IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAWN M. DOUBET,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-456-KAJ
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Gary C. Linarducci, Esq., Wilmington, Delaware; counsel for plaintiff.

Colm F. Connolly, Esq., United States Attorney, and Patricia C. Hannigan, Esq., Assistant United States Attorney, District of Delaware, Wilmington, Delaware; counsel for defendant.

DATE: November 5, 2003
Wilmington, Delaware

JORDAN, District Judge

I. Introduction

Presently before the Court is Plaintiff Dawn Doubet's ("Plaintiff") Motion for Summary Judgment (Docket Item ["D.I."] 6) and Defendant Commissioner of Social Security's ("Commissioner")[1] Cross-Motion for Summary Judgment. (D.I. 8.) Also before the Court is Plaintiff's Motion to Remand this case for further reconsideration by the Administrative Law Judge ("ALJ"). (D.I. 9.)

Plaintiff brings this action under Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) ("the Act"), seeking review of the Commissioner's decision to deny her disability benefits under Title II of the Act, 42 U.S.C. §§ 401-433. The Court has jurisdiction to review the Commissioner's decision under 42 U.S.C. § 405(g).

For the reasons that follow, the Court denies Plaintiff's Motion for Summary Judgment (D.I. 6) and Motion to Remand (D.I. 9), and grants the Commissioner's Cross-Motion for Summary Judgment (D.I. 8).

II. Background

Plaintiff was born on December 21, 1954, and was forty-six years old when the ALJ issued his decision to deny her disability benefits. (D.I. 4 at 20.) She was forty-

[1]Plaintiff originally brought suit against Larry G. Massanari on July 3, 2001. (D.I. 1.) Jo Anne B. Barnhart became the Commissioner of Social Security, effective November 9, 2001, succeeding Mr. Massanari. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Ms. Barnhart is automatically substituted as the defendant in this action.

three years old at the alleged onset of her disability. (*Id*.) She thus fits the definition in the regulations of a "younger person."[2] *See* 20 C.F.R. § 404.1563. Plaintiff is a high school graduate and has past work experience in various clerical positions. (*Id*.; D.I. 6 at 5.)

A. Medical History

On or about May 11, 1998, James B. Knox, M.D., examined Plaintiff for evaluation of her varicose veins. (D.I. 4 at 158-159.) Plaintiff reported to Dr. Knox that she had prominent visible varicosities, and profound tenderness along the right lateral thigh and anterior lower leg, despite using specialized stockings and "attempting to elevate the legs as well as the foot of the bed at night," and that she had been unable to work since February 1998, due to the pain in her legs. (*Id*.) She stated that her condition had "improved with rest and leg elevation." (*Id*.)

Dr. Knox noted that there was swelling in Plaintiff's right upper calf region with soft tissue fullness and tenderness; the right calf measured 38 cm four fingerbreadths below the tibial tubercle, and the left calf measured 34.5 cm; the right ankle was 20.5 cm and the left ankle was 19.5 cm; and although there were no major varicosities, there were small varicosities scattered about the right lower leg in the anterior region just below the knee. (*Id*.) Dr. Knox ordered a venous insufficiency ultrasound, the wearing of fitted compression stockings, and "continue[d] ... leg elevation." (*Id*.)

Plaintiff returned to Dr. Knox for evaluation of her right leg varicosities on June 11, 1998. (*Id*. at 155.) Dr. Knox reported that Plaintiff had "swelling in the right leg

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[2]For a "younger person," the Social Security Administration does "not consider that ... age will seriously affect ... ability to adjust to other work." 20 C.F.R. § 404.1563.

medial aspect just below the knee. This [wa]s tender and there [w]ere some superficial varicosities coursing about the soft tissue fullness. An MRI was obtained[3] which revealed no definite mass, no definite lipoma, but there [wa]s an accumulation of fatty tissue as well as vascular tissue consistent with either simple varicosities or hemangioma." (*Id*.) He stated that Plaintiff would "continue the leg elevation and compression stockings." (*Id*.) On September 9, 1998 Dr. Knox issued a statement opining, "I believe it is not possible for [Plaintiff] to perform her job, and I believe she is disabled ... into the foreseeable future." (*Id*. at 154.)

Plaintiff had the varicosities of the right leg surgically removed on January 20, 1999. (*Id*. at 147.) Afterward, on February 1, 1999, Dr. Knox noted that the wounds were healing nicely and advised Plaintiff to "continue the conservative management of compression stocking and leg elevation." (*Id*. at 146.) In a letter to Delaware Disability Determination Service on April 25, 1999, Dr. Knox stated that Plaintiff has "significant venous insufficiency disease documents ... extensively involving the deeper tissues in the leg, which were not amenable to surgical excision. Therefore, I do believe that she may have significant symptoms of pain and fatigue when standing, and this would limit her ability to work, *unless she were able to maintain a sitting position with her legs elevated*" (*Id*. at 144-145) (emphasis added).

On July 31, 1999, Plaintiff underwent a consultative examination with I.L. Lifrak, M.D. (*Id*. at 181-184.) Plaintiff reported that she was able to walk one mile, climb one flight of stairs, sit for thirty minutes at a time, and stand fifteen minutes at a time. (*Id*. at

[3]The MRI was performed on Plaintiff's right calf on May 27, 1998. *Id*. at 156.

182.) Dr. Lifrak disclosed that she walked with a slight limp favoring her right leg; was unable to walk on her heels or toes; had normal reflexes and sensation and noted no evidence of deep venous thrombosis or stasis ulceration. (*Id*. at 182-184.)

Plaintiff was examined by Bruce A. Fellows, M.D. on November 16, 1999, a colleague of Dr. Knox's at the same medical association. (*Id*. at 203.) Plaintiff complained of left poleteal pressure as well as generalized heaviness and weakness with her left leg, but she had no varicose veins or edema. (*Id*.) An ultrasound showed no vascular abnormalities and no evidence of a Baker's cyst. (*Id*. at 204.)

On April 14, 2000, Hugh Bonner, M.D., completed an assessment of Plaintiff's ability to work. (*Id*. at 206-208.) Dr. Bonner opined that Plaintiff was able to stand or walk less than two hours in an eight hour work day due to achiness in the right and left calves after prolonged standing. (*Id*.) He indicated that she could occasionally climb, but never kneel, crouch, or crawl. (*Id*.) Based on Plaintiff's subjective complaints of pain, Dr. Bonner stated that she must periodically alternate sitting and standing. (*Id*.) On January 22, 2001, Dr. Bonner issued a statement that Plaintiff "needs to elevate her legs periodically through [the] work day, 15 minutes once an hour." (*Id*. at 210.)

B. Procedural History

On April 8, 1999, Plaintiff filed an application for disability insurance benefits with the Social Security Administration ("SSA"), alleging that she had been disabled since February 27, 1998, due primarily to varicose veins and venous insufficiency. (D.I. 6 at 4; D.I. 7 at 1.) The SSA denied Plaintiff's application initially and upon reconsideration. (*Id*.) On January 26, 2001 she appeared before an ALJ, who found, on February 15,

2001, after a thorough review of "all the objective medical evidence and the [Plaintiff's] less than credible testimony as to the frequency and severity of her symptoms and the extent of her functional limitations," that Plaintiff was not disabled within the framework of Medical-Vocational Rules 201.22 and 201.29, and therefore not entitled to receive disability benefits under the Act. (D.I. 4 at 22.) He concluded that "[w]hile the record confirms her need to elevate her legs periodically, the reports and assessments of her treating physicians do not corroborate a need to elevate her legs 'above her nose.' At most, she must elevate her legs twelve to eighteen inches when sitting and alternate sitting and standing positions every fifteen minutes."[4] (*Id*.)

In deciding that Plaintiff was not disabled under the Medical-Vocational Rules, which focuses on whether there are a significant number of jobs existing in the national economy that she could perform, the ALJ solicited the testimony of an impartial vocational expert. The vocational expert was asked to assume a hypothetical individual with Plaintiff's age, education, work experience and work-related limitations. (*Id*. at 69.) In particular, the individual could alternate between sitting and standing or walking at 15 to 20 minute intervals, could not bend, push, pull, or work on uneven surfaces, and could not be exposed to environmental irritants or temperature extremes, especially

[4]At the hearing, the ALJ asked Plaintiff the level at which she elevates her feet. (D.I. 4 at 58.) She replied, "The best is above my heart level. There was a little phrase that a vascular surgeon told me years ago, toes above your nose." (*Id*.) The ALJ later asked Plaintiff how her condition "got so bad," considering that she "normally spent six hours of the [work] day in a seated position." (*Id*. at 60.) Plaintiff replied that "my legs have to be elevated higher than my heart level for the swelling to come down ... . Under my desk, I had my feet elevated. That is not what relieves it... . That helps very, very little. I have to be laying down with my legs up." (*Id*.) Plaintiff further stated that she elevated her legs from the prone position at work five to seven times a week for fifteen to twenty minutes. (*Id*. at 62-63.)

cold. (*Id*.) The vocational expert testified that this hypothetical individual could perform 1,054,000 jobs in the national economy, 3,300 in Delaware, and that the individual could perform these jobs with the limitations described by Dr. Bonner and with the limitations described by Plaintiff to Dr. Lifrak. (*Id*. at 69-70). Next, the ALJ asked the vocational expert to evaluate the impact on the jobs he identified that would occur if the hypothetical individual had to elevate her feet every fifteen minutes. (*Id*. at 70.) He testified that "if the feet only had to be elevated to 'box level' (twelve to eighteen inches), this would not interfere with the performance of the jobs that he described." (D.I. 4 at 21.) However, he also testified that "if the feet had to be elevated 'above the nose,' routinely throughout the day (thus requiring frequent breaks), as the [Plaintiff] testified, this would preclude the performance of the jobs that he described." (*Id*.)

The ALJ's decision became the final agency decision subject to judicial review when the Appeals Council denied Plaintiff's request for review on May 18, 2001. (*Id*.) On July 3, 2001, Plaintiff filed a complaint seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's decision to deny her disability benefits. (D.I. 1 at 1.) The Commissioner filed an answer on November 8, 2001. (D.I. 3.) Plaintiff then filed a Motion for Summary Judgment (D.I. 6) on January 25, 2002 and the Commissioner responded by briefing a Cross-motion for Summary Judgment on February 25, 2002. (D.I. 7.) On March 18, 2002, Plaintiff filed a Motion to Remand (D.I. 9), and the Commissioner replied on April 3, 2002. (D.I. 11.)

III. Standard of Review

The Commissioner's application of law is subject to plenary review. *Markle v. Barnhart*, 324 F.3d 182, 187 (3d Cir. 2003). The Commissioner's findings of fact, however, are reviewed to determine "whether there is substantial evidence to support such findings." *Id*. That determination is made upon review of the entire record. *Reefer v. Barnhart*, 326 F.3d 376, 379 (3d Cir. 2003). Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If the Commissioner's decision is supported by substantial evidence, then a Court is bound by those factual findings. *Plummer v. Apfel*, 186 F.3d 422 427 (3d Cir. 1999).

IV. Discussion

A. Motion to Remand

Plaintiff brought its Motion to Remand (D.I. 9) after bringing its Motion for Summary Judgment (D.I. 6). Although these motions are contradictory, Plaintiff also asked for remand as relief in her Motion for Summary Judgment. (D.I. 6 at 12, 13.)

Plaintiff asks the court to remand this action for further consideration by the ALJ "pursuant to the fourth sentence of 42 U.S.C. § 405(g)." (D.I. 9 at 1.) Specifically, Plaintiff contends that since no doctor of record, including Dr. Knox and Dr. Bonner, stated the precise level to which she must elevate her legs, "the medical record is incomplete and inadequate for the purposes of the ALJ determining that [Plaintiff] must raise her legs only 12-18 inches." (D.I. 9 at 2-3.) Plaintiff alleges that on January 18,

2002, Dr. Bonner was asked to clarify his original prescription of January 22, 2001. The same day, he responded that Plaintiff should: "Elevate bilateral lower extremities periodically throughout the workday for 15 minutes once an hour. Elevate extremities above the level of the heart." (D.I. 10 at Ex. 2.) Plaintiff argues that, according to the vocational expert, plaintiff would be precluded from performing any jobs in the national economy if she had to elevate her legs above her heart/nose. (*Id*. at 3.) Thus, Plaintiff requests remand to the ALJ for "consideration of this prescription clarification and so the government [may] have the opportunity to meet its burden of proving that other jobs exist in the national economy that [Plaintiff can perform with her medical restrictions." (*Id*. at 4.)

Two types of remand are permitted under § 405(g): remands pursuant to the fourth sentence of § 405(g) and remands pursuant to the sixth sentence of § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89, 98-99 (1991). Under sentence four, "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The only evidence that may be considered in assessing whether the ALJ's decision was supported by substantial evidence is the evidence that was in the administrative record at the time of the ALJ's decision. *See Matthews v. Apfel*, 239 F.3d 589, 593-95 (3d Cir. 2001). Here, Plaintiff submitted Dr. Bonner's January 2002 note for the first time with her Motion to Remand. (D.I. 10.) Accordingly, as this is new evidence that was not in

the administrative record at the time of the ALJ's decision, this case will not be remanded pursuant to sentence four of § 405(g).

Even though Plaintiff has not asked the court to grant a remand pursuant to sentence six of § 405(g), I note that remand is not available on this basis either. In contrast to a remand pursuant to the fourth sentence of § 405(g), a remand under sentence six does not address the merits of the administrative ruling. "The district court does not affirm, modify, or reverse the [Commissioner's] decision; it does not rule in any way as to the correctness of the administrative determination." *Melkonyan*, 501 U.S. at 98. Instead, the "court remands because new evidence has come to light that was not available . . . at the time of the administrative proceeding and that evidence might have changed the outcome of the prior proceeding." *Id*. In order to obtain a remand pursuant to sentence six of section 405(g), a claimant must show that the new evidence "is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." *See also Szubak v. Secretary of Health & Human Servs*., 745 F.2d 831, 832-33 (3d Cir. 1984).

Even if Dr. Bonner's January 2002 note is material, Plaintiff must show that she had good cause for failing to submit evidence at an earlier point in the proceedings. This requirement is not a mere technicality. Rather, it guarantees that claimants will not withhold medical reports or fail to submit all relevant evidence "with the idea of 'obtaining another bite of the apple' if the [Commissioner] decides that he claimant is not disabled." *Szubak*, 745 F.2d at 834. Here, Plaintiff has not provided any explanation for her failure to submit additional evidence from Dr. Bonner to the ALJ, the Appeals

Council, or even to this court with her Motion for Summary Judgment.[5] As Plaintiff has not shown good cause for her failure to incorporate the additional evidence from Dr. Bonner, remand is not appropriate under sentence six of 42 U.S.C. § 405(g).

B. Motions for Summary Judgment

Plaintiff argues that she is entitled to Social Security Disability Insurance Benefits because she is disabled under 20 C.F.R. § 404.1520(f). (D.I. 6 at 10.) She contests the ALJ's finding that she was not disabled because she claims the ALJ "failed to (1) develop evidence from a treating physician regarding the level of elevation [Plaintiff] must use with her legs and (2) order a consultative examination to determine the extent to which [Plaintiff] must elevate her legs." (*Id*.) A sequential five-step inquiry pursuant to 20 C.F.R. § 404.1520 is used to determine whether a claimant is entitled to disability benefits.[6] Plaintiff has only challenged the ALJ's finding at step five of the sequential

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[5]The Motion for Summary Judgment was filed on January 25, 2002, nearly one week after the Dr. Bonner issued his clarification. (D.I. 6, 10.)

[6] Under that inquiry, "the [ALJ] determines first whether an individual is currently engaged in substantial gainful activity. If that individual is engaged in substantial gainful activity, [she] will be found not disabled regardless of the medical findings. If an individual is found not to be engaged in substantial gainful activity, the [ALJ] will determine whether the medical evidence indicates that the claimant suffers from a severe impairment. If the [ALJ] determines that the claimant suffers from a severe impairment, the [ALJ] will next determine whether the impairment meets or equals the list of impairments in Appendix I of sub-part P of Regulation No. 4 of the Code of Regulations. If the individual meets or equals the list of impairments, the claimant will be found disabled. If [she] does not, the [ALJ] must determine if the individual is capable of performing [her] past relevant work considering [her] severe impairment. If the [ALJ] determines that the individual is not capable of performing [her] past relevant work, then [the ALJ] must determine whether, considering the claimant's age, education, past work experience and residual functional capacity, [she] is capable of performing other work which exists in the national economy." *Morales*, 225 F.3d at 316 (quoting *Brewster v. Heckler*, 786 f.2d 581, 583 (3d Cir. 1986) (internal citations omitted)).

evaluation process, that she was able to perform a significant number of jobs in the national economy. (D.I. 6 at 10; D.I. 10 at 4.)

Based on the vocational expert's testimony, the ALJ found that Plaintiff "was not under a 'disability,' as defined by the Social Security Act, at any time through the date of this decision" because:

> [Plaintiff] has the residual functional capacity to perform a significant range of sedentary work, but must elevate her legs twelve to eighteen inches when sitting, alternate sitting and standing positions every fifteen minutes, and perform tasks that do not involve bending, pushing, pulling, working on uneven surfaces or tasks that involve working around temperature extremes and respiratory irritants; she can perform one-to two step simple routine tasks . . . [and]
>
> Although the [Plaintiff's] exertional and nonexertional limitations do not allow her to perform the full range of sedentary work, using Medical-Vocational Rules 201.22 and 201.29 as a framework for decision-making, there are a significant number of jobs in the national economy that she could perform.

(D.I. 4 at 22.)

The ALJ's findings are supported by the medical sources of record. Dr. Knox, a vascular surgeon, stated that Plaintiff could perform work from a seated position with her legs elevated, and Dr. Bonner, Plaintiff's family practitioner, said that she could perform sedentary work and that she would need to elevate her legs fifteen minutes per hour. (*Id*. at 144-145, 206-210.) No medical source of record has indicated that Plaintiff must elevate her legs from a prone position to a level above her nose.

Plaintiff asserts that the ALJ "should have accepted [her] unrefuted and credible testimony" that she must elevate her legs above her heart/nose to alleviate her pain,

"otherwise the ALJ should have used every reasonable effort to obtain the specific degree that [Plaintiff] must elevate her legs from one of her treating physicians." (D.I. 6 at 12.) Plaintiff's reliance on her own testimony, as well as her attempt to shift the burden to the ALJ, is misplaced. (D.I. 7 at 14.) In order to establish eligibility for disability benefits, a claimant has the 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 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).[7] Plaintiff has not met its burden.

The ALJ found that Plaintiff's subjective complaints, were not credible based on the factors set forth in 20 CFR § 404.1529 and rejected, in particular, her allegation that she had to elevate her legs to nose level. (D.I. 4 at 17-19, 21-22.) Since substantial evidence supports the ALJ's finding that Plaintiff was not required to elevate her legs to nose level from a prone position, and Plaintiff has not provided medical evidence sufficient to establish entitlement to disability benefits, the Plaintiff's Motion for Summary Judgment will be denied and the ALJ's Cross-Motion for Summary Judgment will be granted.

[7] *See also* 20 C.F.R. § 404.1512; *Bowen v. Yuckert*, 482 U.S. 137, 146, n.5 (1987) (the claimant bears the burden of providing medical evidence because she is "in a better position to provide information about [her] own medical condition").

V. Conclusion

For the reasons stated, the Court will grand defendant's Cross Motion for Summary Judgment (D.I. 8) and deny Plaintiff's Motion for Summary Judgment (D.I. 6) and Motion to Remand (D.I. 9). An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAWN M. DOUBET, Plaintiff, v. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	)	Civil Action No. 01-456-KAJ

ORDER

For the reasons set forth in the Memorandum Opinion issued on this date,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment (D.I. 6) and Motion to Remand (D.I. 9) are DENIED, and the Commissioner's Cross-Motion for Summary Judgment (D.I. 8) is GRANTED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

November 5, 2003
Wilmington, Delaware