

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CYNTHIA WILLIAMS-BARNES, Jacksonville, Florida

 Plaintiff, Case No. 3:08-cv-944-J-32TEM

vs. March 18, 2010

MICHAEL J. ASTRUE, 3:03 p.m.
Commissioner of the
Social Security Courtroom No. 10D
Administration,

 Defendant.

EXCERPT OF FINDINGS FROM ORAL ARGUMENT
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

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(Proceedings reported by microprocessor stenography;
transcript produced by computer.)

P R O C E E D I N G S

1
2 March 18, 2010

3:03 p.m.

3 * * * * *

4 THE COURT: Okay. I'm prepared to announce my
5 decision on the record, if you'll give me a minute to gather
6 my papers here.

7 And what I'm going to do is to essentially
8 announce my opinion that I would be writing if I would write
9 a full opinion.

10 Obviously it won't be as pretty, nor will it be as
11 scholarly, as if I took the time to write a long opinion.
12 But the reasoning and the decision would be the same. And
13 then I will issue a short order and judgment in compliance
14 with the opinion that I'm prepared to announce.

15 The decision of the commissioner is given to me in
16 an opinion by the administrative law judge which is dated
17 March 24th, 2008.

18 And Judge Anderson decided that the claimant was
19 not disabled under the Social Security Act and -- either
20 portion of the act that was relevant.

21 And the appeals council denied plaintiff's request
22 for review of the ALJ's unfavorable hearing decision on
23 June 25th, 2008, and, therefore, the ALJ's decision became
24 the decision of the commissioner. And so it's that decision
25 that I'm reviewing.

1 And under the familiar standards, the plaintiff is
2 entitled to disability benefits if she is unable to engage
3 in substantial gainful activity by reason of any medical
4 determinable -- medically determinable physical or mental
5 impairment which can be expected to either result in death
6 or last for a continuous period of not less than 12 months.

7 The regulations and law for disability insurance
8 and supplemental social security income benefits are
9 functionally the same. The commissioner has engaged in the
10 five-step sequential evaluation process in this case.

11 The plaintiff has the burden of persuasion through
12 Step Four. And at Step Five the burden shifts to the
13 commissioner.

14 The standard of review for this court is to
15 determine whether the ALJ applied the correct legal
16 standards and whether factual findings are supported by
17 substantial evidence.

18 Substantial evidence under the test is more than a
19 scintilla. The evidence must do more than merely create a
20 suspicion of existence of a fact, and must include such
21 relevant evidence as a reasonable person would accept as
22 adequate to support the conclusion under existing Eleventh
23 Circuit precedent.

24 In determining whether the commissioner's decision
25 is supported by substantial evidence, the court does not

1 reweigh the evidence, but determines whether the record as a
2 whole contains sufficient evidence to permit a reasonable
3 mind to conclude that the plaintiff is not disabled.

4 Now, in this case there are essentially three,
5 perhaps four, issues on appeal -- or on review. And I'm not
6 going to recite the age of the plaintiff and so forth.
7 That's in the record and it's not disputed. And so I'll go
8 straight to the sequential analysis.

9 At Step One the ALJ did find the plaintiff had not
10 engaged in substantial gainful activity since the alleged
11 onset date of April 2nd of '04.

12 Step Two, the ALJ found the plaintiff's alleged
13 impairments of diabetes, obesity, and borderline
14 intellectual functioning were severe.

15 Step Three, the ALJ considered whether the
16 plaintiff met the listing -- and that's one of the issues on
17 appeal. The listing being 12.05C or 12.02 -- and concluded
18 she did not meet the listing. And I'll refer back to that
19 in a moment.

20 Step Four, the ALJ determined that plaintiff had
21 the RFC to perform sedentary work with occasional climbing,
22 balancing, stooping, kneeling, crouching, and crawling. She
23 could perform simple routine work that involved one- to
24 two-step instructions, and did not involve complex tasks.
25 So she could not perform her past relevant work.

1 But at Step Five, using a VE, the commissioner
2 determined that plaintiff could work in a variety of
3 sedentary jobs which were found in sufficient number
4 nationally and in Florida.

5 The first issue, the plaintiff alleges that the
6 ALJ erred in finding that the plaintiff did not meet or
7 equal a listing 12.05C.

8 To meet that listing, the plaintiff must have a
9 diagnosis included in the listing and must provide medical
10 reports documenting that condition meets the specific
11 criteria of the listing and the duration requirement.

12 You can also equal a listing. And that is an
13 issue that the plaintiff mentioned, but does not state how
14 there is any evidence in the record to show that the
15 disability equals -- the alleged disability equals a
16 listing. And so, really, the focus of the argument was on
17 whether the plaintiff met the listing of 12.05C.

18 And, really, getting to the point, the -- 12.05
19 has a protocol that you have to go through to determine
20 whether a person meets the listing.

21 And kind of jumping to where this case -- the
22 point of this case is, the plaintiff -- the ALJ here found
23 that the plaintiff had a valid verbal performance, or
24 full-scale IQ score, necessary to satisfy the IQ criteria of
25 60 through 70 -- her scores being 65, 68, and 68 -- but

1 further found that the plaintiff did not have significantly
2 subaverage general intellectual functioning with deficits in
3 adaptive functioning initially manifesting prior to age 22.

4 The ALJ didn't really address the third criteria
5 regarding physical or mental impairments, but -- I'm sorry,
6 physical impairments, but the court assumes that the ALJ
7 found that third criteria to be satisfied.

8 And, therefore, the issue is whether the ALJ's
9 finding that the plaintiff did not meet the first criteria,
10 the significantly subaverage general intellectual
11 functioning, is supported by substantial evidence.

12 As we discussed during the oral argument, which I
13 do incorporate into this opinion by reference, in the
14 Eleventh Circuit there is a presumption that absent evidence
15 of a brain injury or some cause of a drop in IQ, a valid IQ
16 test represents the constant level of intellectual
17 functioning throughout life, and, therefore, there's no need
18 for actual evidence of the plaintiff's intellectual
19 functioning before age 22.

20 The Eleventh Circuit in *Hodges versus Barnhart*,
21 276 F.3d 1265, at pages 1268 and -69, found that the
22 Eleventh Circuit has recognized that a claimant meets the
23 criteria for a presumptive disability under this listing
24 when the claimant presents a valid IQ score in the range of
25 the 60 to 70 and evidence of additional mental or physical

1 impairment.

2 And the Eleventh Circuit in *Hodges* further
3 explained that the satisfaction of this paragraph C
4 regarding the IQ creates a presumption of mental impairment
5 that's rebuttable by a presentation of evidence of daily
6 living.

7 And that's backed up by the Eleventh Circuit's
8 case in *Lowery*, L-o-w-e-r-y. And I'm citing on the jump
9 cite 979 F.2d at 837. I believe *Hodges* actually relies on
10 *Lowery*.

11 And I note that the other case in the case that's
12 important is *Garrett*, G-a-r-r-e-t-t, versus *Astrue*, 244
13 Fed.Appx 937. It's an Eleventh Circuit case 2007. And that
14 case was actually cited by the ALJ in her opinion, which
15 shows me that the ALJ was cognizant of the Eleventh Circuit
16 law and was trying to faithfully apply it.

17 So having accepted the validity of the IQ scores,
18 the court -- the fact that the ALJ had done that, the court
19 must consider whether substantial evidence supports the
20 ALJ's determination that the plaintiff did not suffer
21 requisite significantly subaverage general intellectual
22 functioning with deficits in adaptive functioning.

23 And even though there's a presumption here, *Hodges*
24 still says that the plaintiff retains the burden of proof of
25 mental illness created by her satisfaction of paragraph C.

1 And what the ALJ did -- and, again, the
2 organization of the ALJ's opinion makes it a little
3 difficult to list this out in an organized way, but the ALJ
4 pointed to a variety of factors that she, the ALJ,
5 considered in evaluating whether the plaintiff met the
6 listing, including mild restrictions in activities of daily
7 living, going to church, visiting relatives, cooking meals,
8 light cleaning, shopping, laundry, watching TV, reading,
9 raising four children, and using public transportation.

10 She also -- the ALJ also considered that the
11 claimant, the plaintiff, was trying to get her driver's
12 license and said she intended to do so at the hearing.

13 The ALJ also noted that past work of the plaintiff
14 was school cafeteria work, washing dishes, running a cash
15 register, working in a deli, working as a teacher aide, in
16 which she checked homework and graded tests, completing 13
17 credits at community college when she was age 22, having no
18 history of special education, reporting some note-taking
19 problem, and perhaps being diagnosed by someone as dyslexic,
20 and also noted testimony that the -- there was also
21 testimony by the plaintiff at the hearing that she had been
22 pursuing college courses so she could become a social
23 worker.

24 And I understand that the plaintiff says that this
25 evidence was not fully developed or that the ALJ was making

1 too much out of some of this evidence as being evidence that
2 she could rely on.

3 But it seems to me that when you put all of that
4 together that it does support the ALJ's determination that
5 the presumption created by the valid IQ score has been
6 rebutted and that plaintiff has not shown the requisite
7 deficit and adaptive functioning to meet listing 12.05C.

8 The *Zebley* case from the United States Supreme
9 Court -- 493 U.S., at 532, is the jump cite -- quotes that
10 the listings define impairments which would prevent an
11 adult, regardless of his age, education, or work experience,
12 from performing any gainful activity, not just substantial
13 gainful activity. And substantial evidence, in my view,
14 supports the ALJ's determination that plaintiff did not meet
15 the standard and did not meet the relevant listing.

16 And, as I said, although the plaintiff seemed to
17 argue at one point that there was a -- that the plaintiff
18 met -- or, I'm sorry, equalled the listing, that argument
19 really has not been developed, and there's not -- and the
20 plaintiff has not really suggested how the evidence would
21 support that determination here. And the court finds it
22 does not.

23 With respect to the Step Four argument, whether
24 the ALJ erred by failing to include the manipulative
25 limitations in the plaintiff's RFC at Step Four, the

1 plaintiff argues that the RFC assigned by the ALJ failed to
2 account for the manipulative limitations which the plaintiff
3 claims affects her left upper extremity, her wrist, and her
4 elbow.

5 There was evidence, however, in the record -- for
6 example, the evidence from Dr. Branker, who examined the
7 plaintiff. And the ALJ gave Dr. Branker's opinion
8 substantial weight in determining that the plaintiff was
9 limited to sedentary activity. That's found at transcript
10 20.

11 Dr. Branker's exam revealed plaintiff had full use
12 of both arms and hands in dressing and undressing.
13 Plaintiff was able to make a full fist with both hands. And
14 she had normal hand dexterity. Found no neurological
15 problems or diabetic neuropathy and suggested limiting
16 plaintiff to sedentary activity. Transcript 177.

17 The plaintiff did testify to the ALJ that she
18 could lift a gallon of milk with one hand. She did describe
19 tingling and numbness in her hands, however.

20 She also testified that she participated in
21 various other tasks which required the use of her hands.
22 And I just don't see there being a basis for me to overturn
23 the ALJ's determination at Step Four.

24 It seems to me that substantial evidence supports
25 the ALJ's determination as to the plaintiff's RFC. And, of

1 course, the RFC was for sedentary work under the
2 regulations.

3 Finally, the Step Five argument -- I disagree with
4 the plaintiff's SSR 00-4p argument. First of all, the
5 regulation does direct the ALJ to explain conflicts between
6 a VE's testimony and information in the DOT regulations, or
7 the DOTs, as they're called sometimes, before relying on the
8 VE testimony to support a finding on disability.

9 In this case the VE testified that given
10 plaintiff's RFC that she, the plaintiff, could perform the
11 job of parking lot attendant, ticket seller, and ink
12 printer.

13 The ALJ recognized that the VE was testifying
14 about jobs that the DOT regs described as light, where
15 the -- whereas, the ALJ had limited plaintiff to sedentary
16 work.

17 But the ALJ specifically questioned the VE about
18 this during the hearing. And the VE explained that many of
19 the jobs are performed at the sedentary level, and explained
20 his reasons for that.

21 He explained that he had adjusted -- that is, the
22 VE had adjusted the numbers in the economy to account for
23 the reduced capacity to sedentary jobs, essentially a subset
24 of the DOT job description. And that's at transcript 322
25 and 328.

1 And the ALJ recognized her obligation under
2 SSR 00-4p, and specifically found -- explained the
3 discrepancy between the DOT and the VE. And I'm satisfied
4 that in doing so she did not violate the SSR in this case.

5 And to the extent that there is a separate
6 argument about the R level finding, it seems to me that
7 any -- I don't think there was error there, because I don't
8 think that was really an equivalent argument.

9 I think the ALJ specifically -- or sufficiently
10 stated what the hypothetical was. And it was accurate to
11 the VE.

12 But to the extent that she didn't specifically
13 address the R level issue as raised by the plaintiff, it
14 seems to me it's harmless error in this context, where
15 there's a number of other jobs that were found available for
16 this plaintiff by the ALJ's opinion, as to which I find
17 there was substantial evidence to support.

18 All right. I'm going to put you on mute one more
19 second and make sure I've done everything I want to do here.
20 Hold on a second.

21 (Judge confers with law clerk.)

22 THE COURT: The only thing I want to clarify is I
23 think I, at one point, may have, in the recitation, referred
24 to the DOT as regs. And, of course, they're not social
25 security regulations. It's the Dictionary of Occupational

1 Titles. And I understand that.

2 I probably -- I may not have said it quite the way
3 I intended to, but, in my opinion, the ALJ -- and this is in
4 reference to the -- to the Step Five SSR 00-4p issue.

5 In my opinion, the ALJ recognized the potential
6 discrepancy between the DOT, the DOT that was relevant here,
7 and the VE's testimony, and asked the VE about it and
8 explained her findings sufficiently in her decision to be
9 correct in that regard.

10 So with that one clarification, for the reasons
11 stated, the commissioner's decision finding plaintiff not to
12 be disabled is due to be affirmed, in my view. A brief
13 order will be issued to that effect.

14 We'll attach this transcript as being the opinion
15 of the court. And a final judgment will be entered for
16 appellate purposes at that point.

17 Ms. Freeman, I'm not asking for any reargument. I
18 just wanted to make sure that the record is clear. Is there
19 anything else that you want on the record at this time?

20 MS. FREEMAN: Your Honor, thank you for asking,
21 but, no, Your Honor, I have nothing else I have to add.

22 THE COURT: Okay. Ms. Waldron, does the
23 commissioner have anything else that should be on the
24 record?

25 MS. WALDRON: No, Your Honor. Not that I'm aware

1 of.

2 THE COURT: Okay. Well, thank you both for your
3 time and participation. And an order will be entered in the
4 next day or so. Thank you both.

5 MS. FREEMAN: Thank you.

6 MS. WALDRON: Thank you.

7 (The proceedings concluded at 4:14 p.m.)

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9

CERTIFICATE

UNITED STATES DISTRICT COURT)
)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is
a true and correct computer-aided transcription of my
stenotype notes taken at the time and place indicated
herein.

DATED this 19th day of March 2010.

s/Shannon M. Bishop
Shannon M. Bishop, RMR, CRR