

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PATRICIA KEE,)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-440-KAJ
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant.)

MEMORANDUM OPINION

Gary C. Linarducci, Esquire; 92 Read's Way, Suite 102, New Castle Corporate Commons, New Castle, Delaware 19720, counsel for plaintiff.

Colm F. Connolly, United States Attorney, District of Delaware; Paulette K. Nash, Assistant United States Attorney, District of Delaware; 1007 Orange Street, Suite 700, P.O. Box 2046, Wilmington, Delaware 19899, counsel for defendant.

July 6, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Presently before me is a motion for summary judgment (Docket Item ["D.I."] 12) filed by plaintiff Patricia Kee ("Kee") and a cross motion for summary judgment (D.I. 15) filed by the defendant, the Commissioner of Social Security ("Commissioner"). Kee brings this action under 42 U.S.C. § 405(g), seeking review of the Commissioner's decision denying her supplemental security income under Title XVI of the Social Security Act ("the Act"), 42 U.S.C. §§ 1381-1383f. 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 Kee's motion (D.I. 12) and grant the Commissioner's motion (D.I. 15).

II. BACKGROUND

A. Procedural History

On April 25, 1997, Kee filed a claim for supplemental security income ("SSI"), alleging disability since March 19, 1997, due to degenerative disc disease of the lumbar spine, residual effects from a torn left knee ligament that was surgically repaired, and depression. (D.I. 10 at 14; D.I. 13 at 1; D.I. 16 at 1.) The state agency responsible for disability determinations denied Kee's claims initially and upon reconsideration. (D.I. 13 at 1; D.I. 16 at 1.) At Kee's request, an administrative law judge ("ALJ") conducted a hearing on June 18, 1998, at which Kee, who was represented by counsel, testified. (*Id.*) On August 19, 1998, the ALJ issued a decision denying Kee's claim for benefits. (*Id.*) Kee appealed the ALJ's decision, and on June 12, 2001, the Appeals Council vacated that decision and remanded the case for further consideration. (*Id.*; D.I. 10 at

15.)

A supplemental hearing took place before a different ALJ on October 9, 2001, at which a vocational expert and Kee, who was again represented by counsel, testified. (*Id.*) On January 30, 2002, the ALJ issued a new decision denying Kee's claim for benefits because she retained the ability to perform her past relevant work as a data entry clerk, as that job is generally performed in the national economy. (D.I. 10 at 14; D.I. 13 at 1; D.I. 16 at 1-2.) The ALJ also determined that Kee is not disabled within the Act. (D.I. 10 at 14.)

Kee requested that the Appeals Counsel grant review in this case and overturn the ALJ's January 30, 2002 decision. (D.I. 16 at 2.) The Appeals Council did not grant the request for review. (*Id.*; D.I. 10 at 8-9.) Thus, the ALJ's January 30, 2002 adverse decision became the final decision of the Commissioner. See 20 C.F.R. §§ 416.1455, 416.1481, 422.210 (2002); see also *Sims v. Apfel*, 120 S. Ct. 2080, 2083 (2000); *Matthews v. Apfel*, 239 F.3d 589, 592 (3d Cir. 2001). Kee filed a complaint with this court on May 23, 2002 (D.I. 1), and her case is now before me for disposition on the parties' cross-motions for summary judgment.

B. Facts¹

Kee was born on October 20, 1963 and has a high school equivalent education. (D.I. 10 at 15; D.I. 13 at 2.) She received additional training to become a certified file clerk, data entry operator, and a clerk typist. (D.I. 13 at 2; D.I. 16 at 4.) Kee's past work

¹Both Kee and the Commissioner set forth a brief statement of the facts, essentially restating the ALJ's factual summary of this case. (See D.I. 13 at 5-7; D.I. 16 at 4-7.)

experience includes employment as a cashier and a data entry clerk. (*Id.*; D.I. 10 at 15.)

Kee claims a disability onset date of March 19, 1997. (D.I. 16 at 4.) The medical evidence shows that Kee tore a ligament in her left knee, which was surgically repaired in August 1997. (*Id.*) After the surgery, she underwent physical therapy to rehabilitate her knee. (*Id.*) Upon completing physical therapy in November 1997, she met all goals regarding range of motion in her left knee, strength, and achieving functional independence. (*Id.* at 5.) Though Kee complained of intermittent pain in her left knee, a diagnostic arthroscopy in August 1998 revealed a normal left knee. (*Id.*)

Kee also complained of back pain, which she claims is due to ruptured lumbar discs in her spine.² (*Id.*) However, there is no diagnostic evidence to support her claim of ruptured spinal discs, nor has she undergone surgery for such a condition. (*Id.*) In addition, Yong K. Kim, M.D., a specialist in physical medicine and rehabilitation, found that straight leg-raising tests³ were negative. (*Id.*) Dr. Kim also found that Kee's left knee joint was unremarkable with no sign of effusion and only a slight reduction in rotation. (*Id.*) Overall, Dr. Kim opined that, despite all of Kee's physical impairments, Kee retained a capacity for sedentary work. (*Id.*) The ALJ adopted this as his residual

²Kee also testified that she was being treated for depression. (D.I. 13 at 2.) The ALJ found that Kee's depression was not a medically determinable impairment because it did not precisely satisfy the necessary diagnostic criteria. (D.I. 10 at 19.) Kee does not challenge this determination in her motion for summary judgment.

³The straight leg-raising test is a diagnostic tool which detects nerve root pressure produced by disc herniation. The test is positive when an individual, lying in a supine position, complains of pain when his fully extended leg is raised to less than a 60 degree level out of a possible maximum of 90 degrees. (See D.I. 16 at 5 n.1 (citation omitted).)

functional capacity finding.⁴ (*Id.*)

Kee denied having worked at all since 1991, but her earnings records showed that she did receive some income for work in 1996. (*Id.* at 6.) Kee also testified that she had not used drugs or alcohol in the past twenty years, despite contemporaneous treatment notes documenting ongoing social alcohol drinking and use of marijuana, when it is available. (*Id.*) Kee also testified that she needs a cane in order to walk, but her treatment notes state that she can walk independently, and without an assistive device. (*Id.* at 7.) In January 2000, when asked by a physical therapist whether she used an assistive device, Kee did not mention using a cane and identified only the use of a knee brace. (*Id.*)

C. The ALJ's Decision

To determine whether Kee is disabled, the ALJ performed the five-step evaluation required by 20 C.F.R. § 416.920. The five step evaluation involves the following sequential analysis:

If the claimant is performing substantial gainful work, she is not disabled.

If the claimant is not performing substantial gainful work, her impairment(s) must be severe before she can be found to be disabled.

If the claimant is not performing substantial gainful work and has a severe impairment (or impairments) that has lasted or is expected to last for a continuous period of at least twelve months, and her impairment (or impairments) meets or medically equals a listed impairment contained in Appendix 1, Subpart P, Regulation No. 4, the claimant is presumed disabled without further inquiry.

If the claimant's impairment (or impairments) does not prevent her from

⁴Kee has not offered any arguments challenging the ALJ's residual functional capacity finding in this case.

doing her past relevant work, she is not disabled.

Even if the claimant's impairment or impairments prevent her from performing her past relevant work, if other work exists in significant numbers in the national economy that accommodates her residual functional capacity and vocational factors, she is not disabled.

20 C.F.R. § 416.920; *see also Plummer v. Apfel*, 186 F.3d 422, 428-29 (3d Cir. 1999).

In this case, the ALJ determined that Kee was not disabled within the meaning of the Act and its regulations. First, the ALJ found that Kee has not engaged in substantial gainful work activity⁵ since her alleged onset date of March 19, 1997. (D.I. 10 at 15.) Second, the ALJ determined that Kee's medical impairments are severe in that they cause significant vocationally relevant limitations. (*Id.* at 15-16 (citing 20 C.F.R. § 416.920(c)).) Third, the ALJ found that Kee does not have an impairment or combination of impairments that meet or medically equal one of the impairments listed in Appendix I, Subpart P, Regulations No. 4. (*Id.* at 16.)

The ALJ then turned to the fourth step, considering whether, in spite of her impairments, Kee has the residual functional capacity to perform her past work.⁶ (*Id.* at 16 (citing 20 C.F.R. 404.1529(a) and 416.920(e)).) After considering the medical evidence, functional assessments, and Kee's testimony, the ALJ found that, due to her

⁵Substantial gainful work activity is defined as work that involves doing significant physical or mental activities, *see* 20 C.F.R. § 416.972.

⁶This entails a two-step inquiry. First, there must be objective medical evidence showing the existence of a medical impairment which results from anatomical, physiological, or psychological abnormalities and which could be reasonably expected to produce the pain or other symptoms alleged. It is only after the claimant has met this threshold obligation of showing by objective medical evidence a medical impairment reasonably likely to cause the pain claimed, that the intensity and persistence of the pain and the extent to which it affects the capability to work, must be evaluated. *See* 20 C.F.R. 404.1529(a) and 416.929(a).

physical impairment, Kee has a maximum exertional capacity for only sedentary work. (*Id.* at 19.) The ALJ also determined that Kee is limited nonexertionally in that she can perform only simple, routine tasks that do not require sustained concentration. (*Id.*) Based upon Kee's residual functional capacity, the ALJ found that Kee's past relevant work as a data entry clerk "did not require the performance of work-related activities precluded by her residual functional capacity." (*Id.* at 21.) The ALJ also found that Kee's "medically determinable degenerative disc disease of the lumbar spine, residual effects of torn left knee ligament status-post surgery and depression do not prevent the claimant from performing her past relevant work." (*Id.*) Finally, the ALJ determined that Kee was not under a disability, as defined in the Act, at any time through the date of the decision. (*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 scintilla. It means 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

Kee argues that the ALJ's finding that she is not disabled is not based on substantial evidence. (D.I. 13 at 5.) Specifically, Kee argues that the ALJ "did not use the grids"⁷ and, therefore, should have posed hypothetical questions to a vocational expert to determine whether Kee is capable of performing her past relevant work. (*Id.*) Kee also argues that the ALJ's conclusion that she is capable of performing her past relevant work is not supported by the evidence. (*Id.* at 7.)

In response, the Commissioner argues that substantial evidence does, in fact, support the ALJ's finding that Kee is not disabled. (D.I. 16 at 10.) The Commissioner also argues that, because the ALJ denied this case at step four of the sequential evaluation process and not step five, he was not required to consult the grids. (*Id.* at 12.) The Commissioner says that Kee has not met her burden of proving that she is unable to return to her previous occupation, as opposed to her specific prior job. (*Id.* at 11.)

The ALJ determined that Kee is not disabled at step four in the five-step evaluation that he is required to perform. In other words, the ALJ determined that Kee is not disabled because her impairments do not prevent her from doing her past relevant work, see 20 C.F.R. § 416.920. (See D.I. 10 at 15, 20.) An ALJ only consults the grids as to the availability of other jobs in the national economy once he has determined that a claimant cannot perform her past relevant work at step four. See *Plummer v. Apfel*, 186 F.3d 422, 428 (3d Cir. 1999) (the issue of availability of other

⁷The "grids" are medical-vocational guidelines used by the ALJ to determine the availability of jobs in the national economy. (See D.I. 13 at 4; D.I. 16 at 12.)

jobs in the national economy is reached only once the claimant proves that she is unable to perform her former occupation). In this case, the ALJ never reached step five in the sequential analysis; thus, Kee's argument that the ALJ was required to consult the grids and pose hypothetical questions to a vocational expert is misplaced.

Kee also argues that she cannot perform her past relevant work as a data entry clerk. (D.I. 13 at 6.) At the hearing, Kee testified that her data entry clerk job was exertionally medium as she performed it. (D.I. 13 at 3; D.I. 16 at 10.) The vocational expert testified that a job as a data entry clerk, as it is generally performed in the national economy, requires only a sedentary exertional capacity. (*Id.* (citing Dictionary of Occupation Title ("DOT") 203.582-054).) Under the Act, a claimant is not disabled if she can meet the functional demands of a past relevant job as it is generally performed throughout the national economy. See 20 C.F.R. § 416.920(e) (claimant who can perform the "kind of work" she performed in the past is not disabled). A claimant bears the burden of showing an inability to return to her previous occupation, and not simply to her specific prior job. *DeLoatch v. Heckler*, 715 F.2d 148, 151 (4th Cir. 1983); SSR 82-61. Apart from pointing out that she performed her past job as a data entry clerk at the medium exertional level (D.I. 13 at 6), Kee has not come forward with any evidence to prove that she is unable to return to the general occupation of a data entry clerk, a sedentary job, as it is performed in the national economy.

Finally, the ALJ evaluated Kee's testimony and found that it was not "entirely credible regarding the severity of her symptoms and their limiting effect on her ability to perform work related activities." (D.I. 10 at 17.) The ALJ cited to specific evidence in reaching this determination, such as: (1) Kee's testimony that she had not worked since

1991 was undermined by an earnings statement showing that she had minimal income in 1996; (2) counseling treatment records contradicted Kee's statement that she had not used any drugs in 20 years; (3) Kee previously testified to doing laundry, hanging clothes outside, and vacuuming; (4) Dr. Kim, after conducting a consultative examination, determined that Kee's left knee joint was normal, apart from showing ligament repair; and (5) Dr. Kim determined that Kee was capable of lifting up to 20 pounds occasionally and sitting about six hours in an eight hour work day. (*Id.* at 17-19.) Therefore, the ALJ's finding that Kee's allegations "regarding her limitations are not totally credible" and the her past relevant work as "a data entry clerk did not require the performance of work-related activities precluded by her residual functional capacity" are supported by substantial evidence and are properly noted by the ALJ in his opinion. (*Id.* at 21.)

V. CONCLUSION

For the reasons set forth, the Commissioner's motion (D.I. 15) will be granted and Kee's motion (D.I. 12) will be denied. An appropriate order will issue.

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 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
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 Defendant.)

ORDER

For the reasons set forth in the Memorandum Opinion issued today, it is hereby ORDERED that the defendant's motion for summary judgment is GRANTED (D.I. 15) and the plaintiff's motion for summary judgment is DENIED (D.I. 12).

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
July 6, 2004