

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SUSAN M. OLSON,

Plaintiff,

v.

Case Number 04-10021-BC
Honorable David M. Lawson

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

**OPINION AND ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION, GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT TO AFFIRM THE DECISION OF THE COMMISSIONER, AND
REMANDING FOR AN AWARD OF BENEFITS**

The plaintiff filed the present action on February 2, 2004 seeking review of the Commissioner's decision denying the plaintiff's claim for a period of disability and disability insurance benefits under Title II of the Social Security Act. The case was referred to United States Magistrate Judge Charles E. Binder pursuant to 28 U.S.C. § 636(b)(1)(B) and E.D. Mich. LR 72.1(b)(3). Thereafter, the plaintiff filed a motion for summary judgment to reverse the decision of the Commissioner and remand. The defendant filed a motion for summary judgment requesting affirmance of the Commissioner's decision.

Magistrate Judge Binder filed a report and recommendation on January 31, 2005 recommending that the plaintiff's motion for summary judgment be granted, the defendant's motion for summary judgment be denied, the findings of the Commissioner be reversed, and the case be remanded for an award of benefits. The defendant filed timely objections to the recommendation, and this matter is now before the Court.

The Court has reviewed the file, the report and recommendation, and the defendant's objections, and has made a *de novo* review of the administrative record in light of the parties' submissions. The defendant objects to the magistrate judge's conclusion that substantial evidence does not support the decision of the Administrative Law Judge (ALJ) that the plaintiff is capable of performing her past relevant work, and she argues that if the decision nonetheless is reversed, the matter should be remanded not for an award of benefits but for further proceedings. As support for the proposition that substantial evidence supports the ALJ's determination that the plaintiff retained the capacity to perform light duty work, the defendant primarily points to the report of Dr. William G. Thomas, a consultative physician who reviewed the records of the plaintiff's medical treatment. The defendant also contends that the ALJ properly discounted the evidence of the plaintiff's treating physicians and rejected the plaintiff's testimony of her limitations as not fully credible. Finally, the defendant contends that even if the ALJ's decision is flawed, the evidence does not conclusively establish the plaintiff's entitlement to benefits because factual issues remain to be decided concerning the plaintiff's limitations and whether she can perform any work that exists in significant numbers in the national economy.

The Court disagrees. The administrative record contains clear evidence from a treating source that the plaintiff could not perform work because of physical impairments that are well documented by objective medical tests and clinically correlated. The ALJ's rejection of the opinions of the treating physicians is not based on reasons that withstand analysis in light of even the most casual reading of the record. Those treating-source opinions deserve controlling weight and establish the plaintiff's right to benefits.

The plaintiff, who is now fifty-one, applied for a period of disability and disability insurance benefits on July 27, 2001 when she was forty-seven years old. The plaintiff worked approximately twenty-three years in various jobs for General Motors. During that time she was a security guard, an assembler, and an inspector for her last seven years. She last worked on December 5, 2000, which was the date she alleged her disability began due to a back injury received when picking up a heavy box. Subsequently, a physician diagnosed her with post-traumatic lower back and left leg pain, left sacroiliac joint dysfunction, and bilateral carpal tunnel syndrome. Further examination revealed a herniated lumbar disc, degenerative disc disease, bilateral rotator cuff tears, bilateral rotator cuff tendonitis, arthritis, and bilateral carpal tunnel syndrome. By 2002, the plaintiff began demonstrating signs of diabetes and pain-related depression, insomnia and fatigue.

In her application for disability insurance benefits, the plaintiff alleged that she was unable to work due to herniated discs in her back and neck, numbness in her left leg and foot, and pain in her buttocks. Her claim was denied and she asked for hearing. On May 15, 2003, the plaintiff appeared before ALJ Douglas N. Jones when she was almost fifty years old. ALJ Jones filed a decision on July 18, 2003 in which he found that the plaintiff was not disabled. The ALJ reached that conclusion by applying the five-step sequential analysis prescribed by the Secretary in 20 C.F.R. § 404.1520. The ALJ concluded that the plaintiff had not engaged in substantial gainful activity since December 5, 2000 (step one); the medical evidence in the plaintiff's case established that she has "severe" impairments of degenerative disc disease of the lumbar spine, degenerative joint disease of both shoulders, left sacroiliac joint strain, degenerative disc disease of the cervical spine, bilateral carpal tunnel syndrome, and an adjustment disorder with depression (step two); and none of these impairments alone or in combination met or equaled a listing in the regulations (step three). The

ALJ then determined that the plaintiff retained the capacity to perform a range of light work restricted by non-exertional and postural limitations. He found that the plaintiff's previous work as an inspector and security guard as performed by her fit within those limitations, and therefore she could perform her past work (step four). The ALJ found that the plaintiff was not disabled without reaching step five of the analysis.

The ALJ's residual functional capacity assessment included these limitations: an option to alternate between sitting and standing every 30 minutes; only occasional bending at the waist or knees, twisting of the torso, kneeling, and climbing stairs; and no crawling, climbing ladders, reaching overhead, forceful or sustained gripping or grasping, constant and repetitive moving of her wrists, and using vibrating hand tools. The plaintiff's prior work required her to stand or walk considerably longer than that and did not offer her an option to sit or stand. *See* Tr. at 71-76. The plaintiff's treating neurologist, Dr. Gavin Awerbuch, signed two reports to the plaintiff's employer stating that the plaintiff was totally disabled from performing work due to low back and left leg pain and hand numbness caused by a lumbar herniated disc, degenerative changes, left L4-L5 radiculopathy, neck and bilateral shoulder pain, S1 joint strain, and bilateral carpal tunnel syndrome. Tr. at 145-46. The ALJ rejected these opinions, however, on these grounds:

Dr. Awerbuch lacks hospital privileges and does little except monitor the claimant's condition. His reports contain only incomplete descriptions of his physical examinations, and express his observations in vague and incomplete terms (*e.g.* "incomplete motion" and "positive straight leg raising"). These reports, coupled with the lack of other treatment are insufficient to establish the presence of objective signs and symptoms that would ordinarily be expected to produce functional limitations of the severity complained of by the claimant. . . . Dr. Awerbuch's opinions that the claimant should be "off work" and "limit her activities" have been discounted because they are vaguely stated, unsupported by specific findings and inconsistent with the medical records as a whole.

Tr. at 21.

The plaintiff also testified that she suffered specific physical limitations that prevented her from working, but the ALJ rejected that testimony because he “observed [the plaintiff] to move fluidly without ambulatory aids, wrist splints, or other assistive devices,” she did not pursue surgical intervention, and was receiving disability benefits from work, which the ALJ found as motivating “secondary gain.” *Ibid.*

The standard of review of an ALJ’s decision is deferential, and the Commissioner’s findings are conclusive if they are supported by substantial evidence. 42 U.S.C. § 405(g). “‘Substantial evidence’ means ‘more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Kirk v. Sec’y of Health & Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). However, a substantiality of evidence evaluation does not permit a selective reading of the record. “Substantiality of the evidence must be based upon the record taken as a whole. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Garner v. Heckler*, 745 F.2d 383, 388 (6th Cir. 1984) (internal quotes and citations omitted). *See also Laskowski v. Apfel*, 100 F. Supp. 2d 474, 482 (E.D. Mich. 2000). If the Commissioner’s determination is not supported by substantial evidence on the whole record, the administrative decision must be reversed and the case remanded for further action. *See Howard v. Comm’r of Soc. Sec.*, 276 F.3d 235, 242-43 (6th Cir. 2002).

The medical evidence in the administrative record in this case discloses that the plaintiff first saw Dr. Awerbuch on November 27, 2000 complaining of lower back and left leg pain and bilateral hand numbness. Dr. Awerbuch conducted a thorough physical examination and diagnosed post-

traumatic lower back and leg pain, left sacroiliac joint dysfunction, and bilateral carpal tunnel syndrom. Tr. at 125-27. He prescribed a course of nine physical therapy sessions. He saw her again on January 29, 2001 when she complained of shoulder pain. Dr. Awerbuch ordered diagnostic tests including magnetic resonance imaging and electromyography. On April 30, 2001, he reported that the tests were positive for bilateral carpal tunnel syndrome, lumbar disc herniation, and left sacroiliac joint strain. Tr. at 122. He prescribed medication and referred the plaintiff to a shoulder specialist, Dr. Jerome Ciullo.

Dr. Ciullo performed a thorough physical examination of the plaintiff's upper extremities on June 28, 2001 and diagnosed bilateral rotator cuff tendinitis, stretched joint capsule and arthritis. He ordered further diagnostic testing. The ensuing computerized tomography, arthrograms, and ultrasound studies disclosed a “[l]arge, complete tear, supraspinatus tendon portion of the rotator cuff” of the right shoulder, Tr. at 135, 137; a “[c]omplete tear without retraction, supraspinatus tendon portion of the rotator cuff” of the left shoulder, Tr. at 138, 139; and arthritic changes of the acromioclavicular joint bilaterally. Tr. at 140, 141.

Dr. Awerbuch saw the plaintiff again on August 2, 2001 at which time the plaintiff complained of worsening symptoms that included numbness in her hands and problems manipulating objects. The standard tests were positive for lumbar radiculopathy, and Dr. Awerbuch discussed surgical options with her. He continued her medications. Tr. at 121. On October 31, 2001, the plaintiff had not improved and Dr. Awerbuch ordered her to remain off work. His physical examination showed signs of the orthopedic and neurological problems previously diagnosed. The plaintiff recently had lost her husband, and Dr. Awerbuch stated that if she had to do household chores she should combine frequent rest periods with short amounts of activity. Tr. at 120. On

March 25, 2002, Dr. Awerbuch examined the plaintiff and found her to be suffering from lumbar spasms and trigger points. She could not squat and recover. He prescribed medication, and he noted that the plaintiff wanted to avoid surgery as long as possible. Tr. at 119.

The record documents a continuous treatment course of the plaintiff by Dr. Awerbuch in which he ordered diagnostic tests, performed thorough physical examinations, referred the plaintiff to specialists for examinations and consultations, ordered medications, and discussed conservative as well as more aggressive treatment options with her. Dr. Awerbuch was quite specific in his diagnoses, which were supported by his clinical findings and the objective medical tests. He recommended that the plaintiff not work, and he signed two reports to that effect based on his findings. The record does not support the ALJ's findings with respect to Dr. Awerbuch, and the magistrate judge correctly suggested that those findings cannot withstand rational analysis.

A Rule promulgated by the Secretary states that: "more weight [will be given] to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or reports of individual examinations, such as consultative examinations or brief hospitalizations." 20 C.F.R. § 404.1527(d)(2). The Sixth Circuit has consistently applied this rule. A treating physician's opinion should be given greater weight than those opinions of consultative physicians who are hired for the purpose of litigation and who examine the claimant only once. *See Jones v. Sec'y of Health & Human Servs.*, 945 F.2d 1365, 1370 & n.7 (6th Cir. 1991); *Farris v. Sec'y of Health & Human Servs.*, 773 F.2d 85, 90 (6th Cir. 1985). If a treating physician's opinion is not contradicted, complete deference must be given to it. *Walker v. Sec'y of Health & Human*

Servs., 980 F.2d 1066, 1070 (6th Cir. 1992); *King v. Heckler*, 742 F.2d 968, 973 (6th Cir. 1984). In this case, no physician who actually examined the plaintiff opined that she could perform the physical functions necessary for light or even sedentary work.

The Sixth Circuit recently has held that reversal is required in a Social Security disability benefits case where the ALJ rejects a treating physician's opinion as to the restrictions on a claimant's ability to work and fails to give good reasons for not giving weight to the opinion. *Wilson v. Comm'r of Social Sec.*, 378 F.3d 541, 544 (6th Cir. 2004). There, the court stated that "pursuant to [20 C.F.R. § 404.1527(d)(2)], a decision denying benefits 'must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.'" *Id.* at 544 (quoting Soc. Sec. Rul. 96-2p, 1996 WL 374188, at *5 (1996)). The ALJ in this case gave his reasons for rejecting Dr. Awerbuch's opinion on disability, but those reasons are staggeringly contradicted by the medical evidence in the administrative record.

The perceived lack of objective medical evidence is also one reason the ALJ found the plaintiff's testimony regarding her limitations not fully credible. In evaluating a claimant's complaints of pain, the ALJ quite properly may consider the claimant's credibility. *See Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 531 (6th Cir. 1997); *Kirk*, 667 F.2d at 538. In assessing the credibility of a witness, personal observations are important. In fact, it is one of the reasons underlying the preference for live testimony. *See 2 McCormick on Evidence* § 245, at 94 (4th ed. 1992); *cf. Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Thus, an ALJ, who has observed a witness' demeanor while

testifying, should be afforded deference when his credibility findings are assessed. *See Jones*, 336 F.3d at 475-76; *Villarreal v. Sec’y of Health & Human Servs.*, 818 F.2d 461, 463 (6th Cir. 1987). The Court is not obliged to accept an ALJ’s assessment of credibility, however, if the finding is not supported by substantial evidence. *Beavers v. Sec’y of Health, Educ. & Welfare*, 577 F.2d 383, 386-87 (6th Cir. 1978). Here they are not.

As noted above, the medical evidence provides abundant objective confirmation of the plaintiff’s limitations that the ALJ found wanting. As for his remarks about the plaintiff’s “fluid movement” at the hearing, the ALJ’s reliance on his personal observation in this case is analogous to the so-called “sit and squirm” test, a procedure that has been thoroughly discredited and that cannot serve as a basis for the rejection of a claimant’s allegations of disability. *See King*, 742 F.2d at 975, n.2 (stating that “where all the medical evidence consistently supports the applicant’s complaint of severe back pain, as here, the ALJ’s observation of the applicant at the hearing will not provide the underpinning for denial of Social Security benefits.”). *See also Martin v. Sec’y of Health & Human Servs.*, 735 F.2d 1008, 1010 (6th Cir. 1984); *Weaver v. Sec’y of Health & Human Servs.*, 722 F.2d 310, 312, (6th Cir. 1983).

The Court finds that the ALJ’s decision that the plaintiff could perform her previous work – or any work at the light or sedentary exertional level – therefore, is not supported by substantial evidence. Controlling weight should have been given to Dr. Awerbuch’s well-documented opinion that the plaintiff was not able to work.

That leaves the question of whether further proceedings are needed. In *Faucher v. Sec’y of Health & Human Servs.*, 17 F.3d 171 (6th Cir. 1994), the district court found that the Commissioner’s decision was not supported by substantial evidence because the hypothetical

question posed by the ALJ to a vocational expert did not incorporate all of the claimant's impairments. The district court also concluded that it was unable to remand for taking new and additional evidence because of the limitation contained in sentence six of 42 U.S.C. § 405(g), which conditions a remand on a showing of good cause. Rather, the district court remanded for an award of benefits. On appeal, the court of appeals agreed that sentence six of Section 405(g) requires the Secretary to establish good cause as a prerequisite to a remand. However, a post-judgment remand for further proceedings is authorized under sentence four of Section 405(g). *See Melkonyan v. Sullivan*, 501 U.S. 89, 97-98 (1991).

The court in *Faucher* agreed that the Commissioner's decision was not supported by substantial evidence, but concluded that a remand for benefits was inappropriate in that case. The court reasoned that the record was incomplete because the correct hypothetical question was never posed to the vocational expert. The witness was never given an opportunity to respond to a question that incorporated not only the plaintiff's physical impairments but also the severity of his emotional impairments, and the record contained conflicting evidence on the severity of the plaintiff's emotional impairments. The court observed that the district court had acknowledged that "it was not known whether plaintiff might be capable of performing a significant number of jobs in the national economy that would accommodate his combined limitations." *Faucher*, 17 F.3d at 176. The court concluded, therefore, that "the case must be remanded to the ALJ for further consideration of this issue." *Ibid.*

In *Mowery v. Heckler*, 771 F.2d 966 (6th Cir. 1985), the plaintiff sought Social Security disability insurance benefits, which were denied at the agency level, and he did not prevail in the district court. He suffered from hypertension, headaches and dizziness, and aches and pains. He

was forced to stop work as a construction laborer because of pain. He had worked several years earlier as a night watchman. His I.Q. was below-average. Psychological tests established that the plaintiff was able to function only in construction and mining jobs, and an orthopedic examination showed that the plaintiff had limitation in movement which precluded that activity. The ALJ had denied benefits, concluding that the plaintiff could perform light work, such as that of a night watchman, although there was evidence in the record that the plaintiff had suffered a hearing loss and could only perform as a night watchman when assisted by his son and daughter. The court of appeals reversed the district court and remanded the case to the agency for an award of benefits. The court held:

The court finds it unnecessary to remand the case to the Secretary for further evaluation. In cases where there is an adequate record, the Secretary's decision denying benefits can be reversed and benefits awarded if the decision is clearly erroneous, proof of disability is overwhelming, or proof of disability is strong and evidence to the contrary is lacking.

Id. at 973.

The Court agrees with the magistrate judge that an adequate record exists in this case demonstrating that the plaintiff is disabled within the meaning of the Social Security Act. This conclusion is based on the medical evidence discussed in the magistrate judge's report and this opinion, and the plaintiff's testimony, which the Court finds should not have been rejected as incredible because the ALJ's reasons for doing so are not supported by substantial evidence.

After a *de novo* review of the entire record and the materials submitted by the parties, the Court concludes that the magistrate judge properly reviewed the administrative record and applied the correct law in reaching his conclusion.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation is **ADOPTED**.

It is further **ORDERED** that the plaintiff's motion for summary judgment [dkt # 21] is **GRANTED**.

It is further **ORDERED** that the defendant's motion for summary judgment [dkt # 23] is **DENIED**. The findings of the Commissioner are **REVERSED**, and the case is **REMANDED** for an award of benefits.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: April 7, 2005