

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JEAN LAIRD,)
)
Plaintiff,)
)
v.) Civil Action No. 99-771-GMS
)
)
Larry G. Massanari,)
Acting Commissioner of Social Security,)
)
Defendant.)

MEMORANDUM AND ORDER

On November 9, 1999, Jean Laird (“Laird”) filed this action pursuant to 42 U.S.C. § 405(g), for review of a final decision of the Commissioner of Social Security.¹ The Commissioner determined that Laird was not entitled to disability insurance benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 (“The Act”). Presently before the court are the parties’ cross-motions for summary judgment. For the reasons that follow, the court will reverse the Commissioner’s decision in part and remand this matter for further proceedings.

I. BACKGROUND

A. Procedural History

In August of 1994, Laird applied for disability benefits alleging that she had been disabled since January 1, 1992, because of a degenerative disc disease in her cervical and lumbar spine. Her

¹Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Under Fed R. Civ. P. 25(d)(1), Massanari is automatically substituted as the defendant in this action. Nevertheless, the court can rule on the merits of the case. *See* 42 U.S.C. § 405(g) (stating “[a]ny action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.”). Although Massanari is the “Acting Commissioner,” the court will refer to him as the “Commissioner” throughout its memorandum and order.

application was denied initially and upon reconsideration. After an administrative hearing, at which Laird appeared and testified, administrative law judge (“ALJ”) Linda Bernstein found that Laird was not disabled as defined by the Act because she could perform her past relevant work. ALJ Bernstein denied Laird’s application for benefits on June 30, 1996.

On October 8, 1997, the Appeals Council granted Laird’s request for review and remanded the case back to an ALJ to review all the medical evidence of record and to hold a supplemental hearing. As a result, ALJ Richard Kelly held a supplemental hearing on February 13, 1998, at which Laird appeared and testified with the assistance of counsel. In a decision dated June 17, 1998, ALJ Kelly found that Laird was not disabled because her condition was not severe enough to meet or equal the severity of a listed impairment. The ALJ concluded that she could still perform her past relevant light and sedentary work as a telemarketer, cashier, and receptionist. On September 28, 1999, the Appeals Council denied Laird’s request for review, thereby making ALJ Kelly’s decision the final decision of the Commissioner.

B. Employment History

Laird’s last substantial employment was with Mr. Goodbuy’s from June 1988 to December 1991. At Mr. Goodbuy’s, Laird worked as an administrative assistant, merchandise tagger, and bookkeeper. None of these positions involved any lifting. Prior to December 1991, the Mr. Goodbuy’s management was in the process of terminating her employment because of increasing absenteeism resulting from her impairment. However, Laird continued to work for Mr. Goodbuy’s until the store went out of business.

In 1993, Laird worked for a total of four different employers, all during different times of the year. For a short time period, Laird worked for Jamesway during its opening period for about two

months. This job entailed putting clothes on racks and filling shelves with stock. Also in 1993, Laird worked as a receptionist for two different employers for about a month each. Finally, from October 1993 to February 1994, Laird worked for QVC where she earned approximately \$1,500. While at QVC, Laird loaded and unloads, folded clothes, and worked as a cashier. Most recently, Laird worked for MBNA bank as a telemarketer selling credit cards over the phone for about a month in March and April 1994.

C. Medical History

The earliest medical evidence of record shows that on December 7, 1990, Laird complained to her physician, Dr. Pierre L. LeRoy (“Dr. LeRoy”), about her back pain during an office visit. In September of 1991, while employed by Mr. Goodbuy’s, Laird began to experience pain in her shoulders and left arm. As a result, Dr. LeRoy ordered Laird to be X-rayed, which revealed that her C5 and C7 discs were narrowing and that her degenerative disc disease had increased in severity. Dr. LeRoy further found that radiculopathy marked with spondylosis compounded her condition. In attempts to alleviate her pain, Laird received several nerve block injections between 1992 and 1994. In addition, she followed a physician’s recommendation that she restrict her bending, stooping, and neck movement.

After slipping on ice in 1994, Laird subsequently received an MRI, myelogram, and post myelogram. These tests revealed Laird’s fall had further irritated her back impairment. In August of 1994, Laird underwent surgery for a partial disc removal and bone fusion. Laird had an MRI four months later, which revealed a bulging disc and a spinal cord deformity. Her surgeon then instructed her to wear a “Philadelphia” collar and prescribed her Flexeril (muscle relaxant) for muscle spasms.

Between February 1, 1993 and January 3, 1998, Dr. LeRoy diagnosed Laird with cervical

Myositis/Myofascial syndrome, Sciatica, Sacroilitis and Neuralgia paresthetica. Laird's other symptoms included: constant severe back pain with pain radiating toward her legs, pain in her right hip, pain in her knees with occasional collapse, constant pain in her neck and shoulders with pain radiating down her arms causing weakness and paresthesia along with cramping and numbness in her hands. Moreover, Laird had at times experienced colitis two to three times a week, depression, and dysfunctional sleeping patterns.

Throughout this time period, Dr. LeRoy and her surgeon restricted Laird to lifting no more than twenty pounds and limited her neck movements. In addition, she received numerous treatments and medications. Laird received seventeen nerve root blocks within an eight-year period, even though one block is supposed to last approximately one year. In addition, she received Iontophoresis therapy and home physical therapy. Also, her physicians' prescribed her Tylenol #3 (pain reliever), Zoloft (antidepressant), Baclofen (muscle relaxant), Flexeril, Darvocet N100 (pain reliever), Inderal (anti-anginal), Ativan (anti-anxiety), Paxil (antidepressant), Prozac (antidepressant), Lomotil (anti-diarrheal), Naprosyn (non-steroid, anti-inflammatory pain reliever) and Dalmane (sedative).

D. Occupational Assessments

On March 2, 1995, an occupational therapist filled out a Residual Physical Functional Capacity Assessment ("RFC") without examining Laird.² In completing the RFC, the therapist assessed Laird's functional capacity solely by reviewing her medical records and then filling out a boilerplate checklist of limitations. The therapist reviewing Laird's file checked the boxes which indicated that Laird could occasionally lift and carry a maximum of twenty pounds, frequently lift

²Residual functional capacity describes the range of work activities the claimant can perform despite her impairment.

and carry a maximum of ten pounds, stand and walk a total of about six-hours and sit a total of about six-hours.

On July 27, 1995, Laird received a Key Method of Functional Capacity Assessment (“Key Assessment”) to determine her functional capacities. During the Key Assessment, a medical examiner had Laird perform a multitude of work related exercises. The examiner detailed both the times at which Laird began to suffer and her signs of discomfort. The examiner recorded that the most Laird could work without experiencing severe pain was four hours. Thus, the findings of the Key Assessment conflicted with those of the RFC Assessment.³ The Key Assessment also established that she could carry twelve pounds and lift ten. Furthermore, it showed that Laird’s legs became numb after thirty-nine minutes of sitting and that she could not sit any more than fifty-five minutes without having to stand up and stretch. Laird reported that her left hand was numb after only two minutes of standing and that after thirteen minutes she “need[ed] to sit now” because of numbness in both legs. Finally, Dr. LeRoy supported the findings of Laird’s Key Assessment .

II. DISCUSSION

A. Standard of Review

A court may not disturb the ALJ’s decision if it is grounded upon substantial evidence. *See* 42 U.S.C. §§ 405(g) and 1383(c)(3). Substantial evidence has been defined as “more than a mere scintilla” and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *see also Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999). To demonstrate that his opinion is based on substantial

³The Key Assessment stated that Laird could only work a total of four hours of sitting for sixty minute durations, two hours of standing for fifteen minute durations, or three hours of frequently walking moderate distances.

evidence, the ALJ must make specific findings to support his ultimate findings. *See Stewart v. Secretary of HEW*, 714 F.2d 287, 290 (3d Cir. 1983).

B. Standards for Determining Disability

The purpose of the Social Security Act is to ensure that disabled individuals will be provided with a minimum income. *See Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (citing 42 U.S.C. § 1381). To be entitled to benefits, a person must be found to be disabled. A person is disabled if he or she is “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment,” which can result in death or which has lasted or can be expected to last for a continuous period of at least 12 months. *See* 42 U.S.C. § 1382c(a)(3)(A).

To determine if a claimant’s disability qualifies for disability insurance, a five-step analysis has been established by governing regulations. *See* 20 C.F.R. § 404.1520. The Commissioner evaluates each case according to this step-by-step process until a finding of “disabled” or “not disabled” is made. In sequence, the Commissioner determines whether the claimant: (1) is currently employed, (2) has a severe impairment, (3) has an impairment that meets or equals the requirements of a listed impairment, (4) can perform past relevant work and (5) if not, whether the claimant can perform other work, in light of age, education, and work experience.

In the first four steps, the claimant has the burden of proving the elements of the claim by a preponderance of the evidence. To meet the burden of proof to establish a disability, the claimant must show that he or she does not engage in any substantial gainful activity, and suffers from a severe impairment which prevents the performance of the claimant’s former job.

If the claimant is successful, the Commissioner bears the burden of proof and persuasion in the final step of the analysis. The Commissioner must demonstrate that the claimant has the

ability to perform a significant number of jobs existing in the national economy, given the claimant's medical impairments, age, education, past work experience and residual functional capacity. *See* 20 C.F.R. § 404.1520(f). In order to assist in meeting his burden, the ALJ may use testimony from a vocational expert to identify other work and occupations where the claimant's skills can be applied. *See Podedworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984); 20 C.F.R. § 404.1566.

In this case, the first two steps of the five-part test to determine whether a person is disabled are not at issue: (1) Laird is not engaging in any substantial gainful activity due to her impairment; and (2) Laird's impairment has lasted more than twelve months. The disputed issues in this case concern the third and fourth prongs: (3) whether Laird's impairment meets or equals one listed in the regulations, and (4) whether Laird is able to perform her prior employment.

C. ALJ Kelly's Finding that Laird's Impairment Does Not Meet or Equal A Listed Impairment is Supported by Substantial Evidence

In *Sullivan v. Zebley*, the United States Supreme Court explained the requirements for finding a disability at the third prong. *See* 493 U.S. 521, 524 (1990). The level of severity needed to meet or equal a listed impairment is higher than that required to meet or equal the statutory standard for disability. *Id.* at 532. That is, the listings define impairments which prevent a claimant, regardless of her age, education, or work experience, from performing not just substantial gainful activity, but any gainful activity. *Id.*; *see also* 20 C.F.R. § 416.925 (a) (stating that the purpose of the listings is to describe impairments "severe enough to prevent a person from doing any gainful activity")

Hence, if a claimant is not working and possesses an impairment which meets or equals a listed impairment, the claimant is conclusively presumed to be disabled and awarded benefits without further inquiry. *See Bowen v. Yuckert*, 482 U.S. 137, 141 (1987); *see also* *Petition of*

Sullivan, 904 F.2d 826, 845 (3d Cir. 1990) (holding that a finding of disabled at the third prong implicitly includes a finding that the symptoms of the disease have progressed to a degree that objectively precludes any gainful work).

In this case, Laird must prove that her impairment equals or meets the listed impairment. *See Williams v. Sullivan*, 970 F.2d 1178, 1186 (3d Cir. 1992). Whether a listing is met or equaled depends not only on the diagnosis, but also on medical findings consisting of symptoms, signs, and laboratory findings that meet the required level of severity of the impairment in the listing. 20 C.F.R. § 404.1525(1999).

ALJ Kelly found that Laird's condition did not satisfy the requirements necessary to meet or equal Listing 1.05C. This listing relates to disorders of the spine. The ALJ concluded that she did not have the muscle weakness with sensory and reflex loss which the listing requires. ALJ Kelly consistently found that Laird had an asthenic build, that is, one that is active or strong. In addition, Laird did not cite to any EMG or nerve condition studies which would demonstrate that she had the required motor and sensory loss. Such studies performed in May of 1997 on her upper right extremity were within normal limits. In February of that same year, Dr. LeRoy found that she had no visible muscle atrophy.

Although Laird did present evidence, it was insufficient to satisfy the requirements of Listing 1.05C.⁴ For example, despite the apparently serious nature of Laird's back condition, it seems that no examining physician of record offered any clinical proof that she had a vertebrogenic disorder characterized by radicular distribution of significant motor loss with muscle weakness and sensory

⁴In what appears to be an attempt to err on the side of caution, Laird inundated ALJ Kelly with all of her physicians' reports and prescriptions. The sheer volume of this information may have made it difficult for ALJ Kelly to sift through and find the relevant information.

and reflex loss following her 1994 surgery. Because of the lack of evidence, ALJ Kelly stated at the supplemental hearing that the physicians' findings regarding Laird's muscle weakness with sensory and reflex loss were vague and that he needed additional information. In fact, in his decision, ALJ Kelly specifically quoted 20 C.F.R. § 404.1516 -- "If a claimant does not give us the medical and other evidence that we need and request, a decision will have to be made on the information available in the case record." No more exhibits appear in the record, however, and thus, it seems that Laird failed to provide ALJ Kelly with the necessary information. This left the ALJ to base his decision upon only the information available.

A disability claimant bears the burden of proving that her impairments meet or equal a listed impairment. 20 C.F.R. S 404.1525(d). Given the record evidence, Laird failed to prove that she suffered from muscle weakness with sensory and reflex loss as required in order to meet or equal Listing 1.05C. The court, therefore, finds ALJ Kelly's finding that Laird's impairment does not meet or equal the listed impairment to be supported by substantial evidence.

D. ALJ Kelly's Finding that Laird could Perform her Past Employment is not Supported by Substantial Evidence

If the impairment is not one that is conclusively presumed to be disabling, the analysis proceeds to the fourth prong. *See Bowen v. Yuckert*, 482 U.S. at 141; *see also Bowen v. City of New York*, 476 U.S. 467, 471 (1986) (stating "[i]f a claimant's condition meets or equals the listed impairments, she is conclusively presumed to be disabled and entitled to benefits"; if not, "the process moves to the fourth [prong]").

In order to determine whether a claimant can perform prior employment, the claimant's functional capacity is compared with the physical and mental demands of the claimant's prior

employment, without consideration of age, education, and work experience. 20 C.F.R. § 404.1560(b). In evaluating a claimant's functional capacity, a report that is unaccompanied by thorough written analysis is deemed less reliable, especially when it conflicts with reports of the claimant's treating physician. *See Mason v. Shalala*, 994 F.2d 1058, 1065 (3d Cir. 1993) ("Form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best."); *Brewster*, 786 F.2d at 585; *Green v. Schweiker*, 749 F.2d 1066, 1071 (3d Cir. 1984).

Furthermore, the ALJ must determine whether significant non-exertional limitations, such as pain or psychological difficulties, further limit the claimant's ability to work. *See Id.* 20 C.F.R. § 404.1569a (c), (d). Where there is medical evidence that could reasonably cause the claimant's complaint of pain, the complaints should be given "great weight" and may not be discounted without contrary medical evidence. *See Green v. Schweiker*, 749 F.2d at 1071 (deciding that obesity, hypertension, angina, diabetes and chest pain could reasonably produce dizziness and blackouts); *Roman v. Apfel*, 1999 WL 825601, 12 (D. Del. 1999); *Peebles v. Apfel*, 1999 WL 223500, 6 (D. Del. 1999).

I. ALJ Kelly improperly weighed the RFC and Key Assessment

The court concludes that ALJ Kelly's finding that Laird could return to past employment relied too heavily upon the RFC, while assigning "no significant weight" to the Key Assessment. The court accords little weight to the RFC since the therapist's only obligation was to check a box. The therapist did not examine Laird. As previously noted, such assessments that consist only of a boilerplate checklist of limitations that are answered without examining the claimant are far from persuasive. Furthermore, the reliability of the RFC is properly questioned given that it conflicted with the written reports of Laird's treating physician. .

In comparison, the court gives greater weight to the Key Assessment since it involves a detailed description of Laird's functional capacity during the different exercises she performed for the examiner. During the assessment a trained therapist monitored Laird's reaction to each of the exercises. Moreover, the therapist clocked the times Laird began to suffer pain or numbness and the point at which she could no longer continue. Furthermore, the Key Assessment's empirically based findings were supported by the conclusions of Laird's treating physicians. It seems reasonable to conclude that Laird's treating physicians are in a better position to provide a detailed and more accurate picture of her capabilities than one who does no more than check boxes on a form. 20 C.F.R. § 404.1527.

Thus, it appears that if ALJ Kelly had properly weighed the Key Assessment, Laird may have been able to prove that she could not return to her prior employment because it requires the ability to perform light work. Social Security Ruling 83-10 explains that light work generally requires the ability to stand and carry weight for approximately six hours of an eight-hour day. *Fagnoli v. Massanari*, 247 F.3d 34, 40 (3d Cir. 2001) (citing *Jesurum v. Sec. of Health and Human Servs.*, 48 F.3d 114, 119 (3d Cir. 1995)). Here, it is clear to the court that Laird's Key Assessment states that she can only work four hours due to her impairment.⁵ (R. at 271). Because Laird is capable of only working four hours, she fails to satisfy the six-hour minimum required pursuant to SSR 83-10 and cannot return to her prior light work employment.

Thus, the court finds that ALJ Kelly erred in relying upon the RFC while granting "no significant weight" to the Key Assessment.

⁵The Key Assessment was silent on whether Laird can only work four hours a day, everyday, or whether she can only work four hours a day if she can work at all.

2. ALJ Kelly Erred in Disregarding Laird's Complaints of Pain and Failed to Properly Weigh All the Relevant Medical Evidence

ALJ Kelly was required to give serious consideration to Laird's subjective complaints of pain, even if those complaints were not supported by medical evidence. *See Green v. Schweiker*, 749 F.2d at 1071; *see also Roman v. Apfel*, 1999 WL 825601 at 12. Laird, stated that "[n]o one knows . . . the hell [she] go[es] through." However, the record contains medical evidence that supports her complaints of pain. Thus, ALJ Kelly should not have disregarded her complaints without contrary medical evidence. *See Id.* Moreover, because ALJ Kelly's decision was silent about Laird's complaints of pain, it appears that he failed to properly consider the medical evidence of record that seems to support those complaints. Thus, again, it appears that, if ALJ Kelly had not disregarded her subjective complaints of pain, Laird may have been able to prove that her pain prevents her from returning to her prior employment.

III. CONCLUSION

After reviewing the record the court will affirm ALJ Kelly's decision pertaining to the third prong because it was supported by substantial evidence. The court finds, however, that Laird has satisfied the fourth prong and is unable to return to her prior employment because of her pain. The court will, therefore, reverse ALJ Kelly's decision that Laird can return to her prior employment and remand the matter for a determination as to whether she is capable of any employment in the national economy.

For these reasons, IT IS HEREBY ORDERED, that:

1. Laird's motion for summary judgment (D.I. 6) is GRANTED in part.
2. The Commissioner's motion for summary judgment (D.I. 9) is DENIED.

3. Judgment is hereby entered in favor of Laird on the fourth prong.
4. This case is REMANDED to the Administrative Law Judge for a hearing on the fifth prong consistent with this opinion.

Date: October 3, 2001
Wilmington, Delaware.

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE