

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

KAY A. WILSON,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 98-6511
	:	
KENNETH S. APFEL.,	:	
Commissioner of	:	
Social Security,	:	
	:	
Defendant.	:	

MEMORANDUM

R.F. KELLY, J.

OCTOBER , 1999

This is an action for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying Plaintiff Kay Wilson's ("Ms. Wilson") application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act ("the Act"), 42 U.S.C. §§ 401-433. The parties filed Cross-Motions for Summary Judgment, which were referred to United States Magistrate Judge Arnold C. Rapoport for a Report and Recommendation ("R & R"). Magistrate Rapoport granted Plaintiff's Motion for Summary Judgment, denied the Commissioner's Motion for Summary Judgment, and reversed the decision of the Secretary denying benefits to Wilson and remanded the matter to the Secretary for the award of benefits. The Commissioner filed objections to the R & R and Wilson responded.

For the reasons set forth below, the R & R is rejected, and the Commissioner's Motion for Summary Judgment is granted.

I. BACKGROUND

Ms. Wilson is a fifty-three year old woman with a high school education. Her relevant past work was as a telemarketing trainer and manager from approximately 1984 until 1993, when she ceased working due to the closing of her office. In May of 1992, Ms. Wilson injured her back while moving from one office location to another. On December 12, 1995, Ms. Wilson applied for DIB, alleging disability since January 30, 1993, due to fibromyalgia.¹ She claimed that her condition caused her severe fatigue, depression and intense pain in her back, neck, shoulders and feet. She claims this pain is only alleviated, if at all, by constantly changing positions from sitting, to standing, to walking. Her DIB application was denied by the Commissioner initially and again upon reconsideration.

Subsequently, on June 2, 1997, a hearing was held before an Administrative Law Judge ("ALJ"). By Opinion dated

¹ Fibromyalgia, also called fibrositis, is a condition whose symptoms include pain, fatigue, disturbed sleep, stiffness, and multiple tender spots on the body. Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir. 1996). Its causes are unknown and it is currently incurable. Id. Its symptoms are entirely subjective, and there are no laboratory tests which can gauge the level of severity of the condition. Id. Moreover, while all of its symptoms are "easy to fake," a minority of those people genuinely afflicted with fibromyalgia may be totally unable to work. Id. at 306-307.

August 25, 1997, the ALJ denied Ms. Wilson's application for benefits. The ALJ concluded that although Ms. Wilson suffers from fibromyalgia, she was able to perform the sedentary to light telemarketing work she had performed in the past, as well as a substantial number of light and medium work jobs in the national economy;² thus, she was not disabled under the Act. ALJ Op. at 10.

The Appeals Council denied Wilson's request for review, making the ALJ's decision the final decision of the Commissioner. Having exhausted her administrative remedies, Ms. Wilson then commenced this action for judicial review of the Commissioner's final decision.

II. STANDARD OF REVIEW

The standard of review for a Motion for Summary Judgment in a Social Security Disability case is "whether or not there is substantial evidence to support the findings of fact of the Secretary." Roberts v. E. Shalala, Civ.A. No.93-5473, 1994 WL 285039, at *1 (E.D.Pa. June 21, 1994)(citing Woody v. Secretary of the Dep't of Health and Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988)). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402

² The ALJ found that Ms. Wilson could perform laundry work and stock handling, in addition to telemarketing. ALJ Op. at 10.

U.S. 389, 401 (1971)(citations omitted). It is more than a mere scintilla of evidence but may be less than a preponderance.

Stunkard v. Secretary of the Dep't of Health and Human Servs., 841 F.2d 57, 59 (3d Cir. 1988). If substantial evidence exists, a reviewing Court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently.

Monsour Medical Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986), cert. denied, Monsour Medical Ctr. v. Bowen, 482 U.S. 905 (1987).

IV. DISCUSSION

In order to prevail in a Social Security claim, the claimant must establish that she was so medically impaired and functionally limited that she was unable to perform her past work or any other work for a continuous period of at least twelve months. Heffner v. Apfel, No. Civ.A. 97-5784, 1999 WL 151672, at *2 (E.D.Pa. March 17, 1999). The Social Security Administration has established a sequential evaluation process to be followed in determining whether the claimant has met her burden in proving disability under the Act. Id. (citing 20 C.F.R. § 416.920). The process is as follows: (1) if the claimant is found to be engaged in substantial activity, a finding of not disabled is correct; (2) if the claimant is found not to have a severe impairment which significantly limits his/her physical or mental ability to do basic work activity, a finding of not disabled is

directed; (3) if claimant's impairment meets or equals criteria for a listed impairment(s) in appendix 1, of subpart P of Part 404 of 20 C.F.R., a finding of disabled is directed; (4) if claimant retains the residual functional capacity to perform past relevant work, a finding of not disabled is directed; and (5) the Commissioner will determine whether, given claimant's residual functional capacity, age, education, and past work experience in conjunction with criteria listed in appendix 2, he is or is not disabled. Id. If, upon consideration of these factors, the Secretary determines that the claimant is incapable of performing any work that exists in the national or regional economies, a finding of disabled is required. Hoffman v. Shalala, No. 94-2473, 1995 WL 290442, at *2 (E.D.Pa. May 10, 1995).

In the instant case, the ALJ found that although Ms. Wilson suffers from fibromyalgia, she retains the residual functional capacity to return to the work she did in the past, since her "past work did not require the performance of work activities precluded by her medically determinable impairment." ALJ Op. at 10. Therefore, Ms. Wilson did not meet the requirements of step four in the sequential evaluation process for establishing a disability meriting a benefits award under the Act.³ Id.

³ The ALJ did not proceed to consider whether Ms. Wilson satisfied the requirements of Step 5.

Ms. Wilson essentially argues that the ALJ's finding that she is not entitled to DIB because she retains the residual functional capacity to work is not sufficiently supported by substantial evidence. Specifically, Ms. Wilson avers that the ALJ impermissibly failed to afford appropriate weight to her subjective complaints of pain or to the opinions of her treating physicians. We disagree.

With respect to Ms. Wilson's first argument as to whether the ALJ afforded appropriate weight to her subjective complaints of pain, it is true that such complaints may be probative of a disability. Mock v. Shalala, No. Civ A. 94-4191, 1995 WL 80122, at *2 (E.D.Pa. Feb. 27, 1995) (citing Smith v. Calafano, 637 F.2d 968, 972 (3d Cir. 1981)). However, a claimant's statements as to pain are not by themselves conclusive evidence of a disability. Rather,

there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological abnormalities which could reasonably be expected to produce pain. . . .Objective medical evidence of pain or other clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

Chrupcala v. Heckler, 829 F.2d 1269, 1275 (3d Cir. 1987).

Further, where a claimant's complaints of pain are supported by objective medical evidence, the complaints should be given "great

weight" and may not be disregarded unless there exists contrary medical evidence. Mock, 1995 WL 80122, at *2. Moreover, even where an individual's subjective complaints of pain are not supported by medical evidence, they are entitled to serious consideration. Bailey v. Apfel, No. 97-8089, 1998 WL 401629, at *6 (E.D.Pa. 1998) (quoting Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985)).

In the instant case, it is undisputed that Ms. Wilson suffers from fibromyalgia. Therefore, the critical issue before the ALJ was whether her fibromyalgia symptoms, namely pain, prevent her from retaining residual functional capacity to work. However, because her complaints of pain are subjective, the ALJ was presented with a credibility determination concerning the impact of her pain, if any, on her ability to work.

In Social Security cases in general, the credibility determinations of the ALJ are to be given great deference. Butera v. Apfel, 173 F.3d 1049 (7th Cir. 1999). In fibromyalgia cases, the unique subjectivity of the condition and the ease with which its symptoms can be feigned emphasizes the need to endow the ALJ, as initial fact finder, with the authority to determine issues of credibility.

At the outset, in the instant case, the ALJ found Ms. Wilson's statements on her 1995 Fibromyalgia Impact Questionnaire ("the Questionnaire") inconsistent with her allegations of pain

and, as such, damaging to her credibility. ALJ Op. at 3. "A claimant's daily activities is one factor to be considered in evaluating the credibility of a claimant's subjective allegations of pain." Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). On the Questionnaire, Ms. Wilson stated that she experienced very severe pain. She stated she was very tired. She stated that she was very stiff, very tense, and very depressed.⁴ (R. at 140). However, Ms. Wilson also admitted to remaining capable of performing, without assistance, the following daily activities: kitchen chores such as peeling, cutting, and lifting pots and pans; using the stove, oven, refrigerator and sink; transferring to and from bed, chair, car, toilet and bath; turning on faucets; writing; sweeping, bed making and doing dishes; performing personal tasks such as combing her hair, putting on shoes, pants, sweater, shirt and coat, buttoning, and zippering; brushing her teeth; using a phone; washing herself; walking inside and outside for two blocks; climbing stairs at home and elsewhere, and climbing the curb; shopping; yardwork; and performing work related activities. (R. at 147).

Based upon the above, the ALJ concluded that "[i]t is evident from the claimant's wide variety of activities of daily

⁴ On the Questionnaire, Ms. Wilson circled the highest level of affliction in each category, e.g., tiredness, pain, etc.

living listed in her Fibromyalgia Questionnaire in 1995 that [Ms. Wilson's] subjective complaints are contradictory and inconsistent to the wide range of activities of daily living she can perform." ALJ Op. at 9. Credibility determinations by an ALJ need only be supported by substantial evidence on the record as a whole. Miller v. Commissioner of Soc. Sec., 172 F.3d 303, 304 n.1 (3d Cir. 1999). We find that these inconsistencies constitute substantial evidence to support the ALJ's determination that Ms. Wilson's complaints of pain and assertions of total inability to work were not entitled to full credibility. See Chrupcala v. Heckler, 829 F.3d 1269, 1275 (3d Cir. 1987) (holding ALJ improperly denied fibromyalgia plaintiff DIB where plaintiff's testimony regarding his pain was uncontradicted); Alvarado v. Chater, No. 96-2710, 1997 WL 43008 (E.D.Pa. Jan. 24, 1997) (holding ALJ erred in denying DIB to fibromyalgia claimant whose complaints of pain ALJ deemed incredible based on ALJ's erroneous belief concerning strength of medication she was taking for pain, and specifically noting that "when questioned by the administrative law judge about her daily activities, [claimant's] responses were consistent with the extent of the pain she alleges."); Hutton v. Apfel, 175 F.3d 651, 654 (8th Cir. 1999) (upholding ALJ's determination that fibromyalgia claimant's complaints of subjective pain were not credible since they were inconsistent with her daily activities, and explaining that

"[t]he ALJ may discount subjective complaints of pain if inconsistencies are apparent in the evidence as a whole." (citations omitted); Woolf v. Shalala, 3 F.3d 1210, 1214 (8th Cir. 1993) (holding inconsistencies between DIB claimant's daily activities and DIB application justified ALJ's determination that claimant's testimony was credible only to the extent that she had some pain, but not to the extent where she could not perform any work).⁵

However, Ms. Wilson contends that the ALJ failed to afford appropriate weight to the medical evidence supporting her subjective complaints of pain. A review of the ALJ's Opinion reveals that the ALJ considered all of the medical evidence of record, specifically the evaluations of three of Ms. Wilson's physicians: Dr. Derasse, Dr. Braun, and Dr. Wander.⁶ Nonetheless, Ms. Wilson claims the ALJ should especially have

⁵ Mock v. Shalala, No. Civ.A. 94-4191, 1995 WL 80122 (E.D.Pa. Jan. 27, 1995), also dealt with credibility determinations of a DIB applicant's subjective complaints of pain, although not in the fibromyalgia context. In Mock, the court held that the ALJ erroneously discredited the plaintiff's complaints of pain due to muscular atrophy and pain in her right hand because the ALJ found that they were inconsistent with the complainant's daily activities, as well as the objective medical evidence. Id. at *2. However, Mock is distinguishable from this case in that in Mock, all of the complainant's treating physicians opined that she was unable to perform in a vocational setting, which, as will be discussed later, is not the case here.

⁶ The medical evidence of record consists of very little diagnostic testing. Ms. Wilson had one lumbosacral and one pelvic MRI, both of which were normal, and an endoscopy with a biopsy and esophageal dilation, which was also normal.

afforded more weight to the opinion of Dr. Derasse, a rheumatologist and one of Ms. Wilson's treating physicians. Dr. Derasse diagnosed Ms. Wilson as having fibromyalgia, and treated her from February, 1995, to January, 1997. On February 7, 1995, Dr. Derasse described Ms. Wilson as experiencing daily increasing pain; daily increasing depression; daily increasing fatigue and weakness; and increased pain when Ms. Wilson attempted to exercise and during changes in humidity and weather. (R. at 108-110). Dr. Derasse also reported that upon physical examination, Ms. Wilson had decreased motion in her cervical spine, but had full range of motion in her knees and hips. Id. Further, Ms. Wilson was unable to sustain repeated active range of motion of her shoulders on abduction. Id. Dr. Derasse's February 1995 report also described Ms. Wilson as being unable to function at work and unable to perform most of her daily activities. Id. She further described Ms. Wilson as disabled with a guarded prognosis. Id. Dr. Derasse also wrote a letter to Ms. Wilson's counsel dated January 3, 1997, in which she stated that Ms. Wilson's condition rendered her permanently disabled, significantly limited her ability to work an eight hour day, and prohibited full time employment. (R. at 129). However, Dr. Derasse did not opine that Ms. Wilson was precluded from part time employment.

The ALJ considered Dr. Derasse's statements, but

concluded that they were inconsistent with Ms. Wilson's extensive daily activities during the time Dr. Derasse treated Ms. Wilson. Moreover, the ALJ found the statements of Dr. Braun, an acupuncturist who also treated Ms. Wilson, to merit controlling weight. The reports of Dr. Braun from March 17, 1994, through November 30, 1995, chronicle a progressive improvement in Ms. Wilson's fibromyalgia. On April 6, 1994, Dr. Braun reported that Ms. Wilson was having some "real good days" that she had "not had before." On June 6, 1994, Dr. Braun noted that Ms. Wilson took a six hour car trip with only some discomfort during the last hour. On May 16, 1994, Dr. Braun noted that Ms. Wilson had been feeling "next to no pain" for five days. In his May 9, 1994 and August 1, 1994 reports, Dr. Braun noted that Ms. Wilson was able to exercise along with a Richard Simmons videotape. Also on August 1, 1994, Dr. Braun stated that Ms. Wilson's feet were in very good condition. On August 15, 1994, Dr. Braun stated that Ms. Wilson was tolerating car rides better as her knees were not flaring up as before. On August 29, 1994, Dr. Braun noted that Ms. Wilson's lower back was "really good." On September 26, 1994, Dr. Braun noted that the condition of Ms. Wilson's feet had worsened since her last visit, but that this was because Ms. Wilson had "overdone it" by walking around the mall. On November 2, 1994, Dr. Braun stated that Ms. Wilson was able to sit for longer periods, and that her fibromyalgia had improved. On

November 29, 1994, Dr. Braun reported that Ms. Wilson's fibromyalgia had improved. On December 20, 1994, Dr. Braun noted improvements in Ms. Wilson's back and feet, and that her pain was moderate although it "does limit activity." He noted that she had increased her activity and that her fibromyalgia was better. On May 3, 1995, Dr. Braun noted that Ms. Wilson had a modest improvement in her fibromyalgia. On June 1, 1995, Dr. Braun reported that Ms. Wilson has good and bad days, but mostly good. Dr. Braun noted on August 3, 1995 that Ms. Wilson's condition was improving after two weeks on a new medication. On October 4, 1995, Dr. Braun noted that Ms. Wilson's pain was "always there," but that it was reasonable. Also on that date, Ms. Wilson complained of foot pain, but admitted to having walked around the zoo. Dr. Braun noted that her fibromyalgia was better. Again on November 30, 1995, Dr. Braun noted that Ms. Wilson's fibromyalgia was overall better, but there was no new improvement. However, Dr. Braun noted that Ms. Wilson felt her "treatments have helped somewhat." By April, 1996, Ms. Wilson had a relapse of fibromyalgia. In May, 1996, Dr. Braun noted that Ms. Wilson had a "couple of good weeks," but reported pain in her shoulders and thighs. On June 28, 1996, Dr. Braun noted that Ms. Wilson's fibromyalgia had improved somewhat with the use of a new supplement.

The ALJ noted that despite the fact that Ms. Wilson

claims she had to decline a telemarketing position in March, 1994, due to increased pain and fatigue, Dr. Braun's reports covering the period from April, 1994 to November 30, 1995, are replete with comments that Ms. Wilson's fibromyalgia was improving.⁷ Furthermore, significantly, Dr. Braun did not opine that Ms. Wilson's condition precludes employment.

Moreover, the ALJ also found persuasive the report of Dr. Wander, a state agency reviewing physician. Based on Ms. Wilson's medical records, Dr. Wander concluded that Ms. Wilson retained the residual functional capacity to work.

The ALJ carefully considered the medical evidence both in support and in opposition to Ms. Wilson's subjective complaints of pain. In so doing, he concluded that Dr. Braun's and Dr. Wander's statements, particularly in combination with Ms. Wilson's reported daily activities on the 1995 Fibromyalgia Questionnaire as compared to her complaints of pain, constituted substantial evidence that Ms. Wilson retains residual capacity to work. He did not find the opinions of Dr. Derasse to be consistent with the other evidence of record. "The ALJ is responsible for determining credibility, resolving conflicts in

⁷Dr. Braun's medical reports specifically state that Ms. Wilson's fibromyalgia had improved on the following dates: July 14, 1994; July 21, 1994; August 1, 1994; August 15, 1994; August 29, 1994; November 29, 1994; December 20, 1994; May 3, 1995; July 5, 1995; August 3, 1995; October 4, 1995; November 30, 1995; and June 28, 1996.

medical testimony, and for resolving ambiguities." Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999)(quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). We agree that substantial evidence for the ALJ's findings exists. As such, it is not for this Court, upon review, to decide the facts anew, reweigh the evidence, or substitute its own judgment to decide whether a claimant is or is not disabled. Butera, 173 F.3d at 1055.

We therefore conclude that since matters of credibility are within the province of the ALJ, the ALJ could properly determine that Ms. Wilson's statements were not entitled to full credibility, and that substantial evidence supported a finding that Ms. Wilson is not disabled within the meaning of the Act.

An appropriate Order follows.

