

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SANDRA TAYLOR,)
)
 Plaintiff,)
)
 v.) Civ. No. 02-1367-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant.)

Gary L. Smith, Esquire, Newark, Delaware. Counsel for Plaintiff.

Colm F. Connolly, United States Attorney, Patricia K. Nash,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Defendant. Of
Counsel: James A. Winn, Regional Chief Counsel, Lori R. Karimoto,
Assistant Regional Counsel, Social Security Administration,
Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: February 26, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Sandra Taylor filed this action against Jo Anne Barnhart, Commissioner of Social Security ("Commissioner"), on August 8, 2002. (D.I. 1) Pursuant to 42 U.S.C. § 405(g), plaintiff seeks judicial review of the final decision by the Commissioner denying her claim for disability insurance benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Currently before the court are the parties' cross-motions for summary judgment. (D.I. 10, 14) For the following reasons, the court denies plaintiff's motion and grants the Commissioner's motion.

II. BACKGROUND

A. Procedural History

On February 17, 2000, plaintiff filed an application for DIB.¹ (D.I. 7 at 79) Plaintiff alleged that she was disabled and unable to work due to Meniere's disease and anxiety attacks as of December 1, 1996. (Id. at 79, 94) The State denied plaintiff's original application on July 17, 2000 and her application on reconsideration on December 15, 2000.

Plaintiff requested a hearing before an administrative law judge ("ALJ"). (Id. at 67) On August 22, 2001, the ALJ

¹ This application is the third application that plaintiff has filed for Title II disability benefits. The first application was filed on October 26, 1995 and was denied. The second application was filed June 4, 1996 and was also denied.

conducted a hearing where plaintiff and an independent vocational expert testified. (Id. at 23-48) On August 31, 2001, the ALJ issued a decision denying plaintiff's claim. (Id. at 10-19) In considering the entire record, the ALJ found the following:

1. Claimant meets the nondisability requirements for a period of disability and disability insurance benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits through December 31, 2002.
2. Claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. Claimant has an anxiety disorder with panic attacks, Meniere's disease and a sensory-neural hearing loss of the left ear, a combination of impairments considered "severe" based on the requirements in the Regulations 20 C.F.R. §§ 404.1520 (b).
4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. Claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.
6. The ALJ has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairments (20 CFR § 404.1527).
7. Claimant has the following residual functional capacity: she has no exertional or physical limitations but due to her nonexertional impairments she is limited to performing one-to-two step tasks, and is capable of understanding simple, straight forward written or verbal instructions involving low to moderate levels of stress and frustration. She has to limit interaction with the public and co-workers to a minimal level. She must avoid working around heights, moving machinery or jobs involving significant climbing. Due to her hearing loss she must avoid jobs involving significant participation in work setting meetings or group conversations.

8. Claimant is unable to perform any of her past relevant work (20 CFR § 404.1565).
9. Claimant was 46 years old, or a younger individual at the alleged onset date of disability but is currently 51 years old, or a person closely approaching advanced age (20 CFR § 404.1563).
10. Claimant has a limited (tenth grade) education (20 CFR § 404.1564).
11. Claimant performed unskilled work in the past and has no transferable skills (20 CFR § 404.1568).
12. Considering the types of jobs that the claimant is still functionally capable of performing in combination with the claimant's age, education and work experience, she could be expected to make a vocational adjustment to work that exists in significant numbers in the national economy. Examples of such jobs include medium exertion jobs as a cleaner (4,600 locally and 1,600,000 nationally), and a hand packer (260 locally and 100,000 nationally), and light jobs as an inspector/checker (260 locally and 101,000 nationally), and a cleaner (500 locally and 168,000 nationally).
13. Claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision.

(Id. at 19-20) In making these findings, the ALJ reviewed the plaintiff's medical records from 1994 through 2000, noting the specific diagnoses of each physician who examined plaintiff. The ALJ also considered plaintiff's responses to a Daily Activities Questionnaire. Accordingly, the ALJ denied plaintiff's claim for DIB under Sections 216(i) and 223 of the Social Security Act.

(Id. at 19)

On October 30, 2001, plaintiff appealed the ALJ's decision. The Appeals Council denied plaintiff's request for review on June

7, 2002. (Id. at 4) As a result, the ALJ's decision became the final decision of the Commissioner under 20 C.F.R. § 404.981. Plaintiff now seeks review before this court pursuant to 42 U.S.C. § 405(g).

B. Facts Evinced at the Administrative Law Hearing

At the time of the ALJ hearing in 2001, plaintiff was a fifty-one year old female. (Id. at 27) She had completed the tenth grade and had no other technical or vocational training. (Id.) Plaintiff alleges that her disability began in December 1996, and that she has not been employed since January of 1997. (Id. at 38) Prior to that time, plaintiff worked as an assembler at General Motors. (Id. at 29) Her work activities required her to stand and occasionally lift up to twenty-five pounds at a time. (Id.) In December of 1996, she retired from General Motors and began collecting a disability pension. (Id. at 39)

Plaintiff currently lives in her home with her nineteen year old son. (Id. at 27) Plaintiff testified that her daily activities include some light house chores such as dusting and sweeping. (Id. at 30) She also testified that she does light cooking, washes dishes, and goes grocery shopping about once per month in the early hours of the day to avoid crowds as much as possible. (Id. at 31) Plaintiff further testified that she rarely leaves the house other than to attend doctor appointments. (Id. at 28, 35) She does not attend or participate in any social

activities such as visiting with friends or relatives or going out for dinner or to the movies. (Id. at 32) Plaintiff likewise testified that she has no hobbies and spends a considerable amount of time each day watching television. (Id. at 30, 31, 32, 33)

Regarding plaintiff's medical condition, plaintiff testified that she has been diagnosed with anxiety. (Id. at 33) She also testified that she has an inner ear disease in her left ear, known as Meniere's Disease. (Id. at 34, 39) Plaintiff testified that her anxiety attacks result in dizziness, shortness of breath, and perspiration. (Id. at 33, 34) Plaintiff testified that due to her dizziness she has trouble walking and climbing. (Id. at 37) She stated that these attacks may last from thirty-five minutes up to an hour and may occur several times a day, two or three days a week. (Id. at 33, 34) Because of the Meniere's disease, plaintiff testified that she sometimes misunderstands what people are saying. (Id. at 35)

Plaintiff testified that she is taking three different types of medication for her anxiety, including a sleeping pill. (Id. at 35, 36) Although she could not recall the names of her prescriptions, plaintiff testified that they are helping her anxiety and that she has experienced no side-effects. (Id. at 36)

C. Vocational Evidence

During the administrative hearing, the ALJ called Margaret Preno ("Preno"), a vocational expert, to testify about the exertional and skill requirements of plaintiff's prior job. (Id. at 42) Preno explained that plaintiff's past work as an assembler involved medium exertional work. (Id. at 43) The ALJ then asked the following hypothetical question:

Assume you have a person with no exertional physical limitations, but the following limitations do exist: they have the ability to do one to two step rote task (sic), are capable of understanding simple, straight forward written and verbal instruction. [inaudible] moderate level stress and frustration, and there is a need to limit interaction with the public and company-workers, and to keep it to a minimal level. Considering her age, education and past work experience do any jobs exist in significant numbers in the national and regional economy, jobs that avoid heights, moving machinery, jobs avoiding any significant climbing and due to mild hearing loss, jobs avoiding no significant participation in work settings involving meetings and group conversations.

(Id.) Preno responded that this hypothetical person could perform the medium unskilled jobs of a cleaner (1,600,000 jobs in the national economy and 4,600 jobs in the local economy), hand packer (100,000 jobs in the national economy and 260 jobs in the local economy), or an inspector/checker (101,000 jobs in the national economy and 260 jobs in the local economy). (Id. at 43, 44) Preno added that this hypothetical person could also work as a light skilled job cleaner (168,000 jobs in the national economy and 500 jobs in the local economy). (Id. at 44)

D. Medical Evidence²

In August of 1994, William J. Medford, Jr., M.D., an otolaryngology specialist, examined plaintiff for complaints of clicking, popping and noise in her ear, particularly her left ear, associated with dizziness and vertigo. (Id. at 133-143) An audiologic study of plaintiff revealed a low-tone sensori-neural hearing loss in the left ear. Despite this, Dr. Medford noted that plaintiff's electronystagmography ("ENG") was normal and that her ears were perfect on otoscopic exam. (Id. at 141).

In September 1994, plaintiff reported that her dizziness improved with the medication Antivert. (Id.) Dr. Medford suspected that plaintiff was suffering from inner ear disease, possibly Meniere's disease. Therefore, as a precautionary measure, Dr. Medford referred plaintiff to Ka-Khy Tze, M.D., for a magnetic resonance imaging ("MRI"). The results of the MRI, however, showed nothing of clinical significance. (Id. at 135)

On January 25, 1995, Dr. Medford wrote a note that plaintiff could show to her employer stating that she should avoid any work environment where dizziness may endanger herself or others. (Id. at 134)

In May 1995, Dr. Medford sent plaintiff for a repeat audiology study. Dr. Medford noted that the results of the study

² Plaintiff acknowledges that the medical record is "very sparse." (D.I. 7 at 26)

showed no changes in the plaintiff's condition.³

In January 2000, plaintiff began outpatient care with Charter Behavioral Health Systems for generalized anxiety disorder characterized by anxious mood and agitation. (Id. at 183-198) During this same month, plaintiff also began treatment for anxiety and panic attacks at Suburban Psychiatric Associates. (Id. at 201-208)

On January 19, 2000, Violet Henighan, D.O., diagnosed plaintiff with a generalized anxiety disorder in part due to the continuing legal troubles of her then sixteen year old son. Dr. Henighan referred plaintiff to a therapist. In January 2000, plaintiff began this therapy with Janet Keough, M.S.W., to learn relaxation techniques. The program focused on teaching plaintiff to manage her panic attacks using her cognitive skills and breathing rhythms. (Id. at 183, 187)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive." 42 U.S.C. § 405(g) (2003). The court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E) (2003). The Supreme Court held that

³ No medical records were available from May 1995 to January 2000. The medical records of a psychiatrist that plaintiff visited between 1998 and 1999 were not made part of the record.

"substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion of the existence of the fact to be established.... It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard for determining the availability of summary judgment pursuant to Federal Rule of Civil Procedure 56.

The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)

(internal citations omitted). Thus, in the context of judicial review under § 405(g),

"[a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence – particularly certain types of evidence (e.g., that offered by treating physicians) – or if it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)).

"Despite the deference due to administrative decisions in disability benefit cases, 'appellate courts retain a

responsibility to scrutinize the entire record and to reverse or remand if the [Commissioner]'s decision is not supported by substantial evidence.'" Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) (quoting Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981)). "A district court, after reviewing the decision of the [Commissioner] may, under 42 U.S.C. 405(g) affirm, modify, or reverse the [Commissioner]'s decision with or without a remand to the [Commissioner] for rehearing." Podeworny v. Harris, 745 F.2d 210, 221 (3d Cir. 1984).

IV. DISCUSSION

A. Standards for Determining Disability

"Disability" is defined in the Social Security Act as an inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (2003). A claimant is considered unable to engage in any substantial gainful activity

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A) (2003). The Commissioner makes this determination based upon a regulation promulgated by the Social Security Administration that sets out a five-step sequential evaluation process. See 20 C.F.R. §§ 404.1520, 416.920. The Third Circuit outlined the process in Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999).

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory twelve-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."

The Social Security Administration has promulgated regulations incorporating a sequential evaluation process for determining whether a claimant is under a disability. In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. If a claimant is found to be engaged in substantial activity, the disability claim will be denied. In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. If the claimant fails to show that her impairments are "severe", she is ineligible for disability benefits.

In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. The claimant bears the burden of demonstrating an inability to return to her past relevant work.

If the claimant is unable to resume her former

occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Id. at 427-28 (internal citations omitted).

B. Application of the Five-Step Test

In the present case, the court notes that steps one, two, and four of the five part test to determine whether a person is disabled are not in contention: (1) the ALJ determined that plaintiff has not engaged in substantial gainful activity since the alleged onset of her disability in December 1, 1996; (2) the ALJ determined plaintiff has generalized anxiety disorder with panic attacks, Meniere's disease, and a sensori-neural hearing loss in the left ear that are "severe" within the meaning of the Regulations; and (3) the ALJ concluded that plaintiff is precluded from performing all of the requirements of her past relevant work.

Plaintiff contests the ALJ's finding regarding steps three and five of the process. Focusing first on step three, plaintiff contests the ALJ's method for evaluating the plaintiff's mental impairments and asserts that the ALJ failed to utilize and append

to his decision a Psychiatric Review Technique Form ("PRTF"). However, as the Commissioner points out in her motion for summary judgment, the Social Security Administration published its "Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury", effective September 20, 2000, which states that "requiring that a PRTF be appended to an administrative law judge or Appeals Council decision would only repeat information already required in the decision under these final rules, and renders the PRTF redundant. For this reason, these final rules do not require administrative law judges or the Appeals Council to complete the form or to attach the form to their decisions." See 65 Fed. Reg. 50746, 50758 (2000). On the basis of this regulation, the court finds that the ALJ was not required to complete the PRTF when evaluating plaintiff's mental disability. The court, therefore, finds the plaintiff's argument to be without merit and denies plaintiff's motion for summary judgment on step three grounds.⁴

Turning to consider step five, plaintiff argues that the hypothetical question posed by the ALJ to the vocational expert regarding work options for a person with limitations similar to plaintiff was improper because it failed to mention **all** of

⁴ Plaintiff also argued, alternatively, that the ALJ did not use language in his analysis that is required by 20 C.F.R. § 1520a. After review of the regulation, the court finds no such requirement for mandatory language.

plaintiff's limitations. Plaintiff, nevertheless, fails to allege which limitations she believes were excluded. Moreover, the court finds that the ALJ adequately took into consideration plaintiff's anxiety, panic attacks, dizziness, education level, age and past work experience when deciding whether plaintiff was capable of performing other work. The court, consequently, agrees with the Commissioner that the ALJ considered the totality of plaintiff's limitations as set forth in the record.

Plaintiff further contends that Social Security Ruling 85-15 ("SSR 85-15") directs a verdict that plaintiff is disabled. This ruling contains examples of persons who qualify as disabled. Plaintiff contends that her limitations match those of the person cited in example three and that, for this reason, she should be found disabled. Example three states:

Someone who is closely approaching retirement age, has a limited education or less, worked for 30 years in a cafeteria doing an unskilled job as a "server", almost constantly dealing with the public, and now cannot, because of a severe mental impairment, frequently deal with the public. In light of the narrow vocational opportunity in conjunction with the person's age, education, lack of skills, and long commitment to the particular type of work, a finding of disabled would be appropriate; but the decision would not necessarily be the same for a younger, better educated, or skilled person.

SSR 85-15, Titles II and XVI: Capability to Do Other Work--The Medical- Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments, 1985 WL 56857 *5 (S.S.A.) (1985).

The court finds that this argument fails because plaintiff

does not have the same characteristics as the person described in example three. Plaintiff is a fifty-one year old woman and, as such, may be considered a person "closely approaching advanced age." In contrast, example three envisions a person "closely approaching retirement age," which is defined to be a person aged sixty to sixty-four years old. Additionally, the court notes that example three specifically states that "the decision would not necessarily be the same for a younger...person." Id. Accordingly, the court denies plaintiff's motion for summary judgment on step five grounds.

V. CONCLUSION

For the reasons stated herein, the court denies plaintiff's motion for summary judgment and grants the Commissioner's cross-motion for summary judgment. An appropriate order shall issue.

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 Plaintiff,)
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 v.) Civ. No. 02-1367-SLR
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 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
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 Defendant.)

O R D E R

At Wilmington this 26th day of February, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 10) is denied.
2. Commissioner's cross-motion for summary judgment (D.I. 14) is granted.
3. The Clerk of Court is directed to enter judgment in favor of the Commissioner and against plaintiff.

Sue L. Robinson
United States District Judge