

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

MA VONGPHAKDY : CIVIL ACTION
: :
v. : NO. 07-1010
: :
MICHAEL J. ASTRUE, :
Commissioner of Social Security :

MEMORANDUM

LOWELL A. REED, Jr., Sr. J

DECEMBER 21, 2007

Before the court for consideration is plaintiff's brief and statement of issues in support of request for review (Doc. No. 9) and the response and reply thereto (Doc. Nos. 12, 14). The court makes the following findings and conclusions:

1. On June 12, 2005, Ma Vongphakdy ("Vongphakdy") protectively 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 May 10, 2005. (Tr. 53-59; 63-65). Throughout the administrative process, including an administrative hearing held on May 4, 2006 before an ALJ, Vongphakdy's claims were denied. (Tr. 3-5; 9-17; 43; 44-47). Pursuant to 42 U.S.C. § 405(g), on March 16, 2007, Vongphakdy filed her complaint in this court seeking review of that decision.

2. In her decision, the ALJ concluded that Vongphakdy's diabetes mellitus constituted a severe impairment. (Tr. 13 ¶ 3; 13 Finding 2).¹ The ALJ further concluded that Vongphakdy's impairment did not meet or equal a listing, that she retained the residual functional capacity ("RFC") to perform medium exertional work, and that she was not disabled. (Tr. 14 ¶ 1; 16 ¶ 5; 14 Findings 3, 4; 17 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). It 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. Vongphakdy raises numerous arguments in which she alleges that the determinations by the ALJ were either not supported by substantial evidence or were legally erroneous. Because the ALJ

¹ All numbered paragraph references to the ALJ's decision begin with the first full paragraph on each page.

did not apply the proper legal standards and because her determination is not supported by substantial evidence, I must remand to allow the Commissioner to conduct the proper analysis.

A. Vongphakdy argues that the ALJ incorrectly determined that her kidney, pulmonary, musculoskeletal, and mental impairments along with her obesity were not severe. “An impairment or combination of impairments can be found ‘not severe’ only if the evidence establishes a slight abnormality or a combination of slight abnormalities which have ‘no more than a minimal effect on an individual's ability to work.’” Newell v. Comm’r, 347 F.3d 541, 546-547 (3d Cir. 2003) (quoting SSR 85-28). The step two determination is a *de minimus* screening device under which any doubt should be resolved in favor of the claimant. Id.; McCrea v. Comm’r, 370 F.3d 357, 361 (3d Cir. 2004).

The ALJ’s explanation of why she did not find Vongphakdy’s kidney impairment to be severe, was that although she had some abnormalities in kidney function, there was “no diagnosis of a kidney condition.” (Tr. 13 ¶ 5). The ALJ was incorrect in asserting that there had been no diagnoses of a kidney problem, because Thongchai Vorasingha, M.D. (“Dr. Vorasingha”) noted a diagnosis of glomerulonephritis² three times in 1992 and 1993. (Tr. 240; 242; 244). However, the Third Circuit has held that a diagnosis, alone, is not sufficient to establish a severe impairment. Salles v. Comm’n of Soc. Sec., 229 Fed. Appx. 140, 145 (3d Cir. 2007). In order to demonstrate a severe kidney impairment, Vongphakdy would have had to provide evidence demonstrating that this limitation significantly affected her ability to perform work activities or impaired her mental ability to work. Id. The record fails to include any associated limitations.³ Thus, the ALJ did not err in finding Vongphakdy’s kidney impairment was not severe, and the ALJ’s failure to note the diagnoses of glomerulonephritis was harmless. See 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”).

As for Vongphakdy’s alleged pulmonary impairment, the ALJ acknowledges the pulmonary study from 1993 which demonstrated a “severe obstruction as well as low vital capacity.”⁴ (Tr. 87). However, the ALJ did not find that Vongphakdy had a severe pulmonary impairment because she found the record did not show “an ongoing pulmonary impairment 13 years later” and because Dr. Vorasingha never diagnosed such an impairment.⁵ (Tr. 13 ¶ 6). There are findings that Vongphakdy’s lungs were clear in 1989 by Dr. Vorasingha, in 2001 after a chest x-ray read by Mark Cooper, M.D. for Milton

²Dr. Vorasingha indicated the diagnosis denoted kidney inflammation. (Tr. 244).

³The court also notes that Dr. Vorasingha never identified the objective medical evidence he used to formulate these diagnoses, which were not mentioned again after 1993, and Vongphakdy’s creatinine and blood urea nitrogen levels from 1989 to 2005 were within the normal range. (Tr. 108; 110; 153; 187; 199; 210; 214). Thus, it does not appear that the record contains evidence of a medically acceptable clinical or laboratory diagnostic technique used to diagnosis a kidney impairment.

⁴Although this evidence predates the alleged period of disability, the ALJ specifically stated that she considered the entire medical record pursuant to 20 C.F.R. § 416.912(d). Since the evidence relates to a number of ongoing medical conditions about which Vongphakdy still complains, the court also considered this evidence.

⁵I note that Dr. Vorasingha was a treating physician for Vongphakdy for the duration of the medical record which started in 1989 and continued through 2006. (Tr. 142; 159). Milton Soiferman, D.O. (“Dr. Soiferman”) was also her treating doctor from 2000 through the end of the medical record. (Tr. 107; 131-32; 139-40).

Soiferman, D.O. (“Dr. Soiferman”), and by Dr. Soiferman in 2003. (Tr. 95; 122; 159). However, despite noting that her lungs were clear to auscultation, Dr. Soiferman diagnosed Vongphakdy with lung disease in 2001, chronic obstructive pulmonary disease in 2002, and asthma in 2003. (Tr. 97; 105; 106). In 2006, William Fought (“Mr. Fought”), a physician’s assistant for Dr. Soiferman, noted a medical history including asthma. (Tr. 139). The ALJ rejected Mr. Fought’s mention of asthma, by stating that Mr. Fought’s opinion was not entitled to special weight since he was not a physician, asthma had not been diagnosed by Dr. Soiferman, and because no asthma medications had been prescribed. (Tr. 16 ¶ 1). At the hearing on May 4, 2006, Vongphakdy testified that because of her alleged leg pain and her shortness of breath, she has to rest twice while walking a block. (Tr. 30). 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). Since the ALJ failed to discuss or give a reason for rejecting Dr. Soiferman’s diagnoses that were supported by some objective medical evidence and complaints of limitations, this case must be remanded. Additionally, if the ALJ finds Dr. Soiferman’s diagnoses to be in conflict with his notes that Vongphakdy’s lungs are clear to auscultation, she should recontact him pursuant to 20 C.F.R. § 416.912(e)(1), which provides, “[w]e will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved [or] the report does not contain all the necessary information.”

With regard to Vongphakdy’s alleged musculoskeletal impairment and leg pain, the ALJ noted that an x-ray from 2003 showed straightening of the normal cervical lordosis,⁶ however, without further explanation, the ALJ found this to be “of no consequence.” (Tr. 13 ¶ 6; 121). In finding this impairment not to be severe, the ALJ also stated that no further studies had been done and there had been no further related complaints. (*Id.*). I note that an x-ray from 2001 revealed degenerative changes in her thoracic spine and that the record is replete with numerous diagnoses by Dr. Vorasingha of osteoarthritis and complaints through 2006 by Vongphakdy of pain in her knees and legs. (Tr. 29-31; 35-37; 91; 122; 126; 143; 146; 153-157; 222-245). Mr. Fought noted a history of degenerative joint disease, also known as osteoarthritis, in 2006, and stated that it prevented her from walking, stooping, kneeling, and squatting for work. (Tr. 139-40). The ALJ did not discuss the diagnoses of osteoarthritis and dismissed Mr. Fought’s inclusion of degenerative joint disease in the medical history, noting that his opinion is not entitled to special weight since he is not a doctor and because there are no x-rays to support a diagnosis of degenerative joint disease. (Tr. 16 ¶ 1). As the ALJ noted, a consultative examination on September 1, 2005 revealed that Vongphakdy had a full range of motion in her upper and lower extremities and her back with no muscle atrophy, swelling, palpable muscle spasm, or tenderness. (Tr. 128). However, as discussed *supra*, the ALJ must discuss all the evidence and explain why she is discounting such evidence. Plummer, 186 F.3d at 429. Additionally, an ALJ cannot substitute her lay opinion for that of a treating doctor and can only outright reject a treating doctor’s opinion on the basis of contradictory medical evidence. *Id.* Since the ALJ failed to even acknowledge Dr. Vorasingha’s diagnoses of osteoarthritis, that were supported by some objective medical evidence and resultant limitations, this issue must be reexamined and properly evaluated on remand.

The court also notes that in 1996, a neurologist, Dara Jameison, MD. (“Dr. Jameison”) discovered a benign vascular formation in Vongphakdy’s brain which the neurologist thought could explain Vongphakdy’s complaints of numbness in her legs. (Tr. 160). The ALJ did not appear to give any weight to this objective medical evidence of the vascular formation because Dr. Jameison stated

⁶I note that the x-ray of the cervical spine that revealed a straightening of the normal cervical lordosis, to which the ALJ refers, states that the patient was a 21 year old male with the last name of Vongphakdy. (Tr. 121). It is possible that her son came as a translator and his name was accidentally entered as the patient. The identity of the patient for this x-ray should be clarified upon remand.

Vongphakdy should be watched rather than proceeding to investigate further, unless her symptoms worsened. (Tr. 14 ¶ 4; 161). However, Vongphakdy continued to complain of knee pain in 2005. (Tr. 91; 125; 143). Upon remand, this finding should be considered to determine whether it constitutes a severe impairment or gives further credibility to her complaints of related limitations.

Vongphakdy also asserts that the ALJ erred in failing to discuss her obesity and failing to find it to be a severe impairment. During the relevant time period, Vongphakdy's weight ranged from 194 to 202 pounds and she was measured as being 5 feet tall. (Tr. 127; 131; 143). The ALJ noted that Vongphakdy was 5 feet tall and weighed 202 pounds, however, she did not discuss her obesity any further. (Tr. 15 ¶ 6). As in Rutherford, Vongphakdy did not mention her obesity in her disability application or at her hearing and did not specifically allege how her obesity would further impair her ability to work. 339 F.3d at 552-53. Since Vongphakdy's height and weight were sufficient to alert her doctors to her obesity and factor into the considerations upon which the ALJ relied,⁷ if there was no other basis for remand, this alone would not result in a remand. Id. (Tr. 143; 163). However, upon remand, her obesity should be explicitly considered pursuant to SSR 02-1p.

Vongphakdy further argues that the ALJ erred by not finding her mental impairment severe or not further developing the record in this regard. As evidence of her mental impairment, Vongphakdy points to the fact she was on Prozac, Librium, and/or Zoloft in 1992 and 1994-1996 and that Dr. Vorasingha diagnosed anxiety one time in April of 1994. (Tr. 226; 228; 230; 232; 234; 148; 242; 244). Dr. Jamieson, a neurologist who examined Vongphakdy twice, noted in 1996 that she "appeared mildly depressed" and wondered "if depression [was] a concern with her." (Tr. 161). In December of 2001, Dr. Vorasingha, despite never having previously noted depression, stated Vongphakdy had a history of depression. (Tr. 143). I note that the record does not include any records from a psychologist or a psychiatrist. Dr. Vorasingha's numerous reports that Vongphakdy was temporarily disabled do not include depression or anxiety as a diagnosis, and there is no evidence in the record of any mental impairment resulting in any limitations significantly affecting her ability to work. Vongphakdy argues that the ALJ had a duty to develop the record further in this regard. As 20 C.F.R. § 416.912(a) clearly provides, it is the plaintiff's burden to prove disability, meaning the plaintiff "must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s)." Thus, the ALJ did not err in failing to further develop the record in this regard or finding that Vongphakdy did not have a severe mental impairment.

B. The above analysis demonstrates that the ALJ failed to fully consider the record before her, and thus, the court will not make a ruling on Vongphakdy's remaining arguments regarding the ALJ failing to order a consultative examination, failing to explain the RFC in violation of SSR 96-8p, improperly rejecting opinion of treating physician's assistant and treating physician, and improperly limiting Vongphakdy's credibility. The ALJ is directed to reevaluate those issues once she has fully examined the record in accordance with the proper procedures and legal standards.

5. Therefore, this case must be remanded in order for the ALJ to supplement her decision in a manner consistent with this opinion. An appropriate Order follows.

⁷ I note that two of her doctors told her to watch her diet and exercise. (Tr. 143; 163).

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ORDER AND FINAL JUDGMENT

AND NOW, this 21st day of December, 2007, upon consideration of the brief in support of review filed by plaintiff and response and reply thereto (Doc. Nos. 9; 12; 14) and having found after careful and independent consideration of the record that the Commissioner did not apply the correct legal standards and that the record does not contain substantial evidence to support the ALJ's findings of fact and conclusions of law, it is concluded that the action must be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g). Therefore, for the reasons set forth in the memorandum above, it is hereby **ORDERED** that:

1. **JUDGMENT IS ENTERED IN FAVOR OF THE PLAINTIFF, REVERSING THE DECISION OF THE COMMISSIONER OF SOCIAL SECURITY** for the purposes of this remand only and the relief sought by Plaintiff is **GRANTED** to the extent that the matter is **REMANDED** for further proceedings consistent with this adjudication; and
2. The Clerk of Court is hereby directed to mark this case closed.

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