

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PENELOPE HARRIS,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-185-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

Stephen A. Hampton, Esquire of Grady & Hampton, Dover, Delaware.
Counsel for Plaintiff.

Colm F. Connolly, United States Attorney, and Patricia C.
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MEMORANDUM OPINION

Dated: October 31, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Penelope Harris filed this action against defendant Jo Anne B. Barnhart, the Commissioner of Social Security, on March 13, 2002. (D.I. 3) Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g), of a decision by the Commissioner denying her claim for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-403. Currently before the court are plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment.

(D.I. 16, 19) For the reasons that follow, the court shall grant defendant's motion and deny plaintiff's motion.

II. BACKGROUND

A. Procedural History

On November 12, 1999, plaintiff filed an application for a period of disability and disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-443. (D.I. 11 at 83-86) Plaintiff alleged disability since September 1, 1995 due to having bad knees, wrists, and hips, a bad back, and a ninth grade education. (Id. at 83-86, 99) The left knee and back conditions resulted from a 1995 work accident; the right knee condition resulted from a fall in 1997; the wrist conditions resulted from two 1999 motor vehicle accidents; the hip condition is of unknown origin. (Id. at 156-166)

Although plaintiff alleged that her disability began on September 1, 1995, she continued to work until June 15, 1999. (Id. at 83, 99) Plaintiff worked as a cook/dietary aid in August 1995 to June 1996. (Id. at 100, 108, 111, 157) She operated a daycare center in her home from September 1996 through February 1998, and worked as a telemarketer from September 1998 to June 1999. (Id. at 100, 108-110, 139, 157)

Plaintiff's application for disability insurance benefits was denied initially and upon reconsideration. (Id. at 58-61, 64-67) Plaintiff requested a hearing before an administrative law judge ("ALJ") and the hearing was held on August 3, 2001. (Id. at 23-55) At the hearing, plaintiff was represented by counsel, and plaintiff, her daughter, and a vocational expert testified. (Id.) On September 24, 2001, the ALJ issued a decision denying plaintiff's disability benefits application. (Id. at 9-21) In consideration of the entire record, the ALJ made the following findings:

1. Claimant has not engaged in substantial gainful activity since the filing of the Supplemental Security Income application, November 12, 1999.
2. Claimant's fibromyalgia, carpal tunnel syndrome, torn meniscus bilaterally are impairments that are considered "severe" based on the requirements in the Regulations 20 CFR § 416.920(b).

3. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
4. Claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.
5. Claimant has the following residual functional capacity: she can lift/carry no more than 10 pounds occasionally and less than 10 pounds frequently, and she can stand for 2 to 6 hours in a normal workday; she has unlimited pushing and/or pulling (within her lifting capacity); she can occasionally climb ramps and stairs, balance, stoop, and crouch, very occasionally stoop or crawl, but she is never to climb a ladder/rope/scaffold. She cannot perform repetitive motion with her upper extremities. She must avoid concentrated exposure to extreme cold and vibration to the knees and wrists.
6. Claimant is unable to perform any of her past relevant work (20 CFR § 416.965).
7. Claimant is a "younger individual" (20 CFR § 416.963).
8. Claimant has "a limited education" (20 CFR § 416.964).
9. Transferability of skills is not an issue in this case (20 CFR § 416.968).
10. Claimant has the residual functional capacity to perform a significant range of sedentary and a limited range of light work (20 CFR § 416.967).
11. Although claimant's exertional limitations do not allow her to perform the full range of sedentary or light work, using Medical-

Vocational rules as a framework for decision-making, there are a significant number of jobs in the national economy that she could perform. Examples of such jobs include work as cashier, office clerk, and survey worker.

12. Claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 416.920(f)).

(Id. at 20)

The decision from the ALJ was appealed to the Appeals Council on October 10, 2001. (Id. at 6-8) In denying the request for review, the Appeals Council found no legal basis to review the ALJ's decision. (Id. at 4-5) Therefore, the ALJ's September 24, 2001 decision became the final decision of the Commissioner. See 20 C.F.R. §§ 404.955, 404.981, 422.210 (2001); see also Sims v. Apfel, 530 U.S. 103, 106-07 (2000); Matthews v Apfel, 239 F.3d 589, 592 (3rd Cir. 2001). Plaintiff now seeks review of this decision pursuant to 42 U.S.C. § 405(g).

B. Facts Evinced at the Administrative Law Hearing

Plaintiff was 44 years of age at the time of the administrative hearing on August 3, 2001. (D.I. 11 at 26) She is married and lives in a home with her husband, daughter, and son. (Id. at 32-33) Plaintiff has a 9th grade education and attempted to get a GED, but quit the program prior to completion because she was frustrated by her inability to comprehend the

information. (Id. at 26, 38) She has a driver's license and drives occasionally. (Id. at 32)

Plaintiff testified that she was involved in two car accidents which have caused her significant pain. (Id. at 26, 27.) She testified that she cannot work because "I have a lot of pain, I have headaches a lot." (Id. at 26) She stated that she suffers from stiffness which makes her unable to stand or sit for long periods of time. (Id. at 35) She changes positions frequently in order to stretch her neck and back. (Id. at 45) She stated that she has chronic wrist pain that precludes her from lifting items with her hands, however, she continues to do the cooking and grocery shopping for her family, albeit less frequently than before. (Id. at 28, 29, 31, 42, 43) She is able to dress and feed herself, but must use an adaptive sponge in order to bathe. (Id. at 31, 32)

Plaintiff testified that she has had surgery on both of her knees, and that her physician has recommended knee replacement surgery. (Id. at 30) She requires the use of knee braces when performing household tasks such as vacuuming. (Id. at 43) In addition, she has bilateral foot pain that limits her ability to walk. (Id. at 43, 44)

Plaintiff states that despite the use of various prescription medications, she still suffers from pain. (Id. at

35, 36) She testified: "I have pain every day. I hurt every day. I have to take something every day." (Id. at 36)

Furthermore, the pain medication bothers her stomach, forcing her to lay down after taking her medication. (Id. at 39)

Plaintiff's daughter, Tovanna Prophet, gave additional testimony regarding plaintiff's condition. (Id. at 46-49) She stated that her mother's activity level had significantly decreased since 1997. (Id. at 47) She testified that her mother cooks less than she used to, and that she participates less in church activities. (Id. at 48) Her mother's inability to walk for long periods of time makes it difficult for her to go shopping. (Id. at 49)

C. Vocational Evidence

During the hearing, the ALJ called Mr. Gary Young as a vocational expert. (Id. at 50) Mr. Young stated that based upon the limitations that the ALJ identified, plaintiff should be able to perform jobs such as that of a cashier, office clerk and survey worker. (Id. at 51) Mr. Young conceded that these jobs would be eliminated if the plaintiff was unable to read and comprehend without assistance. (Id. at 52)

D. Medical Evidence

1. Knee Conditions

On April 26, 1995, plaintiff injured her knee during a job-related fall. (Id. at 156) She sought medical treatment at Kent General Hospital, and was referred to Dr. DuShuttle. (Id.) Based upon MRI results, Dr. DuShuttle recommended arthroscopic surgery. (Id.) On June 1, 1995, plaintiff underwent arthroscopy of the left knee to repair the tear of her left medial meniscus. (Id. at 140-145)

Following surgery, plaintiff continued to complain of left knee pain. (Id. at 227) She was treated with an intra-articular injection of Lidocaine and Depo-Medrol, as well as other pain medications, but the pain persisted. (Id. at 226, 227) In August 1995, a repeat MRI of plaintiff's left knee revealed degenerative changes. (Id. at 225) On October 3, 1995, plaintiff underwent a second arthroscopy. (Id. at 223)

On March 24, 1997, plaintiff fell and injured her right knee. (Id. at 163) X-rays taken at Kent General Hospital revealed an old partial avulsion fracture of the medial aspect of the patella. (Id.) Plaintiff was treated with Tylenol with Codeine and instructed to use a cane, ace bandage, and leg brace. (Id.) Despite treatment, plaintiff's condition did not improve, and she underwent arthroscopy of the right knee in June 1997.

(Id.) Following surgery, plaintiff's condition remained unchanged. (Id. at 164)

On January 17, 1998, plaintiff complained to Dr. Rowe about bilateral knee pain. (Id. at 220) He prescribed Cataflam for pain relief and Zantac to relieve medication-induced gastrointestinal symptoms. (Id.) Following a March 1998 visit, Dr. Rowe gave plaintiff a permanent light-duty restriction with no bending or squatting, and prescribed Arthrotec. (Id. at 219) In April 1998, plaintiff claimed that her condition had not improved. (Id.) At this time, Dr. Rowe diagnosed plaintiff with advanced chondromalacia, medial femoral condyle and retroapatellar cartilage of the left knee, and a bucket handle tear and displaced medial meniscus of the right knee. (Id.) An April 24, 1998 MRI of plaintiff's left knee showed evidence of a marked degenerative tear involving the medial meniscus and a chronic tear of the anterior cruciate ligament. (Id. at 218) On May 6, 1998, Dr. DuShuttle told plaintiff that she would probably need a total knee replacement in the future. (Id.) He further stated that "she has a chronic condition and does have a degree of permanent physical impairment. She has reached her maximum medical improvement." (Id.)

On December 14, 1998, plaintiff reported to Dr. Rowe that she had increased discomfort when sitting or standing on the job,

at home, or in church. (Id. at 213) An April 1999 x-ray of the left knee revealed moderate arthritis in the medial femoral condyle lipping. (Id. at 211) Dr. Rowe advised plaintiff to obtain a brace for her left leg, and that she may benefit from a high tibial osteotomy. (Id.) Re-evaluation of plaintiff's left knee in May 1999 showed a partial tear of the ACL, an avulsion injury of the tibial spine, advanced retropatellar chondromalacia and progressive degenerative changes involving the medial joint space. (Id. at 210) Dr. Rowe re-emphasized the need for plaintiff to obtain a knee brace in light of her refusal to have surgery. (Id.) In November 1999, Dr. Rowe advised plaintiff that she should not return to work as a cook due to prolonged amounts of standing that would be required. (Id. at 205) A whole body bone imaging performed in September 2000 was positive for degenerative joint disease of both knees. (Id. at 260)

In April 2001, Dr. Hosny, rheumatologist, diagnosed plaintiff with osteoarthritis of the left knee. (Id. at 264) He stated that "[t]he osteoarthritis is contributing to the increased pain that the patient is having." (Id.)

2. Wrist Conditions

On August 15, 1995, plaintiff sought treatment from Dr. Edmonton, family practitioner, for numbness and tingling in her right hand. (Id. at 224, 231) Dr. Edmonton ordered an EMG,

which revealed mild to moderate right median neuropathy. (Id. at 224) He diagnosed plaintiff with carpal tunnel syndrome and gave her medication, recommended a splint, and ordered therapy. (Id.) On August 28, 1995, Dr. DuShuttle evaluated plaintiff and informed her that she may require surgery for her wrist condition. (Id.) In September 1995, plaintiff stated that her condition persisted, but she refused surgery at that time. (Id.) It was not until 1996 that she successfully underwent surgery on her right wrist for carpal tunnel syndrome. (Id. at 243)

In August 1998, plaintiff presented to Dr. DuShuttle with a new complaint in her right wrist, claiming that her symptoms were due to clinical training classes that required a lot of writing. (Id. at 217) X-rays taken at this time were negative for bony pathology. (Id.) Dr. DuShuttle did discover a small ganglion cyst on plaintiff's right wrist, but stated that it should not be causing any wrist pain. (Id.) Plaintiff complained to Dr. Osunkoya of achy feelings in her wrist on May 20, 1999. (Id. at 184) He advised plaintiff to wear her wrist splint during activity. (Id.)

On July 28, 1999, plaintiff was involved in a motor vehicle accident that resulted in a left wrist injury. (Id. at 207) X-rays taken that day at Kent General Hospital were within normal limits. (Id. at 214) Fred Dimeo, physician assistant,

instructed plaintiff to use ice, a splint, and Naproxen for the pain and inflammation, and told her to follow-up with orthopedics for continued pain past a week. (Id. at 154) Plaintiff did not complain of additional wrist pain until October 1999, at which time Dr. Rowe diagnosed plaintiff with left wrist strain, left extensor and flexor carpi ulnaris tendinitis. (Id. at 207) He gave plaintiff a prescription for therapy, a splint for additional support, and told her to continue taking previously-prescribed Celebrex. (Id.) Plaintiff's left wrist pain recurred following a vehicular accident in November 1999. (Id. at 243)

In February 2000, plaintiff visited Dr. Rowe for re-evaluation of her wrists. (Id. at 205) She stated that her symptoms had worsened in both wrists, however, x-rays taken that day were within normal limits. (Id.) Dr. Rowe injected plaintiff's right wrist with Marcaine and Depo-Medrol, and instructed plaintiff to apply ice and use a wrist immobilizer. (Id.) On April 10, 2000, plaintiff returned to Dr. Rowe's office and stated that the previous injection helped her right wrist, but that she had pain in her right thumb and palm, as well as numbness of several fingers. (Id. at 204) Her left wrist remained swollen. (Id.) Dr. Rowe prescribed an EMG study, instructed plaintiff to continue taking Vicoprofen as previously prescribed by Dr. Osunkoya, and referred her to Easter Seals for

therapy. (Id.) Easter Seals initiated phonophoresis treatment using a 10% hydrocortisone cream on July 18, 2000. (Id. at 241) Due to plaintiff's noncompliance with this therapy, she was only treated on 4 of 8 scheduled appointments. (Id.)

Dr. Tamesis, rheumatologist, reported that plaintiff's May 2000 EMG was negative for carpal tunnel syndrome, and that her ANA, rheumatoid factor and sedimentation rate tests were also negative. (Id. at 253) In September 2000, a bone scan 3-phase of hand and wrist and right wrist x-ray showed localized subtle radiolucency and cortical indistinctness involving the distal tubercle of the scaphoid. (Id. at 260) The remaining osseous structures of the wrist, as well as the joint spaces and articulations, were unremarkable. (Id.)

3. Hip and Back Conditions

Plaintiff twisted her back and left knee during a work-related injury in April 1995. (Id. at 158) She was diagnosed with a lumbar strain that was treated with medications. (Id.) On November 25, 1999, plaintiff was involved in a motor vehicle accident and subsequently developed neck pain, headaches, and left shoulder pain. (Id. at 178) Dr. Osunkoya noted that plaintiff had no neck stiffness or back tenderness. (Id.) He instructed plaintiff to continue taking Celebrex, and reassured her that her condition would improve. (Id.) On February 2,

2000, plaintiff continued to complain of generalized body pain, and shoulder, bilateral knee and lower back pain. (Id. at 177) Dr. Osunkoya referred plaintiff to physical therapy for four weeks, and prescribed Oxycontin for pain relief. (Id.) Dr. Osunkoya noted plaintiff's complaint of persistent pain on her April 5 and May 3, 2000 visits, and prescribed Vicoprofen for pain relief. (Id. at 178, 278, 279) An MRI of plaintiff's spine taken in May 2000 showed mild disc protrusion, C5/6 centrally, with mild, associated effacement of the thecal sac. (Id. at 277) An evaluation performed by Dr. Tames in August 2000 revealed no evidence of limitation of motion in plaintiff's hip joints. (Id. at 253) X-rays obtained in March 2001 showed a normal lumbar spine. (Id. at 273)

In April 2001, Dr. Osunkoya referred plaintiff to Dr. Hosny, who diagnosed plaintiff with fibromyalgia due to the presence of tender points and widespread neck and back pain. (Id. at 263, 264) He prescribed Oxycontin, Nortriptyline, and Flexeril. (Id. at 264) Dr. Hosny saw plaintiff again on June 11, 2001, and noted that patient's fibromyalgia and chronic pain were stable (Id. at 262)

In addition to back pain, plaintiff claims that she suffers from hip pain. (Id. at 99) Evidence of hip pain was first noted on October 9, 1997, and plaintiff was treated with stretching

exercises. (Id. at 164) In December 1998, Dr. Osunkayo noted that plaintiff had osteoarthritis of hip and knees, and advised plaintiff to continue Arthrotec, as prescribed by Dr. Rowe for knee pain. (Id. at 189) In July of 1999, plaintiff complained of right thigh pain, which Dr. Osunkoya diagnosed as trochanteric bursitis. (Id. at 182) On August 5, 1999, Dr. Osunkoya noted focal tenderness in the lateral part of the right hip at the site of trochanteric bursitis. (Id. at 181) He injected plaintiff's right hip with Kenalog and Xylocaine, and instructed plaintiff to continue taking Naprosyn for pain relief, and to restrain from performing strenuous activity for the next few days. (Id.)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g) (2002); 5 U.S.C. § 706(2) (E) (1999); see Menswear Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3rd Cir. 1986). As the Supreme Court has held,

"[s]ubstantial 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 as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 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.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (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 (3rd Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3rd Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3rd Cir. 1990).

IV. DISCUSSION

A. Standards for Determining Disability

Title II of the Social Security Act, 42 U.S.C. § 423(a) (1) (D), as amended, "provides for the payment of insurance benefits to persons who have contributed to the program and who suffer from a physical or mental disability." Bowen v. Yuckert, 482 U.S. 137, 140 (1987). A disability is defined as the "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) (2002).

In Plummer v. Apfel, 186 F.3d 422 (3rd Cir. 1999), the Third Circuit outlined the applicable statutory and regulatory process for determining whether a disability exists:

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). If the Commissioner finds that a claimant is disabled or not disabled at any point in the sequence, review does not proceed to the next step. See 20 C.F.R. § 404.1520(a) (2002).

The determination of whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Social Security Administration Regulations ("the grids"). Cf. Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3rd Cir. 1995) (noting use of the grids for determination of eligibility for supplemental social security income) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). In the context of this five-step test, the Commissioner has the burden of demonstrating that the plaintiff is able to perform other available work. See Bowen, 482 U.S. at 146 n.5. In making this determination, the ALJ must determine the individual's residual functional capacity, age, education, and work experience. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(c) (2002). The ALJ then applies the grids to determine if

an individual is disabled or not disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(d) (2002).

If the claimant suffers from significant non-exertional limitations, such as pain or psychological difficulties, the ALJ must determine, based on the evidence in the record, whether these non-exertional limitations limit the claimant's ability to work beyond the work capacity obtained from reviewing the Social Security regulation "grids." See 20 C.F.R. § 404.1569a(c)-(d). If the claimant's non-exertional limitations are substantial, the ALJ uses the grids as a framework only and ordinarily seeks the assistance of a vocational specialist to determine whether the claimant can work. See Santise v. Schweiker, 676 F.2d 925, 935 (3rd Cir. 1982); 20 C.F.R. § 404, subst. P, app. 2, § 200(d)-(e).

B. Determination of "Not Disabled" by the ALJ

In the case at bar, the first four steps of the five-part test to determine whether a person is disabled are not at issue: (1) plaintiff is not currently engaged in substantial gainful activity; (2) plaintiff suffers from severe impairments; (3) plaintiff does not suffer from an impairment presumed severe enough to preclude any gainful work; and (4) plaintiff is unable to perform her past relevant work because it exceeds her residual functional capacity. The issue in this case concerns the fifth step: whether or not plaintiff can perform other work existing

in the national economy. See Mason v. Shalala, 994 F.2d 1058, 1064 (3rd Cir. 1993).

Plaintiff argues that the ALJ's decision that plaintiff was not disabled is contradicted by his own findings regarding her inability to perform past work. (D.I. 14 at 17) Plaintiff argues that the ALJ failed to give proper consideration to plaintiff's combined impairments. (Id.) Furthermore, plaintiff argues that the ALJ's attacks on her credibility are unjustified and without merit. (Id. at 25)

Defendant argues that the Commissioner's final decision that plaintiff is not disabled was proper. (D.I. 20 at 11) Defendant claims that the decision is supported by substantial evidence of plaintiff's work history, medical opinions, objective medical evidence, and diminished credibility. (Id.) Because plaintiff could perform a significant range of sedentary and some light work, she is not disabled. (Id.)

1. The ALJ's Findings Are Not Contradictory

Plaintiff challenges the Commissioner's step five determination that she has residual functional capacity to perform a significant range of sedentary and a limited range of light work. She claims that the ALJ's finding that she cannot do her previous sedentary job as a telemarketer contradicts the

conclusion that there are a significant number of jobs that she could perform.

Plaintiff argues that her physical ailments are so restrictive as to "significantly erode the unskilled sedentary occupational base to an extent that there is no work for [her]." (D.I. 14 at 11) These arguments are flawed because they assume that an inability to perform past work absolutely precludes one from obtaining other gainful employment.

Plaintiff has multiple physical complaints. At no time, however, has any specialist stated that she could not work.¹ (D.I. 11 at 18) In 1998, Dr. DuShuttle noted that "[plaintiff] has sustained a permanent partial impairment of 25% of the left lower extremity as a direct result of the workman's compensation injury which occurred on April 26, 1995," and that she "was capable of permanent light duty work without bending or

¹The court notes that plaintiff's physicians have excused her from work on several occasions: immediately following knee surgery (Id. at 229, 230); for a period of one day following an automobile accident (Id. at 154); for a period of two days due to bronchitis (Id. at 185); for a period of two days due to pharyngitis (Id. at 186); for a period of two weeks due to carpal tunnel syndrome (Id. at 236); and pending an evaluation by a rheumatologist for chronic degenerative joint disease. (Id. at 203, 248) On one occasion, plaintiff's wrist condition required the use of a splint. She informed Dr. DuShuttle's office that she did not want to work because she would get her splint wet. Plaintiff was advised to obtain a rubber glove or an extra splint to prevent this problem, yet she refused to do so. She requested a "no work note", and Dr. DuShuttle ultimately complied. (Id. at 224)

squatting.” (Id. at 162) In 1999, Dr. Rowe advised plaintiff that she could perform sedentary duty work, as long as she was able to change positions as needed. (Id. at 285) Also, plaintiff’s physicians have repeatedly encouraged plaintiff to participate in exercise programs involving swimming and bike riding, however, plaintiff has not complied with these suggestions. (Id. at 184-189)

The Residual Functional Capacity Assessment performed by a Delaware Disability Determination Service physician also supports the ALJ’s findings. (D.I. 11 at 190-202) The physician found that plaintiff could perform the following: she can lift/carry no more than 10 pounds occasionally and less than 10 pounds frequently; she can stand for 2 to 6 hours in a normal workday; she is unlimited to pushing and/or pulling; she can occasionally climb ramps and stairs, balance, stoop, and crouch, very occasionally stoop or crawl, but she is never to climb a ladder/rope/scaffold. (Id.) She is to avoid concentrated exposure to extreme cold and vibration to the knees and wrists. (Id.) There is to be no highly repetitive use of both upper extremities. (Id.) Thus, while plaintiff has some physical limitations, she retains adequate functioning that would enable her to perform other jobs in the local and national economy.

Moreover, the ALJ relied on statements made by plaintiff in determining her capabilities. According to the Adult Occupational Therapy Evaluation Report dated March 22, 2000, plaintiff stated that she is able to perform homemaking chores such as laundry, vacuuming, making beds, grocery shopping and simple meal preparation. (Id. at 246) She has maintained her ability to perform activities of daily living. (Id. at 245, 246) Thus, plaintiff's ability to perform these tasks on a regular basis further supports the ALJ's findings.

Because plaintiff suffers from significant non-exertional limitations, the ALJ sought the assistance of vocational expert Gary Young. (Id. at 51-52) Mr. Young stated that based on plaintiff's specific work restrictions, she could work as a cashier, office clerk, and survey worker. (Id. at 51) During the hearing, the ALJ gave plaintiff's attorney the opportunity to question Mr. Young regarding the validity of his findings, but the attorney chose not to do so. (Id. at 51-53)

Based upon a review of the record, the court finds that the ALJ did not err in finding that plaintiff has the residual functional capacity to perform a significant number of jobs in the national economy.

2. The ALJ Adequately Considered the Cumulative Effect of Plaintiff's Combined Impairments

Plaintiff also alleges that the ALJ erred by not considering the cumulative effect of her combined impairments, namely fibromyalgia, carpal tunnel syndrome, bilateral knee dysfunction, chronic fatigue and drowsiness, illiteracy, and pain in her neck, shoulder, arms, wrists, back, knees and feet. (D.I. 14 at 23, 24) First, plaintiff's allegations that her fatigue and drowsiness affect her functional capacity are not supported by her medical records. The ALJ addressed plaintiff's claim of her need to lie down and stated "but this may be because she is at home and has nothing else to do." (D.I. 11 at 18) Plaintiff testified that she tries "to lay down every day, it's taking a nap, taking a rest" and that she "might try to get at least get a couple hours of sleep in." (Id. at 40) The ALJ reported that plaintiff "stated that medications make her drowsy but, again, this is not mentioned in the notes of treating physicians."² (Id. at 18)

Second, plaintiff's testimony demonstrated that despite her allegations of illiteracy, she is able to read the Bible, other

²The court notes that on April 5, 2000, plaintiff complained to Dr. Osunkoya regarding her inability to take Oxycontin because it made her drowsy. (Id. at 279) This evidence must be viewed in light of the fact that plaintiff was treated by physicians on over 60 occasions from June 1995 through June 2001. Thus, the court finds that the ALJ ruling was proper.

spiritual books, and the newspaper. (Id. at 123) In addition, she did some typing and filing in her previous job. (Id. at 109)

Objective medical evidence and plaintiff's daily activities demonstrate that her complaints of pain impose no significant limitations on her ability to perform basic sedentary work activities. Laboratory evidence did not support plaintiff's claim of pain. (Id. at 249, 253) A May 2000 EMG was negative for carpal tunnel syndrome. (Id.) Plaintiff's ANA, rheumatoid factor, and sedimentation rate tests were also negative. (Id.) Furthermore, plaintiff's x-rays, MRIs, and bone scans did not support the level of pain alleged. (Id. at 157-158, 249-250, 272-274)

Plaintiff stated at the Administrative Law Hearing that she is able to do the cooking and grocery shopping for her family. (Id. at 28, 29, 42, 43) She continues to perform household tasks such as vacuuming. (Id. at 43) Also, she can dress and feed herself. (Id. at 31, 32) Thus, plaintiff has retained her ability to perform a significant number of tasks, despite her complaints of pain.

In addition, plaintiff's physicians have repeatedly suggested that she engage in physical therapy, aqua therapy, and exercise. (Id. at 184-189, 239-247) Other than on a few

isolated occasions, plaintiff has never been told that she could not work. (Id. at 18)

Therefore, plaintiff's fibromyalgia, carpal tunnel syndrome, and bilateral knee dysfunctions were her only "severe" impairments and, considering all of plaintiff's functional limitations, the ALJ correctly concluded that these impairments do not meet or equal the criteria of any of the impairments listed in 20 C.F.R., Pt. 404, App. 1, Subpt. P, Reg. 4. The court finds that the ALJ did not err by failing to consider the cumulative effect of plaintiff's multiple conditions.

3. Plaintiff's Credibility

The ALJ supported his determination that plaintiff was not credible by pointing to inconsistencies and contradictions in her testimony and the record. For example, plaintiff gave inconsistent testimony regarding her claim of illiteracy. (Id. at 18) She testified that she only has a 9th grade education rendering her unable to read well, and that she relies on her daughter whenever reading is necessary. (Id. at 18, 39) This is inconsistent with plaintiff's description of her recreational activities. (Id. at 123) She wrote in her Daily Activities Questionnaire that she reads items such as the Bible, other spiritual books, and the newspaper on a daily basis. (Id.) She also stated that she helps her son with his homework and reading.

(Id.) In addition, plaintiff described her previous work history as involving some typing and writing. (Id. at 10)

The ALJ also reviewed plaintiff's claim of chronic drowsiness and determined that it was not credible due to lack of evidence. (Id. at 18) Despite her numerous physician visits, plaintiff only mentioned that her medications cause drowsiness to Dr. Osunkoya on one occasion. (Id. at 279) In addition, plaintiff's physicians have repeatedly prescribed physical therapy and aqua therapy, however, plaintiff has been non-compliant with attendance. (Id. at 239-247) They have also advised her to engage in non-impact exercise, such as swimming or bike riding. (Id. at 184-189) Furthermore, plaintiff has maintained her independence as evidence by her ability to perform activities of daily living. (Id. at 245-46)

Further issues regarding credibility pertain to the actual date of disability. Plaintiff alleges that she became disabled in June 1995, however, she did not apply for SSI benefits until November 1999. (Id. at 13) After the date of alleged onset of disability, plaintiff worked as a dietary aid, daycare worker, and telemarketing phone operator. (Id.) Thus, the fact that plaintiff's impairments did not preclude her from working after the onset of the alleged disability furthers the ALJ's findings that she is not fully credible.

The ALJ noted these discrepancies and specifically labeled her testimony as not credible. (Id. at 18-21) Thus, to the extent the ALJ considered plaintiff's credibility in reaching his conclusions, the court finds no error.

VI. CONCLUSION

For the reasons stated above, the court shall grant defendant's motion and deny plaintiff's motion. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PENELOPE HARRIS)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-185-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

O R D E R

At Wilmington this 31st day of October, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 16) is denied.
2. Defendant's cross-motion for summary judgment (D.I. 19) is granted.
3. The Clerk is directed to enter judgment against plaintiff and in favor of defendant.

Sue L. Robinson
United States District Judge