

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

DARLENE STOVER,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 07-2041
	:	
v.	:	
	:	
MICHAEL J. ASTRUE,	:	
Commissioner, Social Security	:	
Administration,	:	
	:	
Defendant.	:	

MEMORANDUM

Giles, J.

August 28, 2008

I. INTRODUCTION

Darlene Stover (“Plaintiff”) seeks judicial review pursuant to 42 U.S.C. §§ 405(g) and 1383(c) of the final decision of Michael J. Astrue, Commissioner of the Social Security Administration (“Commissioner”), denying her claim for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) under Titles II and XVI of the Social Security Act (“the Act”), 42 U.S.C. §§ 401-433, 1381-1383c. Plaintiff filed a Motion for Summary Judgment with this court seeking reversal of the decision of the Administrative Law Judge (ALJ) and an award of disability benefits, or, in the alternative, remand to the Commissioner. Defendant filed a Response, arguing that substantial evidence supported the Commissioner’s decision that Plaintiff retains the residual functional capacity (RFC) for light work with certain nonexertional limitations and that she is able to perform her past relevant work as a parking lot cashier.

For the reasons set forth below, the matter is remanded to the Commissioner for further proceedings consistent with this Memorandum and the related Order.

II. PROCEDURAL HISTORY

Plaintiff filed an application for DIB and SSI on April 19, 2004, alleging disability with an onset date of January 31, 2004 due to mood disorders and asthma.¹ (R. 57, 211.) Plaintiff's claim was initially denied. (R. 32-35.) Plaintiff requested a hearing on April 16, 2005. (R. 36.) An administrative hearing was held on March 29, 2006.² (R. 26.) At this hearing, Plaintiff and vocational expert (VE) Sherry Kristal-Turetzky testified.³ (Admin. Hr'g Tr. 1-36, March 29, 2006.)

On May 17, 2006, the ALJ issued an adverse ruling, finding that Plaintiff is not disabled and that she retains the capacity to perform her past relevant unskilled, light work as a parking lot cashier. (R. 17-25.) On May 26, 2006, Plaintiff submitted a request for review to the Appeals Council. (R. 16.) This request was denied on February 2, 2007. (R. 10-12.) Plaintiff then moved the Appeals Council reopen their decision. (R. 9.) Appeals Council granted that motion to reopen and issued a second denial on March 23, 2007. (R. 5-8.) Plaintiff filed her complaint in district court on May 18, 2007.

¹ Citations to the administrative record will be indicated by "R." followed by the page number.

² An administrative hearing was scheduled for September 16, 2005, at which time Plaintiff was informed of her right to representation. Plaintiff indicated that she wished to obtain counsel, and this administrative hearing was continued. (R. 50-51.)

³ Citations to the transcript of the March 29, 2006 administrative hearing will be indicated by "Tr." followed by the page number.

III. DISCUSSION

A. Standard of Review

The role of this court upon judicial review is to determine whether substantial evidence in the administrative record supports the Commissioner's final decision. See Stunkard v. Sec'y of Health & Human Serv., 841 F.2d 57, 59 (3d Cir. 1988). The United States Supreme Court has defined substantial evidence 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) (citations omitted). It is more than a mere scintilla of evidence but may be less than a preponderance. See Stunkard, 841 F.2d at 59. This court's review is not de novo, and the evidence of record will not be weighed a second time. See Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987).

B. Burden of Proof in Disability Proceedings

In order to be found "disabled" under the Act, a plaintiff must carry the initial burden of demonstrating that she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than twelve months." 20 C.F.R. § 416.905(a).

The Social Security Administration (SSA) has promulgated regulations establishing a five-step sequential evaluation for determining whether a claimant is disabled. Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999). At step one, the Commissioner must determine whether a claimant is engaged in "substantial gainful activity." 20 C.F.R. § 416.920(b); Plummer, 186 F.3d at 428. If a claimant is, then she is not disabled. Id. At step two, the

Commissioner must determine whether claimant suffers from a “severe” impairment or combination of impairments. 20 C.F.R. § 416.920(c). If not, the claimant is determined not to be disabled. Id. At step three, the Commissioner must determine whether the claimant’s severe medical impairment(s) meet or equal the severity of any impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. § 416.920(d). If so, the claimant is disabled. Id. If the claimant’s impairment(s) do not meet a listed condition, the Commissioner proceeds to step four to determine whether a claimant retains the residual functional capacity (RFC) to perform her past relevant work. 20 C.F.R. § 416.920(e)-(f). If the claimant retains such capacity, she is not disabled. If not, the Commissioner proceeds to step five. At this final step, the burden of production shifts to the Commissioner to demonstrate that there are jobs existing in significant numbers in the national economy that the claimant can perform, “consistent with her medical impairments, age, education, past work experience and residual functional capacity.” Plummer, 186 F.3d at 428; 20 C.F.R. § 416.920(e), (g).

C. The ALJ’s Decision

1. The ALJ’s sequential evaluation of Plaintiff’s claim.

In the ALJ’s written decision, he analyzed Plaintiff’s claim in accordance with the sequential evaluation described above. At the second step, the ALJ determined that Plaintiff suffered from the following severe impairments: back disorder and mood disorder. At the third step, the ALJ found that Plaintiff’s impairments did not meet the criteria found in the Listing of Impairments to Appendix 1, Subpart P, Regulation No. 4, 20 C.F.R. § 404.1520(d). The ALJ concluded his analysis at the fourth step and determined that Plaintiff had a residual functional

capacity (RFC) for light work, with the following nonexertional limitations: Plaintiff can occasionally climb stairs, bend or stoop, kneel, crouch-squat, and balance; must avoid exposure to hazardous machinery and unprotected heights; and perform only simple, routine tasks. The ALJ concluded that Plaintiff retained the ability to continue her past relevant work as a parking lot cashier. Having made that determination, the ALJ concluded that Plaintiff was not disabled.

2. The ALJ's decision is not supported by substantial evidence.

The court finds that the ALJ failed to consider all of the medical evidence of record and that his findings with respect to certain medical evidence pertaining to Plaintiff's mood disorder are irreconcilably inconsistent. Specifically, the ALJ failed to consider the entire medical opinion of the State Agency psychologist, the ALJ appears to have made two different credibility findings as to Dr. Rubin's medical opinions concerning Plaintiff's mental impairments, and the ALJ mistakenly represents that certain nonexertional limitations were posed to the VE in a hypothetical question. These omissions and errors concern medical evidence that is probative of the question before the ALJ at Step Four: whether Plaintiff could return to her past relevant work as a parking lot cashier. Due to these omissions and errors, the court finds that the ALJ's decision is not supported by substantial evidence.

In determining a claimant's RFC, an ALJ is obligated to consider all of the evidence before him. Burnett v. Comm'r of Social Security, 220 F.3d 112, 121 (3d Cir. 2000) (citing Plummer, 186 F.3d at 429). Further, an ALJ must give "some indication of the evidence which he rejects and his reason(s) for discounting such evidence." Burnett, 220 F.3d at 121 (citing Plummer, 186 F.3d at 429; Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981), r'hrq. denied, 650

F.2d 481 (3d Cir. 1981)). Without such explanations, this court, upon review, “cannot tell if significant probative evidence was not credited or simply ignored.” Cotter, 642 F.2d at 705.

In Burnett v. Comm’r of Social Security, the ALJ failed to mention and explain contradictory objective medical evidence. 220 F.3d at 122. The Third Circuit found that the “failure to mention and explain this contradictory medical evidence was error” and remanded the matter to the Commissioner, with the direction that the “ALJ must review all of the pertinent medical evidence, explaining his conciliations and rejections.” Id.

However, although “an ALJ may not reject pertinent or probative evidence without an explanation,” the ALJ is entitled to overlook evidence that is “neither pertinent, relevant nor probative.” Johnson v. Comm’r of Soc. Sec., 529 F.3d 198, 204 (3d Cir. 2008) (emphasis added). The probative value of evidence may be discounted and rendered “irrelevant” where there is “[o]verwhelming evidence” to the contrary in the record. Id. Thus, in such instances, an ALJ’s failure to cite the evidence means that the ALJ “implicitly rejected it.” Id. at 205.

During the administrative hearing, the court posed the following hypothetical to the VE:

Let’s assume a hypothetical claimant at the light exertional level. Same age as the claimant here, 45, same education level, 12th grade who occasionally can perform the postural activities; no significant manipulative limitations; no significant physical limitations; no significant communicative limitations. She should avoid hazardous machinery and unprotected heights. She would be limited to simple, routine tasks.

(Tr. 31-32.) The VE responded that an individual with those restrictions could perform Plaintiff’s past relevant work as a parking lot cashier. (Tr. 32.) The court observes that the only “mental limitation” posed in that hypothetical is a limitation of performing simple, routine tasks.

During the administrative hearing, Plaintiff’s attorney posed a hypothetical to the VE,

asking the VE to consider as credible the mental limitations as set forth in the medical source statement of Beth Farber Rubin, who performed a consultative psychological evaluation of Plaintiff. The VE answered that, depending on the frequency of certain behaviors, such an individual would be unable to sustain any gainful employment. (Tr. 34-35.)

In his opinion, the ALJ found that Plaintiff was subject to the nonexertional limitation of performing “simple, routine tasks.” (R. 22.)

In his written decision, the ALJ stated that he accorded “significant weight” to the medical opinion of the State Agency psychologist.⁴ The ALJ specifically discussed the psychiatric review form (Ex. 12-F, R. 174-187) and the mental residual functional capacity assessment form (Ex. 11-F, R. 170-173) completed by the State Agency psychologist. With respect to these exhibits evidencing the opinion of the State Agency psychologist, the ALJ recounted the following:

The State Agency psychologist indicated that the claimant has mild restriction of activities of daily living, moderate difficulties in maintaining social functioning, and moderate difficulties in maintaining concentration, persistence or pace (Exhibit 12-F). It was also indicated that the record does not document any episode of decompensation (Exhibit 12-F). Additionally, on February 17, 2005, the State Agency psychologist completed a mental residual functional capacity assessment form, in which he indicated that the claimant has markedly limited ability to carry out detailed instructions (Exhibit 11-F). He also indicated that the claimant has no significant limitation as to the ability to understand, remember, and carry out very short and simple directions.

(R. 23.) In his written opinion, however, the ALJ neglected to discuss the following findings of the State Agency psychologist: that Plaintiff was moderately limited in the ability to perform

⁴ The name of the State Agency psychologist is not legible in the record.

activities within a schedule, maintain regular attendance, and be punctual within customary tolerances and in her ability to respond appropriately to changes in the work setting; and that she was markedly limited in her ability to interact appropriately with the general public. Further, in the psychiatric review, the State Agency psychologist found that Plaintiff had a moderate degree of limitation with respect to difficulties in maintaining social functioning. This is the same degree of limitation that the State Agency psychologist found that Plaintiff suffered with respect to “difficulties in maintaining concentration, persistence, or pace.”

There is absolutely no indication from the ALJ, however, that he considered the State Agency’s psychologist’s opinions that Plaintiff was moderately to markedly limited in the following areas: the ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; the ability to respond appropriately to changes in the work setting; the ability to interact appropriately with the general public; and, difficulties in maintaining social functioning. This court has no way of knowing whether the ALJ considered the “second set” of the State Agency psychologist’s opinions, or simply ignored them. Either way, this lack of explicit consideration of probative evidence undermines this court’s ability to review the ALJ’s decision.

As evidenced by counsel’s hypothetical to the VE, irritability, impairment in interactions with coworkers and supervisors, and impairment in terms of responding to changes in routine would negatively impact an individual’s ability to work, and specifically, to perform Plaintiff’s past relevant work of parking lot cashier. (Tr. 34-35.) The second set of the State Agency psychologist’s opinions are probative and pertinent, and the ALJ cannot reject such evidence without an explanation. See Burnett, 220 F.3d at 122; Johnson, 529 F.2d at 204. There is not

“overwhelming” evidence to the contrary in the record. See Johnson, 529 F.2d at 204.

Therefore, this court cannot conclude that the ALJ’s failure to cite the evidence means that the ALJ implicitly rejected it. See id. at 205. Therefore, remand is required.

Next, the ALJ’s treatment of the medical source statement of Dr. Rubin is inconsistent, and the questions arising from this inconsistency directly pertain to Plaintiff’s ability to return to her past relevant work. In his review of the medical evidence, the ALJ stated that he accorded little weight to the February 15, 2005 consultative psychological evaluation report of Dr. Rubin as it was “based upon statements from the claimant without a detailed study.” (R. 24 (citing Ex. 9-F, R. 158-162).) Dr. Rubin made the following medical source statement:

In terms of understanding and remembering short simple instructions, she is likely to be only moderately impaired. She appears to have relatively adequate concentration capacity. However, carrying out instructions and details is likely to be markedly impaired because of her level of her anergic state and her psychomotor retardation which is considerable. In terms of carrying out and remembering details, she regularly forgets her keys, important papers, and has to read items many times to retain information.

In terms of interacting with the public, she is likely to be markedly impaired since she is socially isolated and wants to be away from others. In terms of interacting to supervisors, she can become irritable and agitated and argumentative when she cannot isolate herself to a marked degree. In terms of interacting with coworkers, she argues and can cry with them to a marked degree. In terms of responding to work pressure, she would simply walk off the job or be absent. She also might scream at coworkers. In terms of responding to changes in routine, she is likely to be markedly impaired. She needs consistency.

(R. 161.)

However, later in his opinion, the ALJ stated that “[t]he assessment from Dr. Rubin that

the claimant has markedly impaired ability to carry out detailed instruction and self isolates is given appropriate weight in the hypothetical to the vocational expert, with the nonexertional limitation for simple, routine tasks (Exhibit 9-F, p.4).” (R. 24 (emphasis added).) This statement is an inaccurate characterization of both the hypothetical posed by the ALJ to the VE, as well as of Dr. Rubin’s opinion. First, it is not clear what the ALJ intends to signify by “self isolates.” If he is referring to Dr. Rubin’s finding that Plaintiff is socially isolated, the ALJ pulls this finding from a sentence of Dr. Rubin’s medical source statement opining that Plaintiff is markedly impaired in terms of interacting with the public. It appears to this court, then, that the ALJ does accord some weight to the second paragraph of Dr. Rubin’s medical source statement, concerning interaction with the public, supervisors, coworkers, and change in routine, notwithstanding the ALJ’s statement that he gave “little weight” to Dr. Rubin’s medical source statement. Further, despite the ALJ’s representation that the “marked impairment” of self isolation is represented in the hypothetical to the ALJ, it is clear to the court that this impairment is not present in the hypothetical the ALJ posed to the VE. A hypothetical question must reflect all of the Plaintiff’s impairments that are supported by the record. Plummer, 186 F.3d at 431. If the ALJ, in his written opinion, did in fact find that Plaintiff is impaired due to “self isolation,” the VE’s answer to the ALJ’s hypothetical, which did not include that limitation, cannot be substantial evidence in support of the ALJ’s findings on Plaintiff’s RFC. The ALJ’s treatment of Dr. Rubin’s opinions is inconsistent and confusing. Because Dr. Rubin’s opinions, if credited, are probative and pertinent to Plaintiff’s ability to return to her past relevant employment, as evidenced by the testimony of the VE, the court must remand the matter.

Finally, the court notes that Dr. Rubin’s opinions as to Plaintiff’s limitations concerning

interaction with the public, supervisors, coworkers; and changes in routine, are, at least partially, supported by the second set of opinions of the State Agency psychologist. This overlap is critical, and must be addressed by the Commissioner on remand.

The Commissioner is correct in his assertion that in reviewing the denial of benefits, the role of this court is not to decide whether it would have reached a different decision had it been in the position of the ALJ. See Monsour, 806 F.2d at 1190-91 (3d Cir. 1986). In order to determine whether substantial evidence supports the ALJ's decision, however, this court must have the opportunity to conduct a meaningful review of an ALJ's decision. The ALJ's apparent failure to consider probative and pertinent medical evidence has deprived this court of that opportunity.

IV. CONCLUSION

Having found that remand is appropriate for the foregoing reasons, the court declines to address the remainder of the arguments made by the parties. The matter is remanded to the Commissioner, and an appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Plaintiff,	:	NO. 07-2041
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v.	:	
	:	
MICHAEL J. ASTRUE,	:	
Commissioner, Social Security	:	
Administration,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 28th day of August, 2008, upon review of Plaintiff's Motion for Summary Judgment (Docket No. 6) and Defendant's Response in opposition thereto, it is hereby ORDERED that said motion is GRANTED, and the matter is REMANDED to the Commissioner for further proceedings in accordance with the Memorandum issued this same date.

BY THE COURT:

S/ James T. Giles

J.