

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ELIZABETH ACOSTA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 02-1492-KAJ
)	
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security)	
)	
Defendant.)	

MEMORANDUM OPINION

Gary L. Smith, Esquire; 1400 Peoples Plaza, Suite 110, Newark, Delaware, 19702, counsel for plaintiff.

Colm F. Connolly, United States Attorney, District of Delaware; Patricia C. Hannigan, Assistant United States Attorney, District of Delaware; The Nemours Building, 1007 Orange Street, Suite 700, P.O. Box 2046, Wilmington, Delaware 19899-2046, counsel for defendant.

Of Counsel: Patricia M. Smith, Act. Reg. Chief Counsel, Reg. III; William B. Reeser, Associate General Counsel, Office of the General Counsel, Social Security Administration, P.O. Box 41777, Philadelphia, Pennsylvania, 19101

October 6, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Presently before me is a motion for summary judgment (Docket Item ["D.I."] 17) filed by plaintiff Elizabeth Acosta ("Acosta") and a cross motion for summary judgment (D.I. 19) filed by defendant Jo Anne B. Barnhart, Commissioner of Social Security ("Commissioner"). Acosta brings this action under 42 U.S.C. §§ 405(g), 1383(c)(3), seeking review of the Commissioner's decision denying her disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act ("the Act"), 42 U.S.C. §§ 401-434, 1381-1383. The court has jurisdiction to review the Commissioner's decision under 42 U.S.C. § 405(g) of the Act.

For the reasons that follow, I will deny Acosta's motion (D.I. 17) and grant the Commissioner's motion (D.I. 19).

II. BACKGROUND

A. Procedural History

On May 5, 2000, Acosta filed applications for disability insurance benefits and supplemental security income with the Social Security Administration ("SSA"), alleging disability since September 29, 1999. (D.I. 11 at 272.) The SSA denied Acosta's claims initially and upon reconsideration. (*Id.*) Acosta then requested a hearing before an Administrative Law Judge ("ALJ") and, after she indicated in writing that she wanted a decision made on the evidence in the record without a hearing, the ALJ found her disabled for a closed period between September 29, 1999 and March 26, 2001.¹ (*Id.* at 278.)

¹ The ALJ determined that as of March 26, 2001, Acosta's condition had improved to the point that she could perform light work, including her past sedentary work as a billing clerk and office aide. (D.I. 11 at 278).

Acosta's subsequent request for review of the ALJ's decision was denied by the SSA's Appeals Council. (*Id.* at 21.) Acosta did not pursue any further appeals. (*Id.*)

On October 1, 2001, Acosta filed her current application with the SSA, under which this action arises, seeking disability insurance benefits and alleging an inability to work as of September 14, 2001. (*Id.* at 14.) On September 25, 2001, Acosta also submitted a claim for supplemental security income. (*Id.*) The SSA denied both of Acosta's claims initially and upon reconsideration. (*Id.*) Acosta then requested a hearing before an ALJ, after again indicating that she wanted a decision made on the evidence in the record. On April 23, 2002, without a hearing, the ALJ determined that Acosta was able to perform her past relevant work as a hospital billing clerk and thus was not disabled under the Act and its regulations. (*Id.* at 19.)

Acosta then filed a request for review with the SSA's Appeals Council. (*Id.* at 9.) The Appeals Council found that there was "no basis under the [] regulations for granting" Acosta's "request for review." (*Id.* at 6.) The April 23, 2002 decision of the ALJ, therefore, became the final decision of the Commissioner. See 20 C.F.R. §§ 404.955, 404.981, 422.210; see also *Sims v. Apfel*, 530 U.S. 103, 106-107 (2000); *Matthews v. Apfel*, 239 F.3d 589, 592 (3d Cir. 2001). Acosta now seeks review by this Court under 42 U.S.C. §§ 405(g), 1383(c)(3). (D.I. 1.)

B. Facts

Acosta graduated from high school and attended college for two years. (D.I. 11 at 322). She has past work experience as a receptionist, and a billing and office clerk in hospitals, commercial firms, and a youth center. (*Id.* at 15, 317.) Acosta alleges an inability to work as of September 14, 2001, due to constant pain in her neck and back,

numbness of her right leg, and difficulty sitting, walking, and carrying more than five to ten pounds. (*Id.* at 315-324.)

1. Medical Evidence

On March 26, 2001, following Acosta's initial period of disability, Dr. Michael Sugarman released Acosta for full-time work. (D.I. 18 at 2.) After she had been working for approximately three months, Acosta reported to Dr. Sugarman on July 19, 2001 complaining of pain in her low back which was progressively getting worse. (D.I. 20 at 12.) Dr. Sugarman noted that the strength in Acosta's lower extremities was normal, and noted that, while her low back pain was debilitating, she was still able to work. (*Id.*)

On September 4, 2001, Acosta sought treatment from Dr. Jill Mackey for pain associated with her neck and back. (D.I. 18 at 3.) Dr. Mackey indicated that Acosta was complaining that the pain was lasting all day, and that she had trouble with activities of daily living, cleaning, and shopping. (*Id.*) On September 14, 2001, Acosta stopped working. (*Id.*)

On September 20, 2001, Acosta reported to Dr. Sugarman, complaining of continued neck discomfort. (D.I. 20 at 13.) Dr. Sugarman found that Acosta's neck had a limited range of motion, but he could not determine what was causing her pain. (*Id.*) As a result, Dr. Sugarman ordered additional testing. (*Id.*)

An MRI (magnetic resonance imaging) of Acosta's cervical spine was performed on October 10, 2001. (*Id.* at 14.) The MRI showed no evidence of "mass lesion in her neck or disc abnormality." (*Id.*) An MRA (magnetic resonance angiogram) was also performed that day and showed no significant abnormality in Acosta's neck. (*Id.*)

On November 1, 2001, a physician from the Delaware Disability Determination Service (“DDDS”), whose name is not discernable from the record, reviewed the medical records of Acosta and completed a Residual Functional Capacity Assessment. (D.I. 11 at 362-359.) The DDDS physician opined that Acosta was capable of occasionally lifting 20 pounds, frequently lifting 10 pounds, standing or walking two hours in an eight hour work day, and sitting six hours in an eight hour workday. (*Id.* at 363.)

On November 29, 2001, Acosta underwent cervical and lumbar myelograms and CT (computed tomography) scans of her cervical and lumbar spine. (D.I. 20 at 14.) Both the myelograms and CT scans were negative. (*Id.*)

On December 6, 2001, Dr. Sugarman again examined Acosta. (*Id.*) He noted that there was no evidence of any neural compression throughout her cervical or lumbar regions. (*Id.*) He recommended that Acosta attempt physical therapy as a treatment for her symptoms. (*Id.*) Later that same month, Dr. Sugarman, in completing a form for Acosta’s private disability insurance, indicated that she was “totally disabled.” (*Id.*)

Acosta reported to Christiana Care for physical therapy on December 11, 2001. (*Id.*) She rated her pain as a 7/10 at best and 10+/10 at its worse on a scale of 0-10. (*Id.*) Progress notes indicate that she was able to sit unsupported and that there was no tenderness in her cervical spine. (*Id.*) Acosta was to continue with physical therapy three times a week for six weeks. (*Id.*) However, she discontinued physical therapy as of February 5, 2002. (*Id.* at 15.)

On January 18, 2002, another DDDS physician, whose name is not discernable from the record, also reviewed the medical records of Acosta and completed a Residual Functional Capacity Assessment. (D.I. 11 at 354-361.) The DDDS physician opined that

Acosta was capable of occasionally lifting 20 pounds, frequently lifting 10 pounds, standing or walking two hours in an eight hour work day, and must periodically alternate sitting and standing to relieve pain or discomfort. (*Id.* at 355.)

2. *The ALJ's Decision*

To determine whether a claimant is entitled to disability benefits, an ALJ applies a “sequential five-step inquiry pursuant to 20 C.F.R. § 404.1520[]” . *Morales v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000); see 20 C.F.R. § 404.1520; *Brewster v. Heckler*, 786 F.2d 581, 583 (3d Cir. 1986). Under that inquiry:

[T]he [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 Regulations 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.

Brewster, 786 F.2d at 583-584 (internal citations omitted); see *Plummer v. Apfel*, 186 F.3d 422, 428-429 (3d Cir. 1999).

In this case, after applying the sequential evaluation, the ALJ determined that Acosta was not disabled within the meaning of the Act and its regulations. (D.I. 11 at 18.) The ALJ first found that Acosta was not engaged in substantial gainful activity. (*Id.* at 15.) Next, the ALJ concluded that Acosta suffered from “severe discogenic degenerative disorders of the spine, with back sprains and strains.” (*Id.* at 16.) However, her impairments were not impairments listed in Appendix I of subpart P of Regulations No. 4 of the Code of Regulations. (*Id.*) The ALJ then determined that Acosta had a residual functional capacity to perform “a full range of sedentary work.”² (*Id.* at 20.) Given Acosta’s residual functional capacity for sedentary work, the ALJ concluded that she retained the capacity to perform the functional demands of her previous work as a hospital billing clerk. (*Id.*) Therefore, the ALJ found Acosta not disabled under the Act and its regulations. (*Id.*)

III. STANDARD OF REVIEW

Courts apply plenary review to the Commissioner’s application of law. *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.* The entire record is pertinent to that review. See *Reefer v. Barnhart*, 326 F.3d 376, 379 (3d Cir. 2003.)

Substantial evidence is defined as “more than a mere scintilla. It means

² “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.” 20 C.F.R. § 404.1567(a).

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938.)) If the Commissioner’s decision is supported by substantial evidence, then I am bound by those factual findings. *Plummer*, 186 F.3d at 427.

IV. DISCUSSION

Acosta argues that the ALJ’s decision should be reversed and the matter remanded for further proceedings because: 1) The ALJ failed to consider and explain his reasons for discounting all of the pertinent evidence in making his residual functional capacity determination; and 2) The ALJ failed to develop and evaluate Acosta’s past relevant work as required by Social Security Ruling (“SSR”) 82-62. (D.I. 18 at 1, 16.) The Commissioner contends that the ALJ’s determination that Acosta had a residual functional capacity to perform sedentary work, and hence was able to perform her past job as a hospital billing clerk, was supported by substantial evidence and therefore the ALJ’s decision denying Acosta disability insurance benefits and supplemental security income should be upheld. (D.I. 20 at 4, 34.)

A. The ALJ’s determination of Acosta’s residual functional capacity.

“Residual functional capacity’ is defined as that which an individual is still able to do despite the limitations caused by his or her impairment(s).” *Hartranft v. Apfel*, 181 F.3d 358, 359 n. 1 (3d Cir. 1999) (citing 20 C.F.R. § 404.1545(a)). In determining a claimant’s residual functional capacity, the ALJ must “consider all

evidence before him[,]” including “medical records, observations made during formal medical examinations, descriptions of limitations by the claimant and others, and observations of the claimant’s limitations by others.” *Fagnoli v. Massanari*, 247 F.3d 34, 41 (3d Cir. 2001); *Burnett v. Comm’r of Soc. Sec. Admin.*, 220 F.3d 112, 121 (3d Cir. 2000); see 20 C.F.R. § 404.1545(a). While the ALJ may weigh the credibility of such evidence, “he must give some indication of the evidence which he rejects and his reason(s) for discounting such evidence.” *Burnett*, 220 F.3d at 121; see *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981) (The ALJ’s determination of residual functional capacity must “be accompanied by a clear and satisfactory explication of the basis on which it rests.”)

Here, in determining Acosta’s residual functional capacity, the ALJ properly considered and weighed the evidence before him and, further, indicated which evidence he rejected and his reasons for rejecting such evidence. In Acosta’s brief to the court (D.I. 18), she asserts that, while the ALJ “engaged in a recitation” of the evidence, his decision that Acosta has a residual functional capacity for sedentary work is contrary to Dr. Sugarman’s determination that Acosta was “totally disabled”, and is contrary to Acosta’s allegations of pain. (D.I. 18 at 11-14.) However, the ALJ’s opinion clearly indicates that he considered such evidence and adequately noted his reasons for rejecting such evidence due to contradicting medical evidence and lack of credibility. Specifically, to contradict Dr. Sugarman’s findings and determine that Acosta’s allegations of pain were not credible, the ALJ noted that the MRI and MRA performed in October 2001 showed no abnormalities of the neck or

back, the CT scans and cervical and lumbar myelograms performed in November 2001 were negative, and Acosta's physical therapy notes from December 2001 indicated she had no tenderness in her back. (D.I. 11 at 17.) As further support, the ALJ noted that the Residual Functional Capacity Assessments, completed by the DDDS physicians³, demonstrated that Acosta was capable of sedentary work. (*Id.*) Therefore, I find that the ALJ's determination that Acosta "retains the residual functional capacity for a full range of sedentary work" is supported by substantial evidence. (*Id.* at 18.)

Acosta also submits that the ALJ, in his opinion, "misstated the record[,]""cited selectively from the medical reports[,] and was "obviously picking and choosing evidence which he believe[d] [would] support his conclusion[.]" (D.I. 18 at 13.) Specifically, Acosta argues that the ALJ had a "significant omission" in his opinion by failing to mention that Acosta had a herniated lumbar disc. (*Id.* at 12.) This argument, however, is unpersuasive. Acosta was diagnosed, as a result of an MRI, with a lumbar disc herniation in February 2001. (D.I. 11 at 232.) However, in March 2001, Dr. Sugarman determined that Acosta was able to work full-time with no limitations. (*Id.* at 234.) Moreover, the MRI, CT scans, and the cervical and lumbar myelograms performed in the Fall 2001, after Acosta had filed her current claim, did not indicate that she had a herniated lumbar disc. (*Id.* at 374, 564-65.) Therefore, although the ALJ did not mention the February 2001 MRI from

³ ALJs "are not bound by any findings made by State agency medical ... physicians[.] However, State agency medical ... physicians ... are highly qualified physicians ... who are also experts in Social Security disability evaluation." 20 C.F.R. § 404.1527(f)(2)(I).

his opinion, given the numerous points of evidence that Acosta no longer suffers from a herniated lumbar disc, “the omission does not constitute reversible error.” *Mays v. Barnhart*, 227 F. Supp. 2d 443, 449 (E.D. Pa. 2002) (quoting *Versace v. Barnhart*, No. 01-cv-3909, 2002 WL 1880526, at *2 (E.D. Pa. 2002) (holding that the ALJ’s omission of one of the claimant’s medical tests/reports “does not constitute reversible error because the rest of the evidence ... supports the ALJ’s conclusion.”)); see *Peterson v. Barnhart*, 215 F. Supp. 2d 439, 450 n.9 (D. Del. 2002) (“[T]he omissions do not appear to strongly favor plaintiff and, therefore, do not warrant remand to the ALJ for further explanation.”).

B. The ALJ’s evaluation of Acosta’s past relevant work.

Determining whether a claimant is able to perform her past relevant work, as required by step four of the sequential evaluation, involves three substeps: 1) the ALJ must make findings of fact as to the claimant’s residual functional capacity; 2) the ALJ must make findings of fact as to the physical and mental demands of the claimant’s past job; and 3) the ALJ must make findings of fact as to whether the claimant’s residual functional capacity would permit a return to her past job. SSR 82-62; *Burnett*, 220 F. 3d at 120. To assess the physical and mental demands of a claimant’s past job, and determine whether the claimant could return to that past job, SSR 82-62 provides that:

The claimant is the primary source for vocational documentation, and statements by the claimant regarding past work are generally sufficient for determining the skill level; exertional demands and nonexertional demands of such work. Determination of the claimant’s ability to do PRW [past relevant work]

requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the Dictionary of Occupational Titles, etc., on the requirements of the work as generally performed in the economy.

“The assessment of a claimant’s past relevant work must be based on some evidence drawn from the above three categories[.]” *Burnett*, 220 F.3d at 123.

Furthermore, it would be “clear error to make a past relevant work determination that is contrary to uncontroverted evidence presented by the claimant.” *Id.*

In this case, the ALJ properly determined that Acosta was capable of performing her past relevant work as a hospital billing clerk based on his findings of Acosta’s residual functional capacity, as previously established, and his findings regarding the physical and mental demands of Acosta’s past job and her ability to return to that job. Acosta asserts that the ALJ was “clearly in error” when determining Acosta’s demands of her past relevant work because he ignored Acosta’s uncontroverted evidence and instead relied on the Dictionary of Occupational Titles. (D.I. 18 at 15.) However, Acosta’s evidence is far from uncontroverted. In Acosta’s Disability Report, she indicated that her past job as a hospital billing clerk required her to walk for one hour, stand for two hours, and sit for eight hours. (D.I. 11 at 68.) In contrast, Acosta’s Work History Report suggests that she would stand for four hours and sit for four hours. (*Id.* at 85.) Still, in yet another Work History Report, Acosta claims that her past job required her to walk

for eight hours, stand for eight hours, and sit for six hours. (*Id.* at 313.) Clearly Acosta's evidence regarding the functional demands of her past job are controverted by her own statements. Therefore, because of the controverted evidence and, further, because Acosta refused to provide any evidence through testimony at a hearing, the ALJ, in accordance with SSR 82-62, appropriately referred to the Dictionary of Occupational Titles to assist in his determination. Accordingly, the ALJ's finding that Acosta was capable of her past relevant work as a hospital billing clerk, based on her residual functional capacity for sedentary work and the functional demands of her former job as outlined in the Dictionary of Occupational Titles, is supported by substantial evidence.

V. CONCLUSION

For the reasons stated, the court will grant defendant's motion (D.I. 19) and will deny plaintiff's motion (D.I. 17). An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELIZABETH ACOSTA,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security

Defendant.

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Civil Action No. 02-1492-KAJ

ORDER

For the reasons set forth in the Court's Memorandum Opinion of today's date in this matter,

IT IS ORDERED that Defendant's motion for summary judgment (D.I. 19) is GRANTED, and the Plaintiff's motion for summary judgment (D.I. 17) is DENIED.

Kent A. Jordan

UNITED STATES DISTRICT JUDGE

October 6, 2004
Wilmington, Delaware