 669; 671; 766; 771; 791; 797; 831; 832; 976; 978; 998; 1000; 1003; 1004; 1005; 1093). In fact, Dr. Mellinger noted on December 26, 2002, that Suriano lied to him by stating she was not taking Methadone, when a letter from another doctor contradicted this. (Tr. 997). Suriano also claims to have had a stroke and wanted to sue Vioxx over it, to which Dr. Mellinger responded that he did not have any medical records that showed she had a stroke (718; 964). In 2001, Dr. Garvin and Mr. Shires noted that Suriano’s pain management was finally under control and she appeared to be physically improved; Suriano also started going to church again, took care of her daughter’s child, did pool therapy three times a week until her insurance would not pay for it, and did one aerobic workout a week. (Tr. 646; 648; 649; 651; 653; 655; 678; 679; 680; 681; 682; 683).

In light of the above, I find that the ALJ sufficiently supported his credibility determination with substantial evidence.

Additionally, Suriano argues that the case should be remanded because the ALJ did not explain why he rejected some of Suriano's husband's testimony. It appears that the testimony rejected by the ALJ related to the severity of the effect of Suriano's impairments had on her, which the ALJ explained when he rejected Suriano's complaints and Suriano's daughter's testimony, by stating that the record does not support the alleged severity. Although it was an error to not explicitly explain why the ALJ rejected parts of Suriano's husband's testimony, since the ALJ clearly considered the testimony it would be remiss of this court to remand this case so that such an explanation, that clearly would not affect the outcome of the case, could be added by the ALJ, especially since this case has been pending for 17 years. Rutherford v. Barnhart, 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); Fisher v. Bowen, 869 F.2d 1055, 1057 (7th Cir. 1989) (stating that "No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result").

An appropriate Order follows.

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

NANCY SURIANO	:	CIVIL ACTION
	:	
v.	:	NO. 06-3615
	:	
MICHAEL J. ASTRUE,	:	
Commissioner of Social Security	:	

ORDER AND FINAL JUDGMENT

AND NOW, this 25th day of June, 2007, upon consideration of the brief in support of review filed by plaintiff and defendant's response thereto (Doc. Nos. 10; 14) and having found after careful and independent consideration that 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, for the reasons set forth in the memorandum above, it is hereby

ORDERED that:

1. **JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANT, AFFIRMING THE DECISION OF THE COMMISSIONER OF SOCIAL SECURITY** and the relief sought by Plaintiff is **DENIED**; and

2. The Clerk of Court is hereby directed to mark this case closed.

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