

**SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

BRENDA J. WALMSLEY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION H-05-2613
	§	
JO ANNE B. BARNHART,	§	
Commissioner, Social	§	
Security Administration,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Brenda J. Walmsley filed this case under the Social Security Act, 42 U.S.C. § 405(g), for review of the final decision of the Commissioner denying her request for disability insurance benefits. The parties have filed motions for summary judgment (Dkts. 10, 12). Having considered the parties' submissions, the administrative record, and applicable law, the court recommends that Walmsley's motion be denied and the Commissioner's motion be granted.

I. Background

Walmsley filed for disability benefits under Title XVI of the Social Security Act alleging she was disabled and unable to work as of March 31, 2003¹ due to lupus, coronary artery disease, hypertension, chronic fatigue, and a knee problem. After her application and request for reconsideration were denied, Walmsley requested a hearing before an

¹ Walmsley's original application listed an onset date of January 1, 1989, but she amended the date to March 31, 2003 at the hearing. Record, at 298.

administrative law judge (ALJ). The ALJ conducted a hearing on January 24, 2005. The ALJ determined in a March 18, 2005 opinion that Walmsley was not disabled because she was able to perform jobs that exist in significant numbers in the national economy. The Appeals Council denied her request for review on June 17, 2005, making the ALJ's determination the final decision of the Commissioner of Social Security. Walmsley now seeks judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

II. Analysis

A. Standard of Review

Section 405(g) of the Social Security Act sets forth the standard of review in this case. The federal courts review the decision of the Commissioner to deny Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the Commissioner's decision is supported by substantial evidence. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Substantial evidence is "more than a scintilla and less than a preponderance." *Masterson*, 309 F.3d at 272; *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the questions *de novo*, or substitute its own judgment for that of the Commissioner. *Masterson*, 309 F.3d at 272. "Conflicts in the evidence are for the [Commissioner] and not the courts to resolve." *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990).

In order to qualify for disability benefits, a plaintiff must prove he has a disability, which is defined under the Social Security Act as the “inability to engage in 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) and 1382c(a)(3)(A); *Masterson*, 309 F.3d at 271. The administrative law judge must follow a five-step sequential analysis to determine whether a plaintiff is in fact disabled:

1. Is the claimant currently engaged in substantial gainful activity, *i.e.*, working? If the answer is yes, the inquiry ends and the claimant is not disabled.
2. Does the claimant have a severe impairment? If the answer is yes, the inquiry proceeds to question 3.
3. Does the severe impairment equal one of the listings in the regulation known as Appendix 1? If so, the claimant is disabled. If not, then the inquiry proceeds to question 4.
4. Can claimant still perform his past relevant work? If so, the claimant is not disabled. If not, then the agency must assess the claimant’s residual functional capacity.
5. Considering the claimant’s residual functional capacity, age, education, and work experience, is there other work claimant can do? If so, claimant is not disabled.

20 C.F.R. §§ 404.1520, 416.920; *Waters*, 276 F.3d at 718. At step five, the burden shifts to the Commissioner to show that employment for the claimant exists in the national economy.

Wren v. Sullivan, 925 F.2d 123, 125 (5th Cir. 1991).

B. The Commissioner’s Decision and the Evidence of Record

The ALJ determined that Walmsley's impairments of coronary artery disease, systemic lupus erythematosus, Sjogren's syndrome, rheumatoid arthritis, and degenerative joint disease are severe but do not meet or equal an impairment listed in Appendix 1 of Social Security Administration regulations. Relying on the testimony of a medical expert who had reviewed Walmsley's medical records, the ALJ found that Walmsley could perform light work, with limited stooping, twisting, crouching, kneeling, and climbing of stairs or ramps, and no crawling, balancing, or climbing of ladders or scaffolds, and avoidance of hazards such as heights, vibration, and dangerous machinery. Based on the testimony of the vocational expert, the ALJ further found that Walmsley could perform her past work as a billing clerk and appointment clerk/receptionist, or other jobs that exist in significant numbers in the regional economy such as payroll clerk. Walmsley argues that in reaching his conclusion the ALJ erroneously disregarded the opinion of her treating physician, Dr. Merrit, in favor of the opinion of the agency's non-examining medical expert, Dr. Wik.

The opinion and diagnosis of a treating physician should be afforded great weight in determining disability unless there is good cause to decrease reliance. *Leggett v. Chater*, 67 F.3d 558, 566 (5th Cir. 1995). "The ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion. The treating physician's opinions are not conclusive." *Newton v. Apfel*, 209 F.3d 448, 455 (5th Cir. 2000) (citations omitted).

Newton establishes the following rule:

[A]bsent reliable medical evidence from a treating or examining physician controverting the claimant's treating specialist, an ALJ may reject the opinion

of the treating physician *only* if the ALJ performs a detailed analysis of the treating physician's views under the criteria set forth in 20 C.F.R. § 404.1527(d)(2). Additionally, if the ALJ determines that the treating physician's records are inconclusive or otherwise inadequate to receive controlling weight, absent other medical opinion evidence based on personal examination or treatment of the claimant, the ALJ must seek clarification or additional evidence from the treating physician in accordance with 20 C.F.R. § 404.1512(e).

209 F.3d at 453 (emphasis in original).

The record contains an undated note from Dr. Merrit to the Social Security Administration stating that she has known Walmsley personally for a long time, that Walmsley had been her patient for 17 years, and that Walmsley was her employee for one year. Dr. Merrit praised Walmsley's work ethic, and stated: "Due to the multiple conditions, she is not employable nor can she work for sustained periods of time. She requires rest hourly and there is NO WAY would make it as an employee."²

The ALJ evaluated Dr. Merrit's opinion in light of the factors set out in 20 C.F.R. 404.1527, as required by *Newton*. That regulation provides that if a treating source's opinion on the nature and severity of impairments is well-supported by medically acceptable clinical techniques and is not inconsistent with other substantial evidence in the record, the ALJ will give it controlling weight. If a treating source's opinion is not given controlling weight, the ALJ considers the following factors in determining what weight to give the opinion: (i) length of the treatment relationship and frequency of examination; (ii) nature and

² Record, at 290 (emphasis in original).

extent of the treatment relationship; (iii) supportability; (iv) consistency; (v) specialization; (vi) other factors brought to the attention of the ALJ. 20 C.F.R. 404.1527(d)(2)-(d)(6).

The ALJ's decision that Dr. Merrit's opinion was not entitled to controlling weight is not error. The Fifth Circuit has repeatedly held that an opinion that a claimant is unable to work is not the type of treating physician's opinion that is entitled to controlling weight. *Barajas v. Heckler*, 738 F.2d 641, 645 (5th Cir. 1984) ("A statement made by a treating physician that a claimant is disabled does not mean that the claimant is disabled for purposes of the Social Security Act; that conclusion may be determined only by the [Commissioner]."); *Tamez v. Sullivan*, 888 F.2d 334, 336 n.1 (5th Cir. 1989) (citing *Barajas*); *Frank v. Barnhart*, 326 F.3d 618, 620 (5th Cir. 2003) ("Among the opinions by treating doctors that have no 'special significance' are determinations that an applicant is 'disabled' or 'unable to work.'").

Dr. Merrit's opinion is contained in a single memo to the Social Security Administration, and does not reference any medical evidence or laboratory findings. In contrast, physical examinations of Walmsley since her alleged onset of disability indicated improvement. Specifically, an April 2004 exam indicated that hip replacement surgery was successful and she walked normally with good balance, good strength, and full hip range of motion with no pain³; a physical exam in June 2004 was essentially normal⁴; and an August

³ Record, at 269.

⁴ Record, at 263-64.

2004 exam indicated that she had some problems, but had full range of motion in all joints and adequate grip strength.⁵ Walmsley's own testimony was that she could walk ½ block, drive, shower and dress herself, prepare small meals, do laundry, and perform light household chores other than mopping or vacuuming.⁶

Dr. Wik acknowledged that fatigue is commonly associated with Walmsley's impairments of lupus, Sjorgren's syndrome, and rheumatoid arthritis and recognized that Walmsley has a history of fatigue.⁷ However, Dr. Wik testified that the major problem revealed in Walmsley's medical records is her hip replacement.⁸ Dr. Wik did not even mention fatigue in her detailed summary of the objective medical evidence, indicating that the records do not substantiate Walmsley's subjective complaints.⁹ As noted above, Dr. Merrit cited no supporting medical evidence in her opinion. Therefore, the ALJ found Walmsley's allegations regarding her limitations not entirely credible. The ALJ found based on the objective medical evidence and on Walmsley's own testimony that her limitations are mild to moderate and permit light work with certain specified limitations. This conclusion is supported by substantial evidence in the record.

⁵ Record, at 276.

⁶ Record, at 316-20.

⁷ Record, at 330.

⁸ In addition, when asked why she stopped working, Walmsley primarily cited her hip pain. She further testified that after having hip replacement surgery, her hip was 100% better than before. *Id.* at 305-06.

⁹ Record, at 321-27.

III. Conclusion

The Commissioner's decision is supported by substantial evidence in the record and is based on proper legal standards. Therefore, the court recommends that plaintiff's motion for summary judgment be denied, and defendant's motion for summary judgment be granted.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas, on May 5, 2006.



Stephen Wm Smith
United States Magistrate Judge