

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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JULIA GONZALEZ,
                                Plaintiff,
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                                :
                                : 06-CV-6036T
v.
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                                :
JO ANNE B. BARNHART,
Commissioner of Social Security,
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                                :
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                                :
Defendant.
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**BRIEF IN SUPPORT OF THE COMMISSIONER'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

PRELIMINARY STATEMENT

The Commissioner of Social Security ("the Commissioner") submits this brief in support of her motion for judgment affirming her final decision that Julia Gonzalez ("plaintiff") was not eligible for Disability Insurance Benefits ("DIB") or entitled to Supplemental Security Income ("SSI") benefits under Titles II and XVI of the Social Security Act ("Act"). This Court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3). As shown below, substantial evidence supports the Commissioner's decision and, therefore, the Commissioner's decision must be affirmed.

ISSUE

The only issue to be determined is whether the Commissioner's decision that plaintiff was not under a disability from April 2003, her alleged disability onset date, through August 22, 2005, is supported by substantial evidence.

THE ADMINISTRATIVE RECORD

A. Procedural History

Plaintiff filed applications for Disability Insurance Benefits ("DIB") and for Supplemental Security Income ("SSI") benefits on April 23, 2003 (Tr. 60-63).¹ The applications were denied initially (Tr. 29-33, 241-46), and on reconsideration. Plaintiff then requested a hearing before an administrative law judge ("ALJ") (Tr. 35). On August 4, 2005, plaintiff and her representative appeared at a hearing before ALJ Bruce R. Mazzarella and presented testimony (Tr. 259-93). After considering the case *de novo*, ALJ Mazzarella issued an unfavorable decision dated August 22, 2005 (Tr. 14-27). Plaintiff then requested that the Appeals Council review the decision (Tr. 12). The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on December 7, 2005 (Tr. 5-8). This action followed.

B. Nonmedical and Testimonial Evidence

Plaintiff was 38 years old at the time of the ALJ's decision (Tr. 27, 60). She did not graduate from high school and instead received a General Equivalency Diploma ("GED") (Tr. 271). She is able understand a bit of English and was able to read and write in

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Page citations are to the transcript of the administrative record.

Spanish (Tr. 272-73).

Plaintiff claimed that she could not work due to her HIV positive status, left arm numbness, leg and back pain, and incontinence (Tr. 82, 276, 278, 280, 283-84). She also claimed that these conditions limited her ability to walk, stand and sit (Tr. 282). She was able to drive a car and go out alone (Tr. 84, 267). Plaintiff's hobbies include sewing and ceramics (Tr. 85, 286). She claimed her medications caused her to have diarrhea once or twice a week, depending on what she ate (Tr. 282). Plaintiff had no difficulty sleeping (Tr. 288).

Plaintiff's last worked on a production/assembly line (Tr. 90, 267). At this job, plaintiff was required to lift up to twenty pounds and stand/walk for up to four hours each per day (Tr. 91).

Plaintiff's daily activities involved making breakfast for her children and getting them ready for school, watching television, cleaning her house, doing the laundry, grocery shopping once per month and cooking (Tr. 81, 83, 85, 285-86). She also helped her children with their school work (Tr. 82).

C. Medical Evidence

In September 2002, Dr. Amneris E. Luque, plaintiff's treating physician, reported that plaintiff was clinically stable without any signs of opportunistic infections or disease progression (Tr. 159).

Plaintiff's HIV/AIDS was asymptomatic in December 2002 (Tr. 155-56). In addition, her viral load was undetectable and T cell count was normal (Tr. 156). She was taking medication to suppress her genital herpes (Tr. 156).

In January 2003, plaintiff reported that she had stopped taking her medications for three months but then resumed on December 20 (Tr. 153; see Tr. 155). On examination, Dr. Luque reported that plaintiff was "healthy-appearing in no acute distress or obvious discomfort.". Id. Plaintiff's gait was normal and she was neurologically intact (Tr. 153-54).

It was noted in February 2003 that plaintiff's CD4 cell counts were within normal limits and that, therefore, opportunistic infections were not an issue (Tr. 152, 183).

In May 2003, Dr. Luque opined that plaintiff did not reveal any signs of myopathy and that there were minimal signs of a possible sensory neuropathy (Tr. 161-62). Dr. Luque also noted that plaintiff complained of leg pain which was of "unclear etiology" (Tr. 170).

Plaintiff was examined by Dr. Giovanni Schifitto for complaints of left leg pain (Tr. 161-62; Tr. 210). A neurological examination did not reveal any signs of myopathy and there were minimal signs of a possible sensory neuropathy (Tr. 162). To further assess the possibility of myopathy, Dr. Schifitto scheduled

a nerve conduction/EMG study (Tr. 162). The EMG revealed no electrophysiologic evidence of a generalized myopathy or polyneuropathy (Tr. 160, 176).

In August 2003, Dr. Ramon Medalle consultatively examined plaintiff and reported that plaintiff's straight leg raising tests were negative bilaterally and that she had normal ranges of motion and no muscle atrophy (Tr. 200; Tr. 209). Dr. Medalle also noted that plaintiff engaged in a full range of daily activities such as cooking meals, cleaning, doing the laundry, shopping for food and clothing, caring for her personal needs, socializing, going to the movies, listening to the radio and watching television (Tr. 199). Dr. Medalle concluded that plaintiff was mildly limited in activities requiring sustained moderate to heavy physical exertion because of her HIV infection and AIDS complicated by myopathy (Tr. 201).

Also in August 2003, Dr. Luque examined plaintiff who complained of left leg pain (Tr. 169). Dr. Luque reported that she was unable to convince plaintiff to take her full dosage amprenavir given that plaintiff had maintained an undetectable viral load with a 50% dose of the medication (Tr. 170). Dr. Luque again opined that the leg pain was of unknown etiology. Id.

In February 2004, Dr. Luque examined plaintiff and noted that she was doing well and was stable without signs of opportunistic

infection (Tr. 224). Dr. Luque again warned plaintiff about her only taking one-half of her amprenavir dosage but plaintiff insisted that since "her numbers are good", she did not see the need to take more medication. Id.

In December 2004, plaintiff's CD4 count was less than 200 and she showed no signs of major opportunistic infections (Tr. 254).

Treatment notes dated June 2005 indicate that plaintiff's bilateral pain was of unclear etiology with episodes coinciding with her genital herpes outbreaks (Tr. 229). A magnetic resonance image ("MRI") of plaintiff's lumbar spine revealed disc degenerations at L3-4, L4-5 and L5-S1 (Tr. 237). L3-4 also showed right paracentral disc herniation. Id.

In March 2005, plaintiff continued not to show any signs of opportunistic infections (Tr. 255). Plaintiff reported being compliant with all of her medications in their full doses. Id.

In July 2005, Dr. Luque opined that due to persistent left leg pain, plaintiff could only lift and carry between two and five pounds (Tr. 227-28). Dr. Luque also opined that plaintiff could only stand and/or walk for one hour per day (Tr. 227; Tr. 239-39A).

In September 2005, Dr. Luque opined that plaintiff had no difficulty sitting (Tr. 248, 250).

ARGUMENT

**THE DECISION OF THE COMMISSIONER THAT PLAINTIFF
WAS NOT DISABLED IS SUPPORTED BY SUBSTANTIAL EVIDENCE
AND, THEREFORE, MUST BE AFFIRMED.**

**A. Statutory Standard of Entitlement to DIB and SSI Under Titles
II and XVI of the Social Security Act**

Disability insurance benefits may not be paid unless plaintiff meets the insured status requirements of 42 U.S.C. § 423(c). SSI benefits may not be paid unless plaintiff meets the income and resource limitations of 42 U.S.C. §§ 1382a and 1382b. Further, a claimant must demonstrate an 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).

The statute further requires that an individual will be determined to be under a disability

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. . . .

42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B).

The regulations set forth a five step sequential analysis for evaluating whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920. The Commissioner first considers whether the claimant is

currently engaged in substantial gainful activity. If so, she will be found not disabled without consideration of her medical condition. 20 C.F.R. §§ 404.1520(b) and 416.920(b).

If not, the next consideration is whether the claimant has an impairment or combination of impairments that significantly limits her physical or mental ability to do basic work activities. If she does not have such an impairment(s), her claim will be denied without consideration of her age, education and work experience. 20 C.F.R. §§ 404.1520(c) and 416.920(c).

If plaintiff has a severe impairment(s), the Commissioner will consider whether the claimant has an impairment(s) which is listed in Appendix 1 of the regulations, or is equal to a listed impairment. If the claimant has such an impairment, the Commissioner will find the claimant disabled without considering vocational factors. 20 C.F.R. §§ 404.1520(d) and 416.920(d).

If the claimant does not have a listed impairment, the fourth step is to determine whether, despite her severe impairment(s), she has the residual functional capacity to perform her past relevant work. If so, the claimant will be found not disabled. 20 C.F.R. §§ 404.1520(e) and (f), 416.920(e) and (f).

Lastly, if the claimant is unable to perform any work she has done in the past, the Commissioner considers the claimant's residual functional capacity and her age, education, and past work experience

to determine if she can do other work. If she cannot, he will be found disabled. 20 C.F.R. §§ 404.1520(g) and 416.920(g). The Commissioner bears the burden of proof only with regard to this last inquiry. Diaz v. Shalala, 59 F.3d 307, 315 (2d Cir. 1995); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982).

Thus, plaintiff must not only have a medically determinable impairment, but it must cause functional limitations that negate his ability to do any kind of work which exists in the national economy.

B. Scope of Review

Title 42 U.S.C. § 405(g), applicable to SSI cases through 42 U.S.C. 1383(c), provides the basis for this Court's jurisdiction and establishes the limitations upon its review. In accordance with the statute, a court may review the factual findings of the Commissioner only to determine whether the administrative record contains substantial evidence for such findings.² If there is substantial evidence of record to support the Commissioner's findings, they are conclusive. Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996). Thus, the Court is not empowered, pursuant to 42 U.S.C. § 405(g), to conduct a de novo review.

C. The ALJ properly determined that plaintiff was not disabled within the meaning of the Act.

After thoroughly reviewing the evidence, the ALJ found that plaintiff's Asymptomatic HIV+ status, lower leg pain and back condition were "severe" impairments that did not meet or equal 1.04 or 14.08 of the Listings in Appendix 1 of 20 C.F.R. Part 404, Subpart P (Tr. 22, 23, 26). Since plaintiff could not be found disabled at step three of the sequential evaluation process, the ALJ proceeded to step four. Here, the ALJ found that plaintiff

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Substantial evidence is "more than a mere scintilla" and that evidence which "a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

retained the residual functional capacity to perform sedentary work, i.e., during the course of an eight-hour workday, she can sit for up to six hours, stand and/or walk on an occasional basis for up to two hours and lift and/or carry up to ten pounds on occasion (Tr. 24). Because plaintiff's past work as an assembly line worker exceeded the exertional requirements of her residual functional capacity, the ALJ found that plaintiff could not perform her past relevant work (Tr. 25). At step-five, the ALJ found that based on her age, education, and residual functional capacity for sedentary work, Medical-Vocational Guideline ("Grid Rule") 201.23 directed a finding of not disabled (Tr. 25-26). Substantial evidence supports the ALJ's decision and, thus, her decision should be affirmed.

1. Plaintiff's HIV+ diagnosis did not meet or equal Listing §14.08

The ALJ's finding that plaintiff did not have an impairment or combination of impairments which satisfied the requirements of any impairment listed in 20 C.F.R., Part 404, Subpt P., App. 1 ("the Listings") is supported by substantial evidence.

Plaintiff had the burden to prove that her asymptomatic HIV+ diagnosis either met or equaled the requirements of Listing § 14.08. 20 C.F.R., Part 404, Subpt P., App. 1, § 14.08. To meet a listed impairment, it is not enough that plaintiff have one or some of the required criteria. Plaintiff must satisfy all of the specified medical criteria. Sullivan v. Zebley, 493 U.S. 521, 530 (1990).

The record in this instance does not support such a conclusion.

Here, plaintiff had to demonstrate that she had HIV infection with one of the following: a bacterial infection, a fungal infection, a protozoan or helminthic infection, or, a viral infection. 20 C.F.R., Part 404, Subpt P., App. 1, § 14.08. While plaintiff demonstrated an HIV infection, as noted by the ALJ, she did not submit medical evidence of any of these infections nor did she allege that she had any of these infections. This was confirmed by notes from Strong Memorial Hospital clinic indicating that plaintiff's HIV was asymptomatic and she had no opportunistic infections (Tr. 22, 152, 155-56, 159, 183, 224, 254, 255). Therefore, the ALJ properly found that impairment was not of Listing-level severity.

2. Substantial evidence supports the ALJ's finding that plaintiff's subjective complaints were not credible.

In his decision, the ALJ carefully considered plaintiff's testimony regarding pain and functional limitations and reasonably found that they do not support a finding of disabled.

Plaintiff testified that she could not work due to her HIV positive diagnosis, left arm numbness, leg and back pain, diarrhea and incontinence (Tr. 82, 276, 278, 280, 282, 283-84). However, subjective symptomatology, by itself, cannot be the basis for finding a disability. There must be medical signs or other findings which show there is a medical condition that reasonably could be expected

to produce the conditions alleged and that, considered with all the evidence, demonstrates that plaintiff is disabled. 20 C.F.R. §§ 404.1529, 416.929; Social Security Ruling ("SSR") 96-7p. Substantial evidence of record supports the ALJ's credibility finding.

First, it bears noting that the ALJ did not reject all of plaintiff's complaints of pain as evidenced by the fact that due to her back condition, fatigue and leg pain, he found that she was only able to perform sedentary work (Tr. 24). Second, although plaintiff was diagnosed as being HIV positive, her treating physician opined that she remained asymptomatic (Tr. 152, 155-56, 159, 183, 224, 254, 255). Third, there is no evidence that plaintiff was ever hospitalized or that she received treatment for any opportunistic infections. Indeed, the record is replete with evidence that plaintiff was stable and had no opportunistic infections (Tr. 152, 155-56, 159, 183, 224, 254, 255).

Fourth, the record contains evidence that on a daily basis, plaintiff prepared meals for her children and got them ready for school, she watched television, cleaned her house, did the laundry, and grocery shopped once per month(Tr. 81, 83, 85, 285-86). She also helped her kids with their school work (Tr. 82). In addition, she was able to care for her personal needs, socialize, and go to the movies (Tr. 199). The fact that plaintiff was able to engage

in these extensive activities belied her claim of a complete inability to perform work-related activities.

The Commissioner may properly attach significance to evidence that plaintiff is capable of engaging in a variety of daily activities despite allegedly disabling symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). See Rosado v. Shalala, 868 F. Supp. 471, 472 (E.D.N.Y. 1994). Hence, the ALJ appropriately used his discretion as fact-finder to determine that plaintiff's statements about her functional limitations were not entirely credible. See Mimms v. Heckler, 750 F.2d 180, 186 (2d Cir. 1984). The ALJ's finding regarding the credibility of plaintiff's testimony must be accepted by the Court if it is supported by substantial evidence. Aponte v. Secretary of Health and Human Services, 728 F.2d 588, 591 (2d Cir. 1994).

3. **Substantial evidence shows that plaintiff retained the residual functional capacity to perform sedentary work**

After reviewing all of the evidence of record, the ALJ determined that despite her severe impairments, plaintiff retained the residual functional capacity for sedentary work (Tr. 24, 27). Because plaintiff's residual functional capacity exceeded the exertional demands of her past relevant work as an assembly line worker, the ALJ proceeded to step five of the sequential evaluation (Tr. 25-26, 27). Relying upon the Medical-Vocational Guidelines,

the ALJ concluded that plaintiff was not disabled because she could perform other work in the national economy. Id. Substantial evidence supports this finding.

a. The ALJ's Residual Functional Capacity Finding.

Plaintiff bore the burden of establishing that she did not have the residual functional capacity to perform work-related activities by submitting medical and other evidence to support her claim. See 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1545(a)(3), 416.945(a)(3). However, plaintiff failed to establish that her impairments were severe enough to preclude the performance of work-related activities. Substantial evidence supports the ALJ's finding that plaintiff retained the residual functional capacity to perform the full range of sedentary work.

As noted above, the objective medical evidence reveals no evidence of any opportunistic infections as a result of plaintiff's HIV positive status (Tr. 152, 155-56, 159, 183, 224, 254, 255). Further, the evidence reveals that despite plaintiff's claims of left leg pain, her gait was normal and she was neurologically intact (Tr. 153-54, 162). Her straight leg raising tests were negative bilaterally and she had normal ranges of motion with no muscle atrophy (Tr. 200, 209). These are all normal physical findings, as noted by the ALJ (Tr. 24). In addition, Dr. Medalle

opined that due to her HIV infection, plaintiff was only mildly limited in activities requiring sustained moderate to heavy physical exertion (Tr. 201). This opinion is consistent with the ability to perform sedentary work which only requires a maximum lifting/carrying ability of ten pounds, which the Commissioner submits is no where near a moderate to heavy weight. See 20 C.F.R. §§ 404.1567(b), 416.967(b); SSRs 83-10 and 83-14.

Although Dr. Luque opined that plaintiff was not even able to perform even sedentary work, the ALJ determined that this opinion was not entitled to controlling weight because it was not consistent with the overall record (Tr. 24). The Commissioner's Regulations state that a treating physician's opinion is entitled to controlling weight only if it is well-supported by medically acceptable clinical and diagnostic techniques and is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527, 416.927.

Here, Dr. Luque's limited assessment of plaintiff's ability to perform work-related activities was based solely on plaintiff's self-serving complaints of left leg pain which, as noted by Dr. Luque, was of unknown etiology (Tr. 227-28). The Commissioner notes that subjective symptomatology cannot, by itself, be the basis for a finding of disability. Rather, plaintiff must demonstrate by medical signs or findings the existence of an

underlying condition reasonably expected to produce the symptomatology alleged. 42 U.S.C. §§ 423(d)(5)(A) and 1382c(a)(3)(A); 20 C.F.R. §§ 404.1529, 416.929; SSR 96-7p. Here, there were no medical findings to support plaintiff's claims of disabling left leg pain as it was of "unknown etiology" and under the Act, an assessment of an individual's ability to perform work-related activities cannot be based on symptoms alone. See Id. Therefore, on the basis of normal physical findings of record, the ALJ did not err when he did not give Dr. Luque's assessment controlling weight.

Further, Dr. Luque's limited assessment is also inconsistent with plaintiff's reports of her daily activities such as preparing all meals, helping her children get ready for school, helping them with their homework, doing the laundry, grocery shopping, cleaning her home, socializing, and going to the movies (Tr. 81-83, 85, 199, 285-86). Moreover, as noted by the ALJ, although plaintiff claimed she had difficulties sitting, Dr. Luque contradicted this claim when she stated that plaintiff was not limited in her ability to sit (Tr. 248, 250, 282). Therefore, due to the inconsistency of Dr. Luque's opinion with the overall record, under the regulations, the ALJ was entitled to give this opinion less than controlling weight.

In sum, because the objective medical findings of record support the ALJ's residual functional capacity finding for sedentary work, it should be affirmed.

b. Plaintiff could perform other work in the national economy.

At step-five of the sequential evaluation, the ALJ considered plaintiff's residual functional capacity, age, education and work experience, the ALJ found that plaintiff could perform other work in the national economy. Plaintiff, who was 38 years old on as of the date of the ALJ's decision, was considered to be a "younger individual," which is defined in the regulations as a person under age fifty (Tr. 25, 26). 20 C.F.R. §§ 404.1563(c), 416.1563(c). The ALJ also found that plaintiff had a high school education. Id.; See 20 C.F.R. § 404.1564(b)(4), 416.964(b)(4). Considering these factual findings, together with plaintiff's residual functional capacity for sedentary work, the ALJ relied on Medical-Vocational Rule 201.23 to direct a finding that plaintiff not disabled (Tr. 26). Where the findings of fact made with respect to an individual's age, education, work experience and functional capacity coincide with all the criteria of a rule, that rule directs a conclusion as to whether the individual is disabled or not. 20 C.F.R. §§ 404.1569, 416.969. Heckler v. Campbell, 461 U.S. 458 (1983).

After thoroughly evaluating the evidence of record, the Commissioner determined that plaintiff failed to sustain her burden of proof that she was under a disability within the meaning of the Act. The Commissioner submits that the decision is reasonable and should be affirmed by this Court under the substantial evidence rule. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389 (1971).

CONCLUSION

It is submitted that the Commissioner's decision is supported by substantial evidence and, therefore, entitled to affirmance.

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