

In a Report and Recommendation filed on July 17, 2002 (Dkt. Entry 9), United States Magistrate Judge Malachy E. Mannion, to whom this matter had been referred, addressed each of Rosenberry's contentions and concluded that the Commissioner's decision was supported by substantial evidence. Thus, he proposed that the denial of benefits be sustained.

Rosenberry's Objections to the Report and Recommendation, filed on July 30, 2002 (Dkt. Entry 10), repeat verbatim the arguments presented to Magistrate Judge Mannion in the Plaintiff's Brief on appeal. (Dkt. Entry 7.) Those arguments are that: 1) the ALJ erred in finding that the Plaintiff's depression was a non-severe impairment; 2) the ALJ erred in determining that the Plaintiff's food and medication allergies did not constitute a medically determinable impairment; 3) the ALJ improperly discredited the Plaintiff's subjective complaints of pain; and 4) the ALJ improperly discredited the Plaintiff's credibility on the basis of her ability to perform limited activities of daily living. (Compare Plaintiff's Brief, Dkt. Entry 7, at 4 ("STATEMENT OF ERRORS"), with Plaintiff's Objections to the Report and Recommendation, Dkt. Entry 10, at 1,3,4, and 6.) On August 7, 2002, the Commissioner waived her right to respond to Rosenberry's objections. (See Dkt. Entry 11.)

Having reviewed the record de novo and given plenary consideration to the arguments advanced on behalf of Rosenberry, I find that the denial of disability benefits is indeed supported by substantial evidence. Accordingly, the Report and Recommendation of Magistrate Judge Mannion will be adopted and the Commissioner's decision denying

Rosenberry's application for disability benefits will be affirmed.

DISCUSSION²

As explained in Plummer v. Apfel, 186 F.3d 422, 427-28 (3d Cir. 1999):

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory 12-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." [Citations omitted.]

Judicial review of a decision to deny an application for disability benefits "is limited to determining whether that decision is supported by substantial evidence." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999). "Substantial evidence has been defined as 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate.'" Plummer, 186 F.3d at 427. Decisions of the United States Court of Appeals for the Third Circuit have instructed that "[t]he search for substantial evidence is . . . a qualitative exercise without which our review of social security disability cases ceases to be merely deferential and becomes instead a sham." Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). As explained in Kent:

²Magistrate Judge Mannion's Report and Recommendation includes a comprehensive recitation of the facts of this matter and is not challenged by the Plaintiff. Accordingly, there is no need to recount the factual background here.

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 -- particularly certain types of evidence (e.g., that offered by treating physicians) -- or if it really constitutes not evidence but mere conclusion.

Id.

In the case at bar, the ALJ assessed the record in the context of the familiar five-step sequential evaluation process established at 20 C.F.R. § 404.1520.³ As Magistrate Judge Mannion observed in his Report and Recommendation, “[t]he instant action was ultimately decided at the fourth step of the process, when the ALJ determined that the plaintiff’s medically determinable impairments did not prevent her from performing her past relevant work.” (Dkt. Entry 9, p. 3.)

1. Plaintiff’s Depression as a “Non-Severe” Impairment

Rosenberry asserts that the ALJ erred in finding that the Plaintiff’s depression was a non-severe impairment. In support of this contention, Rosenberry initially points out:

ALJ Landesberg noted that the Plaintiff did not report depression as a significant

³The five-step sequential approach requires the Commissioner to decide whether (1) the claimant has engaged in any substantial gainful activity during the relevant timeframe; (2) the claimant has a severe impairment, meaning one which "significantly limits . . . physical or mental ability to do basic work activities . . .," 20 C. F.R. § 404.1520(c); (3) the impairment meets or equals a "listed impairment," in which case the claimant will be found to be disabled without consideration of age, education and work experience; (4) if the impairment does not meet the requirements of a listed impairment, the impairment prevents the claimant from performing past relevant work; and (5) there exists jobs in the economy that the claimant can perform if unable to perform past relevant work.

problem on any Social Security forms and did not seek treatment until late March 2000. (R. 20) Medical evidence in the record, however, indicates that the Plaintiff was referred to York Health Behavioral Health Systems for treatment for major depression by Dr. Sicilia, one of her treating physicians for fibromyalgia, and Dr. Barani, her family doctor, and that treatment was begun on November 23, 1999. (R. 357-360.)

(Dkt. Entry 7, p 4-5.)

The fact that the ALJ was in error as to when Rosenberry first obtained treatment for depression does not undermine her conclusion that the condition was not “severe” insofar as vocational abilities are concerned. What is significant, and is undisputed, is that Rosenberry was not referred for mental health care until months after her disability application was filed. Furthermore, the conclusions of the mental health care professionals do not compel a determination that her depression poses a severe impairment with respect to her ability to work.

Rosenberry asserts three primary arguments in opposition to the ALJ’s conclusion on this issue. First, Rosenberry points out that, “ALJ Landesberg . . . noted the Plaintiff’s GAF of 60, noted on a one-page Discharge Form from Dr. Diles, who discharged the patient from York Health Behavioral Health Systems on April 11, 2000 and listed the reason as ‘She doesn’t want any treatment.’” (Dkt. Entry 7, p. 5.) “In fact,” Plaintiff argues that “in [her] testimony, she explained that she refused the treatment that Dr. Diles offered her, which involved at least a two week hospitalization, because of her fear of allergic reaction to medication and because of the advice of her chiropractor. (R. 45-46).” (Id.) Her rationale for refusing further treatment does not mean that the ALJ erred in relying upon the information communicated on the

Discharge Form. Dr. Diles assigned Rosenberry a Global Assessment of Functioning (“GAF”) score of 60.⁴ A GAF of 60 suggests that the symptoms are only moderate, or that there is “moderate difficulty in social, occupational or school functioning.” (Id. at 32.) Dr. Diles’ GAF rating is the type of evidence upon which a reasonable person could rely in determining that Ms. Rosenberry’s depression does not impose a severe impairment.

The fact that an attending physician checked off a box on a form to signify that Ms. Rosenberry was “permanently disabled” and that she was “depressed” due to fibromyalgia does not undermine the ALJ’s conclusion that any impairment from depression was not severe. An impairment is treated as non-severe if it does not significantly limit an individual’s ability to do basic work activities. 20 C.F.R. § 404.1521. There is nothing in Dr. Khalalfalleli’s conclusory report that supports a determination that Ms. Rosenberry’s depression limited her ability to do basic work activities. The form completed by Dr. Khalalfalleli certainly does not constitute

⁴As explained in the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV):

The reporting of overall functioning . . . is done using the Global Assessment of Functioning (GAF) Scale. The GAF Scale may be particularly useful in tracking the clinical progress of individuals in global terms, using a single measure. The GAF Scale is to be rated with respect only to psychological, social, and occupational functioning. . . . In most instances, ratings on the GAF Scale should be for the current period (i.e., the level of functioning at the time of the evaluation,) because ratings of current functioning will generally reflect the need for treatment or care.

Id. at 30.

“substantial evidence.” See Jones v. Sullivan, 954 F.2d 125, 129 (3rd Cir. 1991)(stating that an unsupported diagnosis by a treating physician is not entitled to significant weight); See also Mason v. Shalala, 994 F.2d 1058, 1065 (3rd Cir. 1993)(stating that “fill in the blanks” type of form report constitutes “weak evidence at best”).

Rosenberry’s second argument involves the results of a standard mental health evaluation, known as the Minnesota Multiphasic Personality Inventory - II (“MMPI-II”), which was performed by James A. High, a licensed psychologist. Rosenberry asserts that the ALJ “completely misinterpreted the MMPI results,” arguing that, “what Mr. High actually did note was that the results of the MMPI were ‘*somewhat*’ compromised due to a ‘*high*’ score on a correction scale, and that that elevated score ‘*could be indicative*’ of the behavior that ALJ Landesberg noted. (Emphasis added.) (R. 437.)” (Dkt. Entry 10, p. 2.)

Actually, High’s report states that:

The Results of the MMPI-II were somewhat compromised due to the fact that Mrs. Rosenberry scored very high on the K-scale, which is a correction scale. An elevated K score could be indicative of the following[:] marked defensiveness, faking good, all false responding, or guardedness in employment situations.

(R. 437.) (Emphasis added.) Furthermore, High’s own conclusion is as follows:

It is clear from the client’s elevated scaled scores that she is preoccupied with physical concerns. The MMPI-II results are not conclusive and there is some question as to the validity of the profile, therefore more definite conclusions concerning her disability status cannot be made based upon this clients MMPI-II results alone.

(Id.) Thus, a reasonable person could certainly hesitate in accepting the conclusions of the

MMPI results. Moreover, the MMPI results may reasonably be interpreted as suggesting that Ms. Rosenberry is not credible.

Third, Rosenberry states generally that “[t]he Plaintiff has a long history of anxiety and depression, which is documented by the medical evidence in the record.” (Dkt. Entry 7, p. 6.)

In support of this contention, Rosenberry notes that:

Dr. Lanpher, to whom Dr. Donati had referred the Plaintiff and who treated the Plaintiff from September 27, 1997 through November 19, 1999, consistently listed anxiety under the Plaintiff’s list of diagnoses. (R. 226-242, 309-310.) On October 26, 1999, Dr. Sicilia noted the Plaintiff’s diagnoses of anxiety and depression. (R. 265.) On December 29, 1999, Dr. Barani noted the Plaintiff’s history of depression. (R. 326.) On March 7, 2000, Dr. Mackle noted the Plaintiff’s history of anxiety and depression. (R. 271.)

(Dkt. Entry 7, p. 6.)

The evidence cited by Rosenberry, however, simply establishes the existence of depression, a fact that is undisputed by the Commissioner. Since Rosenberry offers no evidence supporting the alleged severity of her depression, I agree with the Magistrate Judge, who determined, based on the evidence of record, that “substantial evidence supports the ALJ’s finding that the plaintiff’s depression was a ‘non-severe’ impairment because the record failed to establish that her depression caused more than slight restriction in activities of daily living, slight difficulty with social functioning, seldom occurring deficiencies of concentration, or episodes of deterioration in work or work-like settings. (TR. 25-31).” (Dkt. Entry 9, p. 20.)

2. Plaintiff’s Allergies as Medically Non-Determinable Impairments

Rosenberry argues that the ALJ erred in determining that the Plaintiff's severe allergies did not constitute a medically determinable impairment. Ms. Rosenberry's argument ignores the ALJ's finding that her allergic rhinitis is indeed a medically determinable impairment that posed a severe impairment insofar as her occupational abilities are concerned. (R. 19-20.)⁵ The ALJ found only that the alleged food and medication allergies were not medically determinable. In making this determination, the ALJ relied upon the fact that laboratory testing and clinical evaluations failed to confirm Ms. Roseberry's complaints. (R. 19.) Ms. Rosenberry has not pointed to any evidence in the record, other than her self-reporting of allergic reactions, that calls into question the ALJ's determination. In this regard, there is no diagnosis of food or medication allergies. At most, the evidence is that she suffered from "food sensitivities." (See, e.g., R. 226-30.) Thus, the ALJ's finding that her food and medication allergies are not medically determinable is consistent with the record.

3. Plaintiff's Subjective Complaints of Pain

The analytical framework for reviewing an ALJ's assessment of a social security disability claimant's pain complaints was recently articulated by our Court of Appeals in Myers v. Barnhart, No. 02-2747, 57 Fed. Appx. 990, 996-97, 2003 WL 462791, at *5-*6 (3d Cir. Feb. 25, 2003), as follows:

⁵Allergic rhinitis is "a general term used to denote any allergic reaction of the nasal mucosa; it may occur perennially (nonseasonal allergic rhinitis) or seasonally (hay fever)." The Sloane-Dorlane Annotated Medical Legal Dictionary, at 620 (1987).

The Social Security regulations provide the authoritative standard for the evaluation of a claimant's subjective complaints, including pain. The regulations governing the evaluation of pain and other subjective complaints provide that a claimant's statements about his or her impairments need not always be sufficient to establish disability. Instead, a claimant must first establish a medical impairment which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all other evidence, could lead to a conclusion of disability. Once this threshold showing is met, the ALJ must then evaluate the intensity and persistence of the symptoms to determine whether they limit the claimant's capacity to work. Thus, the ALJ is required to assess the degree to which the claimant is accurately stating his or her subjective symptoms or the extent to which they are disabling. Because a claimant's subjective complaints can sometimes suggest a greater severity of impairment than can be shown by the objective medical evidence, the following factors may be considered in assessing the credibility of a claimant's statements: (1) daily activities; (2) duration, location, frequency, and intensity of the pain and other symptoms; (3) precipitating and aggravating factors; (4) medication taken to alleviate pain or other symptoms; (5) treatment other than medication; (6) any other measures used to relieve the symptoms; and (7) other factors concerning functional restrictions or limitations due to pain or other symptoms. [Citations omitted.]

The entire record is to be considered, and the adjudicator is directed to consider the consistency of the individual's statements, both internally and with other information in the record. See Social Security Ruling 96-7p, 1996 WL 374186 (July 2, 1996). This Social Security Ruling also indicates that a claimant's statements may be considered "less credible if the level or frequency of treatment is inconsistent with the level of complaints" Id. at * 7.

In this case, the ALJ considered a number of pertinent factors in determining that Ms. Rosenberry's reporting of the limiting effects of her conditions was exaggerated. For example, while Ms. Rosenberry asserted that she could not sit for longer than 30 minutes, stand for more

than 30 minutes, or do any lifting at all, the medical records showed only some limitation on the range of motion of the neck, only mild muscle spasm, and some localized point tenderness. (R. 145, 206, 211, 245.) The evidence also revealed daily activities that were inconsistent with her professed limitations, “such as driving to appointments, preparing meals, doing the dishes, cleaning her home, shopping and going out to lunch and dinner.” (R. 115-19.) There was also evidence that use of a TENS unit resulted in “marked” improvement in her pain symptoms. (R. 272-74.) The ALJ also took into account the results of the MMPI test, that suggested fabrication of responses. (R. 437.)

There were also the opinions of Ms. Rosenberry’s treating physicians, which, contrary to her own self-assessment, indicated that she could perform light duty work in an environment that was dust free and did not have excessive fumes. (R. 142-43, 350.) This, as well as other evidence cited by the ALJ, are plainly adequate to support a conclusion that Ms. Rosenberry exaggerated her symptoms.⁶

CONCLUSION

Having carefully reviewed the record de novo, and having given plenary consideration to

⁶As the foregoing discussion makes clear, the ALJ in this case did not solely rely upon Ms. Rosenberry’s reported activities of daily living to conclude that she retained the ability to perform a limited range of light duty work. Thus, Ms. Rosenberry’s final contention – that the ALJ afforded excessive weight to her report of activities of daily living – is without merit. The ALJ considered the entire record and supported her decision with citation to substantial evidence that was not overwhelmed by conflicting credible evidence.

the issues presented, I find that the objections to the Report and Recommendation of Magistrate Judge Mannion are without merit. Accordingly, the decision of the Commissioner of Social Security will be affirmed. An appropriate Order follows.

s/ Thomas I. Vanaskie

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

Date: July 30, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY ANNE ROSENBERRY,
Plaintiff

v.

JO ANNE BARNHART,
Commissioner of the Social Security
Administration,
Defendant

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3:CV-01-0822

(CHIEF JUDGE VANASKIE)

ORDER

NOW, THIS 30th DAY OF JULY, 2003, for the reasons set forth in the foregoing
Memorandum, **IT IS HEREBY ORDERED THAT:**

1. The Report and Recommendation of Magistrate Judge Mannion (Dkt. Entry 9) is

ADOPTED.

2. The decision of the Commissioner of Social Security is **AFFIRMED.**

3. The Clerk of Court is directed to enter judgment in favor of the Commissioner of
Social Security and against the Plaintiff.

4. The Clerk of Court is further directed to mark this matter **CLOSED.**

s/ Thomas I. Vanaskie

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania