

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HILDA RODRIGUEZ,
Plaintiff,
v.
JO ANNE B. BARNHART,
Commissioner of Social
Security,
Defendant.

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: Civil Action No. 03-0254-JJF
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Attorney for Plaintiff.

Colm F. Connolly, Esquire, United States Attorney, and Patricia
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OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.

Of Counsel: James A. Winn, Esquire, Regional Chief Counsel, and
Eda Giusti, Esquire, Assistant Regional Counsel of the SOCIAL
SECURITY ADMINISTRATION, Philadelphia, Pennsylvania.

Attorneys for Defendant.

MEMORANDUM OPINION

March 10, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is an appeal pursuant to 42 U.S.C. § 405(g), filed by Plaintiff, Hilda Rodriguez, seeking review of the final decision of the Commissioner of the Social Security Administration denying Plaintiff's application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Plaintiff has filed a Motion For Summary Judgment (D.I. 6) requesting the Court to enter judgment in Plaintiff's favor or in the alternative to remand this matter to the A.L.J. In response to Plaintiff's Motion, Defendant has filed a Cross-Motion For Summary Judgment (D.I. 9) requesting the Court to affirm the Commissioner's decision. For the reasons set forth below, Defendant's Motion For Summary Judgment will be granted, and Plaintiff's Motion For Summary Judgment will be denied. The decision of the Commissioner dated May 6, 2002, will be affirmed.

BACKGROUND

I. Procedural Background

Plaintiff filed an application for disability insurance benefits ("DIB") on February 4, 2000, alleging disability since January 1, 1997, due to varicose veins, high blood pressure, diabetes and arthritis. (Tr. 14, 15, 49-51, 67). Plaintiff's application was denied initially and upon reconsideration. (Tr. 24-27, 33-36). Plaintiff timely requested a hearing (Tr. 22-37),

and the A.L.J. conducted a hearing on January 18, 2002. (Tr. 468-492). Plaintiff was represented by counsel at the hearing, and she testified. Following the hearing, the A.L.J. issued a decision on May 6, 2002, denying Plaintiff's claim for DIB. (Tr. 11-20). Plaintiff filed an appeal, and the Appeal's Council denied review. (Tr. 5-6). Accordingly, the A.L.J.'s decision became the final decision of the Commissioner. Sims v. Apfel, 530 U.S. 103, 107 (2000).

After completing the process of administrative review, Plaintiff filed the instant civil action pursuant to 42 U.S.C. § 405(g), seeking review of the A.L.J.'s decision denying her claim for DIB. In response to the Complaint, Defendant filed an Answer (D.I. 3) and the Transcript (D.I. 4) of the proceedings at the administrative level.

Thereafter, Plaintiff filed a Motion For Summary Judgment and Opening Brief (D.I. 6) in support of the Motion. In response, Defendant filed a Cross-Motion For Summary Judgment and a combined Opening and Answering Brief (D.I. 10) requesting the Court to affirm the A.L.J.'s decision. Thereafter, Plaintiff filed a Reply Brief (D.I. 13) to Defendant's Cross-Motion For Summary Judgment. Accordingly, this matter is fully briefed and ripe for the Court's review.

II. Factual Background

A. Plaintiff's Medical History, Condition and Treatment

At the time of the A.L.J.'s decision, Plaintiff was fifty-two years old. Plaintiff has a limited education, and past relevant work experience as a textile worker (gluer), fast food worker, and housekeeper. (Tr. 15). With respect to her work in textiles, Plaintiff indicated on a form submitted with her disability application that this work did not require any lifting, climbing, stooping, kneeling, crouching, crawling, handling, grabbing or grasping. On other forms, Plaintiff indicated that her daily activities include washing dishes, dusting, preparing meals and doing laundry. (Tr. 84-85). Plaintiff also stated that she experiences no side effects from her medication. (Tr. 88).

Plaintiff's medical history involves a number of impairments including obesity, back pain, chronic left plantar fasciitis, inflammatory arthritis/fibromyalgia, diabetes, hypertension, leg pain from varicose veins and GERDs. (Tr. 104-463). Plaintiff's disability application bases her claims on her varicose veins, high blood pressure, diabetes and arthritis (Tr. 15, 67), and therefore, the Court will focus its discussion on these ailments with only a brief mention of Plaintiff's other conditions.

1. Plantar Fascia

In August of 1988, Plaintiff underwent an x-ray of her left

heel to determine the cause of pain she had been experiencing. The x-ray revealed that Plaintiff suffered from a plantar calcaneal spur. (Tr. 117). On June 25, 1999, Plaintiff underwent surgery by Glen D. Rowe, D.O., to release the left plantar fascia. (Tr. 118-132).

2. Chest Pain

In November 1988, Plaintiff presented to the Kent General Hospital emergency room with chest pain and elevated blood pressure. (Tr. 153). The attending physician noted that Plaintiff had a history of hypertension and non-insulin dependent diabetes, and that she had only recently restarted her blood pressure medication. (Tr. 151). Plaintiff was diagnosed with chest pain and hypertension, with relatively good blood pressure control. (Tr. 155).

In January 2000, Plaintiff again presented to Kent General Hospital with complaints of chest pain. (Tr. 138). A cardiac catheterization was performed, and it revealed no evidence of significant coronary artery disease. (Tr. 148). Plaintiff was diagnosed with atypical chest pain with multiple risk factors for coronary disease. (Tr. 142).

On January 20, 2000, Plaintiff had a follow-up visit with Judith A. Rippert, D.O. (Tr. 220). Dr. Rippert reported that Plaintiff was feeling well on the day of her visit and that she had no further chest discomfort since her emergency room visit.

Dr. Rippert diagnosed Plaintiff with "[a]typical chest pain; probably GI; negative echocardiogram and low risk Cardiolite scan." (Tr. 220). Dr. Rippert opined that Plaintiff was stable and on good medical therapy and suggested the need for continued risk factor modification. (Tr. 220-221).

3. Varicose Veins

In February 2000, Plaintiff underwent varicose vein ligation and stripping of the right leg performed by Sidney Barnes, M.D. (Tr. 293). At her follow-up visit, Dr. Barnes noted that Plaintiff's incisions were well healed and that "[s]he has already been getting back into the swing of things." (Tr. 285). In July 2000, Plaintiff complained to Dr. Barnes about some swelling in her legs, and Dr. Barnes stressed that she "needs to be really good about the support stockings, [because] . . . this is the way to prevent further problems." (Tr. 260).

4. Blood Sugar

From April 1999 through August 2000, Plaintiff treated with Dr. Barnes and Rufino V. Rosal, M.D. for monitoring of her diabetes and other conditions. (Tr. 258-301). Treatment notes from August 15, 2000, indicated that Plaintiff was not checking her blood sugar at home. (Tr. 258). Plaintiff's failure to check her blood sugar continued into July 2001, as noted in treatment notes from that time frame. (Tr. 364).

5. Joint Pain

Plaintiff also complained to her physicians of joint pain in her knees and numbness in her left upper extremity. However, her motor strength was noted to be 5/5. (Tr. 258). In August 2000, Plaintiff was referred by Blanca Ocampo-Lin, M.D. to Eric R. Tamesis, M.D., a rheumatologist, for her complaints of joint pain. Dr. Tamesis noted that Plaintiff had some signs or symptoms suggestive of fibromyalgia syndrome, but that he was going to run further tests, including tests for the possibility of an inflammatory muscle disease. (Tr. 321). At a follow-up visit on October 2, 2000, Dr. Tamesis noted that Plaintiff's lab studies were negative and that her sedimentation rate was normal. Plaintiff continued to follow up with Dr. Tamesis who concluded that the etiology of Plaintiff's diffuse myalgias and polyarthralgias was "still quite unclear." (Tr. 313). Dr. Tamesis noted that "[t]here is a possible somatic component to her discomfort," and could not rule out an underlying connective tissue disease because of more recent lab studies showing elevated protein and sedimentation rates. (Tr. 313).

6. Blood Pressure

In February 2001, Plaintiff was referred to Gertrude A. Findley-Christian, M.D. for evaluation of her blood pressure which Plaintiff reported was uncontrolled for the last year. (Tr. 323-325). Dr. Findley-Christian recommended an increase in

Plaintiff's medication. In March 2001, Plaintiff had a follow-up visit with Dr. Findley-Christian. At this visit, Dr. Findley-Christian noted that Plaintiff's blood pressure was under better control. (Tr. 376). At an April 2001 follow-up, Dr. Findley-Christian noted that Plaintiff reported that her husband was laid off and that she had lost her insurance coverage, but was eligible for Medicare. (Tr. 374). Dr. Findley-Christian noted that Plaintiff's hypertension was uncontrolled with a reading of 168/100 and then 198/100, but noted that "[t]his may also be related to her state of frustration over the loss of her husband's job as well as her back pain." (Tr. 374). Dr. Findley-Christian also noted that Plaintiff was running out of her medication so she, "wonder[ed] if she has been thinning this out to enable her to have some at least once a day. . . ." (Tr. 374). Dr. Findley-Christian further commented that "[h]opefully, she will check her pressure and this will be better controlled once she has all her medications and some of her anxiety is allayed." (Tr. 375).

7. Gastrointestinal Complaints

Beginning in January 2001, Plaintiff was also treated by Brent W. Gessinger, M.D. for abdominal and other gastrointestinal complaints. Plaintiff underwent a colonoscopy and a pelvic ultrasound, both of which were essentially unremarkable. (Tr. 326-329, 381-393). Dr. Gessinger also noted that Plaintiff was

responding well to Prevacid and had "good control of her symptoms." (Tr. 381).

8. Medical Opinions

In June 2000, a state agency physician reviewed Plaintiff's claim for benefits and completed a Physical Residual Functional Capacity Assessment form. The state agency physician opined that Plaintiff had the RFC to perform medium work. (Tr. 245-252).

In September 2000, a second state agency physician also reviewed Plaintiff's claim and completed an RFC assessment. The second state agency physician also concluded that Plaintiff had the RFC to perform medium work avoiding concentrated exposure to extreme cold. (Tr. 302-309).

In May 2001, Dr. Barnes, Plaintiff's physician, completed a Medical Source Statement Of Ability To Do Work-Related Activities (Physical). Dr. Barnes opined that Plaintiff had no physical limitations provided that she wear compression stockings.

In July 2002, Plaintiff submitted to the Appeals Council a Fibromyalgia Residual Functional Capacity Questionnaire from Dr. Rowe. The form indicates that Dr. Rowe sees Plaintiff "every month," but it does not set forth when the treatment commenced. (Tr. 459-463). Dr. Rowe opined that Plaintiff had fibromyalgia and inflammatory arthritis and that she had numerous symptoms including multiple tender points, nonrestorative sleep, chronic fatigue, morning stiffness, muscle weakness, subjective swelling,

irritable bowel syndrome, frequent severe headaches, tempormandlbular joint dysfunction, numbness and tingling, breathlessness, anxiety, panic attacks, depression and chronic fatigue syndrome. Dr. Rowe indicated that Plaintiff could not tolerate even "low stress" jobs.

B. The A.L.J.'s Decision

On January 18, 2002, the A.L.J. conducted a hearing on Plaintiff's application for benefits. At the hearing, Plaintiff was represented by counsel. Plaintiff testified at the hearing that she could no longer work because of joint and body pain, particularly pain in her fingers. (Tr. 476). Plaintiff testified that her blood pressure is not controlled and that she has GI problems. (Tr. 479). Plaintiff also testified that she no longer does her cooking, laundry, grocery shopping or washing of dishes. (Tr. 484-488).

In his decision dated May 6, 2002, the A.L.J. concluded that Plaintiff suffered from hypertension due to noncompliance, non-insulin dependent diabetes mellitus due to noncompliance, moderate facet arthropathy at L4-5 and L5-S1 with back pain, and status post varicose vein ligation, impairments which were severe, but did not meet or equal a listed impairment. The A.L.J. also concluded that Plaintiff's testimony concerning her pain was not fully credible, because none of her treating physicians found that Plaintiff was so restricted that she could

not perform some work, and Plaintiff's conditions were adequately controlled through the use of medication. The A.L.J. then concluded that Plaintiff retained the RFC to perform light work, being able to lift 10 pounds frequently and up to twenty pound occasionally. Because Plaintiff's past relevant work as a textile worker gluer was performed at the light exertional level, with occassional sitting and standing and not much lifting required, the A.L.J. concluded that Plaintiff could perform her past relevant work. Accordingly, the A.L.J. concluded at step four of the sequential analysis that Plaintiff was not disabled.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), findings of fact made by the Commissioner of Social Security are conclusive, if they are supported by substantial evidence. Accordingly, judicial review of the Commissioner's decision is limited to determining whether "substantial evidence" supports the decision. Monsour Medical Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). In making this determination, a reviewing court may not undertake a de novo review of the Commissioner's decision and may not re-weigh the evidence of record. Id. In other words, even if the reviewing court would have decided the case differently, the Commissioner's decision must be affirmed if it is supported by substantial evidence. Id. at 1190-91.

The term "substantial evidence" is defined as less than a

preponderance of the evidence, but more than a mere scintilla of evidence. As the United States Supreme Court has noted substantial evidence "does not mean a large or significant amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 555 (1988).

With regard to the Supreme Court's definition of "substantial evidence," the Court of Appeals for the Third Circuit has further instructed, "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 . . . or if it really constitutes not evidence but mere conclusion." Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). Thus, the substantial evidence standard embraces a qualitative review of the evidence, and not merely a quantitative approach. Id.; Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981).

DISCUSSION

I. Evaluation Of Disability Claims

Within the meaning of social security law, a "disability" is defined as the inability to do 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). To be found disabled, an individual must have a "severe impairment" which precludes the individual from performing previous work or any other "substantial gainful activity which exists in the national economy." 20 C.F.R. § 404.1505. In order to qualify for disability insurance benefits, the claimant must establish that he or she was disabled prior to the date he or she was last insured. 20 C.F.R. §§ 404.131, Matullo v. Bowen, 926 F.2d 240, 244 (3d Cir. 1990). The claimant bears the initial burden of proving disability. 42 U.S.C. § 423(d)(5).

In determining whether a person is disabled, the Regulations require the A.L.J. to perform a sequential five-step analysis. 20 C.F.R. § 404.1520. In step one, the A.L.J. must determine whether the claimant is currently engaged in substantial gainful activity. In step two, the A.L.J. must determine whether the claimant is suffering from a severe impairment. If the claimant fails to show that his or her impairment is severe, he or she is ineligible for benefits. Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999).

If the claimant's impairment is severe, the A.L.J. proceeds to step three. In step three, the A.L.J. must compare the medical evidence of the claimant's impairment with a list of impairments presumed severe enough to preclude any substantial

gainful work. Id. at 428. If the claimant's impairment meets or equals a listed impairment, the claimant is considered disabled. If the claimant's impairment does not meet or equal a listed impairment, the A.L.J.'s analysis proceeds to steps four and five. Id.

In step four, the A.L.J. is required to consider whether the claimant retains the residual functional capacity to perform his or her past relevant work. Id. The claimant bears the burden of establishing that he or she cannot return to his or her past relevant work. Id.

In step five, the A.L.J. must consider whether the claimant is capable of performing any other available work in the national economy. At this stage the burden of production shifts to the Commissioner, who must show that the claimant is capable of performing other work if the claimant's disability claim is to be denied. Id. Specifically, the A.L.J. must find that there are other jobs existing in significant numbers in the national economy, which the claimant can perform consistent with the claimant's medical impairments, age, education, past work experience and residual functional capacity. Id. In making this determination, the A.L.J. must analyze the cumulative effect of all of the claimant's impairments. At this step, the A.L.J. often seeks the assistance of a vocational expert. Id. at 428.

II. Whether The A.L.J.'s Decision Is Supported By Substantial Evidence

By her Motion, Plaintiff contends that the A.L.J.'s decision is not supported by substantial evidence. Specifically, Plaintiff contends that the A.L.J. (1) erred in assessing Plaintiff's credibility; (2) erred in assessing Plaintiff's RFC, because he did not take into account limitations imposed by Plaintiff's pain; and (3) erred in failing to make the findings necessary to establish that Plaintiff could meet the physical and mental demands of her past work.

After reviewing the A.L.J.'s decision in light of the record evidence in this case, the Court concludes that the A.L.J.'s decision is supported by substantial evidence, and the A.L.J. did not err in his assessments of Plaintiff's credibility, her pain, and her ability to perform her past relevant work. A plaintiff's subjective complaints of pain must be consistent with the objective medical evidence concerning the plaintiff's impairment. 20 C.F.R. § 404.1529. Once an A.L.J. concludes that a medical impairment could reasonably cause the alleged symptoms, the A.L.J. is required to evaluate the intensity and persistence of the pain, and the extent to which it affects the claimant's ability to work. Id. This determination necessarily requires the A.L.J. to gauge the credibility of the claimant. Id.; Morrow v. Apfel, 2001 WL 641038, *9 (D. Del. Mar. 16, 2001); Wilson, 1999 WL 993723 at *3.

An A.L.J.'s credibility determinations are generally entitled to great weight and deference. Fagnoli v. Massanari, 247 F.3d 34, 43 (3d Cir. 2001). The A.L.J. may discredit a claimant's complaints of disabling pain if "he affirmatively addresses the claim in his decision, specifies the reasons for rejecting it and has support for his conclusion in the record." Hirschfeld v. Apfel, 159 F. Supp. 2d 802, 811 (E.D. Pa. 2001); see also Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993).

In this case, Plaintiff's complaints of pain stem from her alleged affliction with fibromyalgia. Fibromyalgia is considered to be an incurable disease and its causes are unknown. See e.g. Wilson v. Apfel, 1999 WL 993723, *1, n.1 (E.D. Pa. Oct. 29, 1999) (citing Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir. 1996)). In evaluating claimants with fibromyalgia, courts have recognized that the symptoms of the disease are entirely subjective and that there are no current laboratory tests that can gauge the severity of the condition. Id. However, courts have also recognized that a diagnosis of fibromyalgia does not necessarily equate with a finding of disability under the Act. Id.

Because of the subjective nature of fibromyalgia, "the credibility of a claimant's testimony regarding her symptoms takes on substantially increased significance in the A.L.J.'s evaluation of the evidence." Brunson v. Barnhart, 2002 WL 393078, *16 (E.D.N.Y. Mar. 14, 2002). In evaluating the

claimant's complaints of pain in the context of a diagnosis of fibromyalgia, the A.L.J. may also consider such factors as (1) whether the record contains a detailed clinical documentation of the claimant's symptoms, and (2) whether the physicians who diagnosed the claimant with fibromyalgia reported on the severity of his or her condition. Id.

In this case, the A.L.J. found that Plaintiff's subjective complaints were not entirely credible. The Court concludes that substantial evidence supports the A.L.J.'s determination. Although Plaintiff complained of back and joint pain, an MRI of Plaintiff's lumbar spine showed no evidence of disc herniation or spinal stenosis, and Plaintiff's motor strength was 5/5. (Tr. 258, 397). Although Plaintiff's joints were tender to palpation, there was also no evidence of acute inflammation or synovitis. (Tr. 313, 315). Further, Plaintiff was never conclusively diagnosed with fibromyalgia by Dr. Tamesis, the rheumatologist treating her for her complaints of joint pain. In fact, Dr. Tamesis indicated that the etiology of Plaintiff's myalgias and polyarthralgias was "still quite unclear." (Tr. 313). In addition, Dr. Tamesis never reported on the severity of Plaintiff's condition.

Although Plaintiff testified at the hearing that she was incapable of performing any work as a result of her pain, Plaintiff's allegations of disabling pain are inconsistent with

statements made by Plaintiff in her application for disability benefits. In her application, Plaintiff indicated that she engaged in extensive daily household chores, including washing dishes, dusting, preparing meals and doing laundry. (Tr. 84-85). Plaintiff also made inconsistent statements regarding the side-effects of her medication, indicating at the hearing that she experienced side effects, but stating in her application and to various doctors that she did not experience any side effects from her medications. (Tr. 141).

To the extent that Plaintiff complained of pain in her legs due to varicose veins, the record also supports the A.L.J.'s conclusion that Plaintiff's complaints of pain were not entirely credible. Following her surgery, Plaintiff indicated that she was feeling better, and her complaints appear to be limited to swelling, rather than pain. Dr. Barnes, who performed the surgery, indicated that Plaintiff should wear compressed stockings to avoid this problem. Further, Dr. Barnes completed an RFC assessment of Plaintiff in May 2001, indicating that Plaintiff had no physical limitations.¹ (Tr. 352-354).

As for Plaintiff's high blood pressure and diabetes, the record does indicate and the A.L.J. did conclude that Plaintiff

¹ It appears from the record that Dr. Barnes treated Plaintiff for her other conditions as well. Accordingly, Dr. Barnes assessment of no physical limitations is relevant to Plaintiff's other ailments.

suffered from these conditions. However, the record also supports the A.L.J.'s conclusion that Plaintiff's conditions were exacerbated by her lack of compliance with the recommendations of her physicians. See 20 C.F.R. § 404.1530 (claimant's failure to follow prescribed treatment without good reason will result in a finding of not disabled). Plaintiff's physicians stressed weight loss and dietary control, and the record demonstrates that Plaintiff's blood pressure improved to stable levels when she lost weight and complied with her physicians' directives, including the taking of her medications. (Tr. 258-301, 330-351, 376). Conversely, the record indicates that Plaintiff's blood pressure was deemed uncontrolled in situations which often followed Plaintiff's noncompliance with her medications. (Tr. 107, 112, 151, 332-333, 374). For example, when Plaintiff presented to Kent General Hospital in 1998 with high blood pressure, it was noted that Plaintiff had only recently restarted her medication. (Tr. 151). Similarly, Plaintiff's blood pressure was deemed uncontrolled when she was running out of her medicines and may have been "thinning out" her doses to allow her to take at least some pills each day. (Tr. 374). Further, the record indicates that Plaintiff did not check her blood pressure at home, as recommended by her physicians. (Tr. 261, 266). As for Plaintiff's blood sugar, the record also indicates that Plaintiff did not check her blood sugar at home, as recommended

by her physicians to monitor and help control her condition. (Tr. 258, 265, 364). Given the inconsistencies between Plaintiff's statements in her disability application and her testimony at the hearing, the lack of any diagnosis of fibromyalgia and any indication regarding the severity of the disease, and the evidence demonstrating Plaintiff's lack of compliance with treatment recommendations and monitoring of her conditions, the Court cannot conclude that the A.L.J. erred in finding that Plaintiff's allegations of disabling pain were not entirely credible.

Further, it is evident in the A.L.J.'s decision that, to the extent the A.L.J. found Plaintiff's complaints of pain to be credible and supported by the record, the A.L.J. accounted for any limitations resulting from Plaintiff's pain when he assessed her residual functional capacity. Despite medical evidence in the record which would have supported a finding that Plaintiff could perform medium work, the A.L.J. further reduced Plaintiff's residual functional capacity to no more than light work. Accordingly, the Court concludes that the A.L.J.'s assessment of Plaintiff's residual functional capacity properly took into account Plaintiff's allegations of pain.²

² In her opening brief, Plaintiff suggests that Plaintiff had substantial non-exertional impairments. Plaintiff contends that pain can be a substantial non-exertional limitation and refers to cases involving complaints of chest pain and dizziness. The Court concludes that the A.L.J. correctly found that

To the extent that Plaintiff contends that the A.L.J. did not make the findings necessary to support a conclusion that Plaintiff could return to her past relevant work, the Court disagrees with Plaintiff's assertion. Plaintiff bore the burden of establishing that she could not return to her past relevant work. See e.g. 20 C.F.R. § 404.1566. By her own description, Plaintiff's past relevant work did not entail lifting, climbing, stooping, kneeling, crouching, crawling, handling, grabbing, or grasping. Plaintiff also indicated that her job involved walking only three hours a day, standing four hours a day and sitting for an hour a day. (Tr. 77). This evidence was sufficient to establish the requirements of Plaintiff's past, relevant work. Banks v. Massanari, 258 F.3d 820 (8th Cir. 2001) (holding that vocational expert testimony is not required until step five of the sequential analysis); Bowen v. Sullivan, 976 F.2d 740; 1992 WL 236885, *4 (10th Cir. 1992) (holding that A.L.J. was not required to seek testimony of vocational expert at step four, because burden only shifts to Commissioner when claimant establishes that he or she has a disability which prevents him

Plaintiff did not suffer from substantial non-exertional limitations. To the extent that Plaintiff refers to chest pains and the inability to concentrate, the record does not support such nonexertional limitations. Plaintiff's chest pains were limited to an isolated period and the record does not support any limitations on Plaintiff's ability to concentrate. Further, as the Court has previously concluded, the A.L.J. properly accounted for Plaintiff's complaints of pain in making his residual functional capacity assessment.

from performing his or her past relevant work); Mullin v. Apfel, 79 F. Supp. 2d 544, 549 (E.D. Pa. 2000), aff'd 254 F.3d 1078 (3d Cir. 2001). Further, as discussed above, the evidence supported the A.L.J.'s findings that Plaintiff could perform her past work as a textile gluer. Plaintiff's treating physician, Dr. Barnes, indicated that Plaintiff had no physical limitations and two reviewing state agency physicians opined that Plaintiff had the residual functional capacity to perform the demands of medium work. (Tr. 302-309, 245-252). These assessments are consistent with the medical evidence before the A.L.J. which contained no restrictions on Plaintiff's activities and which documented that Plaintiff's condition improved when she was compliant with her medications and other physician directives. Accordingly, the Court concludes that the A.L.J.'s decision that Plaintiff was not disabled is supported by substantial evidence.

III. Whether A Remand Is Appropriate In Light Of New And Material Evidence

Plaintiff next contends that the Appeals Council erred in failing to reverse the decision of the A.L.J. in light of the Fibromyalgia Residual Functional Capacity Questionnaire (the "Fibromyalgia Questionnaire") completed by Dr. Rowe after the A.L.J.'s decision was rendered in this matter. Plaintiff contends that this evidence is both new and material, and therefore, the Court should remand this matter for consideration of the newly presented evidence.

When the Appeals Council has considered additional evidence that was not before the A.L.J. and the Appeals Council has denied review of the A.L.J.'s decision, the district court may remand the case to the Commissioner to consider the additional evidence if: (1) the evidence is new and not cumulative of what is already in the record; (2) the evidence is material, that is relevant and probative, and there is a reasonable probability that it would have changed the outcome of the Commissioner's decision; and (3) the plaintiff has demonstrated good cause for not having incorporated the evidence into the record. Matthews v. Apfel, 239 F.3d 589, 592 (3d Cir. 2001); Szubak v. Secretary of Health and Human Services, 745 F.2d 831, 833 (3d Cir. 1984). "Good cause" is established when there is "some justification for a claimant's failure to have acquired and presented such evidence to the A.L.J." Cunningham v. Apfel, 2001 WL 892796, *8 (Aug. 2, 2001) (citing Matthews, 239 F.3d at 594-595).

In this case, the Commissioner contends that the evidence presented by Plaintiff is not material to Plaintiff's claim, because it does not relate to the time period for which benefits were denied, which ended on May 6, 2002, the date of the A.L.J.'s decision. In addition, the Commissioner contends that Plaintiff has not alleged good cause why this evidence was not submitted to the A.L.J. prior to rendering his decision.

Evidence is considered to be material, if it is "relevant to

the claimant's condition during the time period for which benefits were denied." Clark v. Commission of Soc. Sec., 143 F.3d 115, 118 n.1 (2d Cir. 1998). By her Motion, Plaintiff contends that the Fibromyalgia Questionnaire completed by Dr. Rowe relates to the time period at issue in this case, because it was based upon the findings of Dr. Tamesis during the relevant time. Plaintiff contends that "Dr. Tamesis did not make the definitive diagnosis of fibromyalgia until after the claimant's hearing" and that because Dr. Tamesis was not available to complete the form, Dr. Rowe, his colleague and an orthopedic specialist, completed the document based on Dr. Tamesis' findings and diagnosis. (D.I. 13 at 4).

The Court has reviewed the Fibromyalgia Questionnaire, as well as Plaintiff's counsel's letter to the Appeals Council concerning its submission. The Fibromyalgia Questionnaire is dated July 19, 2002, does not indicate the time frame for which it pertained and does not indicate that it was based on the findings of another treating physician. Further, when Plaintiff submitted this evidence to the Appeals Council, she did not indicate that the Fibromyalgia Questionnaire was based on Dr. Tamesis' findings and diagnosis. Rather, Plaintiff indicated that Dr. Rowe was her treating physician and that he had diagnosed Plaintiff with fibromyalgia and inflammatory arthritis. However, Dr. Rowe did not provide any treatment records to

support his conclusions. Thus, in the Court's view, it is unclear what time frame Dr. Rowe's diagnosis relates to and it is also unclear as to what evidence supports that diagnosis. It is well-established that evidence cannot be material if it relates to a subsequent deterioration of a previously non-disabling condition. Szubak, 745 F.3d at 833. Because Plaintiff bears the burden of establishing materiality, and she has not done so, the Court concludes that a remand is not required. Matthews, 239 F.3d at 592-594.

CONCLUSION

For the reasons discussed, Defendant's Motion For Summary Judgment will be granted, and Plaintiff's Motion For Summary Judgment will be denied. The decision of the Commissioner dated May 6, 2002, will be affirmed.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HILDA RODRIGUEZ,
Plaintiff,
v.
JO ANNE B. BARNHART,
Commissioner of Social
Security,
Defendant.

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: Civil Action No. 03-0254-JJF
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O R D E R

At Wilmington, this 10th day of March 2004, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Cross-Motion For Summary Judgment (D.I. 9) is GRANTED.
2. Plaintiff's Motion For Summary Judgment (D.I. 6) is DENIED.
3. The final decision of the Commissioner dated May 6, 2002, is AFFIRMED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HILDA RODRIGUEZ,
Plaintiff,
v.
JO ANNE B. BARNHART,
Commissioner of Social
Security,
Defendant.

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: Civil Action No. 03-0254-JJF
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JUDGMENT IN A CIVIL CASE

For the reasons set forth in the Court's Memorandum Opinion and Order dated March 10, 2004;

IT IS ORDER AND ADJUDGED that judgment be and is hereby entered in favor of Defendant Jo Anne B. Barnhart and against Plaintiff Hilda Rodriguez.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

Dated: March 10, 2004

ANITA F. BOLTON
(By) Deputy Clerk