

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA**

| | | |
|---------------------------------|---|---------------------------|
| NANCY JEAN THOMAS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CASE NO.: 3:14-CV-651-TLS |
| |) | |
| CAROLYN W. COLVIN, |) | |
| Commissioner of Social Security |) | |
| Administration, |) | |
| |) | |
| Defendant. |) | |

OPINION AND ORDER

The Plaintiff, Nancy Jean Thomas, brought this action pursuant to 42 U.S.C. § 405(g), seeking review of the Commissioner’s decision to deny her supplemental security income. On October 26, 2012, Administrative Law Judge William E. Sampson denied the Plaintiff benefits, and that decision became the final decision of the Commissioner when the Appeals Counsel denied her request for review.

For the reasons discussed below, the Commissioner’s decision is affirmed.

STANDARD OF REVIEW

This Court has the “power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security.” 42 U.S.C. § 405(g). “The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.” *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Liskowitz v. Astrue*, 559 F.3d 736, 739 (7th Cir. 2009). The standard of review is deferential, and the court may not make independent credibility

determinations or reconsider facts and evidence. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Even if reasonable minds may differ as to whether the plaintiff is disabled, the court must affirm the ALJ's decision if it is supported by substantial evidence. *Books v. Chater*, 91 F.3d 972, 978 (7th Cir. 1996). However, conclusions of law are not entitled to such deference, and, if the ALJ commits an error of law, the decision must be reversed. *Schmidt v. Astrue*, 496 F.3d 833, 841 (7th Cir. 2007).

ANALYSIS

To be eligible for disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 416(i), 423, and supplemental security income under Title XVI of the Act, §§ 1382, 1382c, a claimant must prove she is unable to engage in any substantial gainful activity by reason of a 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 twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner of the Social Security Administration uses a five-step sequential analysis to determine whether a claimant is disabled: (1) is the plaintiff currently unemployed; (2) does the plaintiff have a severe impairment; (3) does the plaintiff have an impairment that meets or equals one of the impairments listed as disabling in the Commissioner's regulations; (4) is the plaintiff unable to perform his past relevant work; and (5) is the plaintiff unable to perform any other work in the national economy? 20 C.F.R. § 404.1520; *Simila v. Astrue*, 573 F.3d 503, 512–13 (7th Cir. 2009); *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351–52 (7th Cir. 2005).

At the first step of the analysis, the ALJ determined that the Plaintiff had not engaged in

substantial gainful activity since the date she applied for benefits. Proceeding to the next step, the ALJ found that the Plaintiff had the following medically determinable impairments: Graves' disease¹; degenerative changes of the left shoulder; mild degenerative changes of the lumbar spine; and dysthymic disorder. However, the ALJ concluded that there was no objective evidence that these impairments significantly limited the Plaintiff's ability to perform basic work activities. Therefore, he found that she did not have a severe impairment or combination of impairments, and was not entitled to benefits.

The Plaintiff maintains that the ALJ's finding that no single impairment or combination of impairments is severe was not based on substantial evidence, and that the ALJ imposed the wrong legal standard. Additionally, she argues that the ALJ "improperly gave no weight to the Plaintiffs's symptoms and cherry-picked the record to disregard the well-supported opinion of her treating physician." (Pl.'s Br. 1, ECF No. 22.) The Plaintiff's Brief does not address the ALJ's assessment of the limiting impact of the Plaintiff's medically determinable mental impairment, dysthymic disorder. This Court's Opinion is, thus, likewise limited to the Plaintiff's physical impairments.

A. Step Two Findings

An applicant for benefits must be found to have a severe impairment. The applicable regulations advise applicants that "[i]f you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work

¹ Graves' disease is an immune system disorder that results in the overproduction of thyroid hormones (hyperthyroidism). <http://www.mayoclinic.org/diseases-conditions/graves-disease/basics/definition/con-20025811> (visited May 1, 2015.)

activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.” 20 C.F.R. § 416.920(c); *see also Bowen v. Yuckert*, 482 U.S. 137, 149–50 (1987) (disability insurance benefit payments require a “threshold showing of medical severity”). The claimant has the burden to prove that an impairment is severe. *Castile v. Astrue*, 617 F.3d 923, 926 (7th Cir. 2010).

Impairments are not severe “when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work.” SSR 85-28. The severity requirement is not met when medical evidence shows that the person is capable of performing the basic “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 416.921(b).

Examples of these include—(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) Capacities for seeing, hearing, and speaking; (3) Understanding, carrying out, and remembering simple instructions; (4) Use of judgment; (5) Responding appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes in a routine work setting.

Id. Analyzing whether medical impairments are severe requires an assessment of the claimant’s functioning. SSR 85-28.

First, a claimant must produce medical signs and laboratory findings demonstrating the existence of a medically determinable impairment. Symptoms alone cannot be the basis for a finding of impairment. SSR 96-4p; SSR 96-3p (“Symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect an individual’s ability to do basic work activities unless the individual first establishes by objective medical evidence (i.e., signs and laboratory findings) that he or she has a medically determinable physical or mental impairment(s) and that the impairment(s) could reasonably be expected to produce the alleged

symptom(s).”). “[O]nce the requisite relationship between the medically determinable impairment(s) and the alleged symptom(s) is established, the intensity, persistence, and limiting effects of the symptom(s) must be considered along with the objective medical and other evidence in determining whether the impairment or combination of impairments is severe.” SSR 96-3p; *see also Curvin v. Colvin*, 778 F.3d 645, 649 (7th Cir. 2015) (“[I]f an individual’s impairment does not appear from the objective medical evidence to be severe, the ALJ must then consider the limitations and restrictions caused by the individual’s symptoms.”).

The ALJ found that the Plaintiff had a medically determinable impairment of Grave’s disease that was first diagnosed in 2006. However, the medical documentation consistently recorded that the condition was mild, well-controlled, and did not cause any functional limitations. On appeal to this Court, the Plaintiff does not appear to take issue with the ALJ’s statements or analysis surrounding her Grave’s disease. Instead, she focuses on her left shoulder and back pain, and the ALJ’s conclusion that the degenerative changes in her left shoulder and lumbar spine caused no more than minimal limitations in her functioning. The Plaintiff also complains that the ALJ played doctor when he overruled Dr. Rashid’s and Dr. Blankenstein’s diagnosis of fibromyalgia and disregarded the Plaintiff’s somatic symptoms.

The Plaintiff notes that, in February 2011, she presented with complaints of lower back pain and shoulder pain. The ALJ described the record from this visit:

In February 2011, the record begins showing complaints of back and left shoulder pain (Exhibit 12F/175–176.) Although Dr. Blankenstein found some limited left shoulder range of motion, he noted no tenderness over the AC joint or clavicle. Similarly, while he indicated mild diffuse tenderness over the claimant’s lumbar spine, he found no muscle spasm or SI joint tenderness. In spite of these minimal findings, Dr. Blankenstein assessed diagnoses of lumbago with bilateral lower extremity radiculopathy and left shoulder tendonitis. An x-ray of the claimant’s left shoulder demonstrated some minimal spurring of the AC joint (Exhibit

12F/57). Likewise, an x-ray of the claimant's lumbar spine showed only mild degenerative changes. However, Dr. Blankenstein's only prescribed treatment was Naprosyn.

(ALJ Decision 22, ECF No. 16 at 26.) The ALJ also noted the Plaintiff's April 2011 visit to Dr. Asima Rashid where she was found to have left shoulder tenderness, with moderately reduced range of motion. Dr. Rashid gave the Plaintiff a prescription for Ultram and instructed her to perform shoulder exercises. However, a left shoulder x-ray was normal. The Plaintiff then began attending physical therapy the following month. The ALJ did not include all of the findings from the physical therapy sessions, but found it significant that the Plaintiff completed only six sessions. During at least two occasions, she refused to do more than lay in a prone position due to complaints of pain all over and dizziness. She was discharged when she did not respond to the therapy office's attempts to contact her.

Based on the Plaintiff's subjective complaints of pain, Dr. Blankenstein then assessed that the Plaintiff had a myofascial pain syndrome, such as fibromyalgia. When Lyrica improved her symptoms, he assessed a diagnoses of fibromyalgia. The ALJ found that the diagnoses lacked clinical support, as there was no evidence of any tender point analysis, and Dr. Blankenstein is not a rheumatologist.

In August 2011, the Plaintiff reported to Dr. Rashid that she had pain all over, tingling on her left side, and pain in her upper left arm. However, she also reported moderate activity levels, including walking about 20 minutes three times per week. Additionally, she had no gait disturbance, and Dr. Rashid's physical examination was rather benign. Although Dr. Rashid

found some left arm pain on palpation, the Plaintiff retained full range of motion.² Dr. Rashid did not find any other skeletal tenderness or deformity, and no motor weakness or sensory loss. The ALJ stated that an x-ray demonstrating mild to moderate degenerative changes of the AC joint did not suggest that the condition rose to the level of a severe impairment absent any clinical findings of functional limitation.

Over a year later, in September 2012, the Plaintiff reported a burning sensation in her hands and feet. A physical examination did not identify any significant clinical findings.

The ALJ concluded that, “[A]t no point in the record, as detailed above, did any treating or examining physician make any clinical findings of functional limitation due to the claimant’s physical impairment that would indicate that these conditions cause more than minimal limitation in the claimant’s ability to perform work-related activities.” (ALJ Decision 23.) He noted her testimony that her personal care tasks took more time to complete, but that she was independent and able to engage in a variety of activities of daily living. “In short, the claimant’s subjective complaints are outweighed by a lack of supporting objective evidence.” (*Id.*)

1. *Legal Standard Applied by the ALJ*

The Plaintiff submits that the ALJ’s Decision is internally inconsistent because he recognized the Plaintiff’s degenerative changes and shoulder pain, but then rejected her allegations when he concluded that this medically determinable impairment caused no more than

² The Plaintiff points out that during her April 2011 visit to Dr. Rashid to address her shoulder pain, he noted that her left shoulder range of motion “is not good” and that she was unable to “move her arm behind her back.” The statements about her range of motions, however, was the Plaintiff’s own assessment. Dr. Rashid noted that the range of motion was “moderately reduced.” (R. at 600.) Additionally, it is not a basic work requirement to put your arm behind your back.

minimal limitations in her ability to function. According to the Plaintiff, “[t]he ALJ apparently reasoned that all of her allegations were not supported by any objective evidence.” (Pl.’s Br. 16.)

The Plaintiff misunderstands the ALJ Decision. The ALJ indeed recognized that the Plaintiff had several medical determinable impairments that could produce the symptoms she alleged related to her shoulder and back. His conclusion, based on a recitation of the objective medical evidence and lack of functional limitations associated with the same, was that these impairments did not cause the kind of restrictions on the ability to do basic work activities to support a finding that the impairments were severe. “A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual’s physical and mental ability(ies) to perform basic work activities.” SSR 85-28. This is the evaluation the ALJ undertook. As such, his Decision does not employ the wrong legal standard.

2. *Dr. Rashid’s Opinion*

In making his determination that the record did not contain any physician’s clinical findings of functional limitations that would cause more than minimal limitation on the ability to perform work-related activities, the ALJ gave little weight to the medical source statement completed by Dr. Rashid on January 10, 2012. This statement was a form provided by Ivy Tech Community College after the Plaintiff applied for services from the Office of Disability Support Services at Ivy Tech. According to the form, Dr. Rashid was to list the Plaintiff’s medical diagnosis and check whether the condition “substantially limit[ed]” any of the major life activities that were listed on the form. Dr. Rashid wrote that the Plaintiff suffered from

fibromyalgia, muscle pain, and osteoarthritis, and he checked walking, working, and performing manual tasks as the major life activities that were substantially limited. For functional limitations, he wrote only that she should not lift heavy weights over 20 pounds.

A treating physician's medical opinion may merit controlling weight only if it is both "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record." 20 C.F.R. § 416.927(c)(2); *see also Schaaf v. Astrue*, 602 F.3d 869, 875 (7th Cir. 2010). In assigning little weight to Dr. Rashid's opinion, the ALJ discussed both the medical record, as a whole, and Dr. Rashid's own findings. First, the ALJ concluded that Dr. Rashid's opinion was not supported by any of the objective evidence that the ALJ had set forth earlier in his Decision. He noted that, while an x-ray showed degenerative changes, Dr. Rashid's own findings were that the Plaintiff retained full range of motion. Additionally, the Plaintiff's assessed diagnosis of fibromyalgia was not made by a rheumatologist and was not supported by clinical findings of tender points. Finally, the ALJ noted that the Plaintiff had virtually no office visits or emergency treatment for any condition between August 2011 and September 2012, which suggested that the symptom severity was not as serious as the Plaintiff alleged.

The Plaintiff complains that the ALJ appears to have rejected Dr. Rashid's opinion because it was not supported by objective medical evidence, and maintains that this would have been improper because an x-ray showed degenerative changes. Thus, his opinion was well supported by medically acceptable clinical and laboratory diagnostic techniques. This characterization is incomplete. The ALJ fully acknowledged that the Plaintiff had some degenerative changes in her shoulder and spine. His conclusion regarding the weight to afford

the restrictions—which Dr. Rashid’s opinion indicated were substantial in the areas of walking, working, and performing manual tasks—was based on a lack of clinical findings of functional limitations in any of these areas, either by Dr. Rashid himself or any other treating or consulting physician. The Plaintiff complains that the ALJ made Dr. Rashid’s “entirely reasonable opinion . . . seem more extreme than it is.” (Pl.’s Br. 23 n.3.) The ALJ, however, simply reiterated the language of the form Dr. Rashid completed. If it was made to seem more extreme, that is a function of the fact that Dr. Rashid merely put a check next to a function, and had no option to suggest something less than a substantial limitation. This type of form is not particularly helpful. *See, e.g., Schmidt v. Astrue*, 496 F.3d 833, 843 (7th Cir. 2007) (stating that a form where doctor stated that the plaintiff could not perform sedentary work was suspect because it was drafted by the plaintiff’s attorney and did not include any new medical evidence or other basis to justify the more extreme limitations); *Dixon v. Massanari*, 270 F.3d 1171, 1177 (7th Cir. 2001) (finding that the ALJ properly discounted the opinion of a treating physician who opined that his patient was disabled merely “by writing ‘yes’ next to a question that [the patient’s] attorney had pre-typed [but] did not elaborate on the basis for this opinion”). Likewise, Dr. Rashid placed check marks on a form without any elaboration on the basis for the significant restrictions. Then, when asked to describe the functional limitations that resulted from the medical restrictions, he did not mention any limitations on walking or basic work activities. The only functional limitation he assessed was no lifting over twenty pounds.

In contrast to Dr. Rashid’s opinion, State agency medical consultants found the Plaintiff’s alleged physical conditions to be nonsevere. The ALJ gave great weight to the State agency doctors’ opinions as consistent with the record. Specifically, with the evidence that the Plaintiff’s

Grave's disease was well controlled, that the Plaintiff retained range of motion despite degenerative changes, and that the consultative examiner found no evidence of any functional limitation in the record. The Plaintiff has not identified any error in the ALJ's approach, or his ultimate conclusion regarding the weight to assign the physicians' opinions. *See, e.g., Hofslie v. Barnhart*, 439 F.3d 375 (7th Cir. 2006) (holding that the weight to be given to testimony or other evidence of a treating physician depends on circumstances and that treating physician's opinion does not carry a presumption of correctness where evidence opposing it is introduced); *see also Dixon*, 270 F.3d at 1178 ("When treating and consulting physicians present conflicting evidence, the ALJ may decide whom to believe, so long as substantial evidence supports that decision."); *Books*, 91 F.3d at 979 ("[I]n the end, it is up to the ALJ to decide which doctor to believe—the treating physician who has experience and knowledge of the case, but may be biased, or . . . the consulting physician, who may bring expertise and knowledge of similar cases—subject only to the requirement that the ALJ's decision be supported by substantial evidence.").

3. *Fibromyalgia*

The Plaintiff argues that the absence of tender point findings was not an adequate basis to dismiss Dr. Rashid's opinion about the limiting impact of the Plaintiff's fibromyalgia. The Plaintiff cites to SSR 12-2p, which provides guidance for developing evidence to establish that a person has a medically determinable impairment of fibromyalgia. The Ruling states that fibromyalgia is a medically determinable impairment when it is "established by appropriate medical evidence." SSR 12-2p. According to the Ruling, the administration cannot rely upon a physician's diagnoses of fibromyalgia alone. Rather, to be reliable, "the evidence must document

that the physician reviewed the person's medical history and conducted a physical exam." *Id.*

The social security administration "will review the physician's treatment notes to see if they are consistent with the diagnosis of [fibromyalgia], determine whether the person's symptoms have improved, worsened, or remained stable over time, and establish the physician's assessment over time of the person's physical strength and functional abilities." *Id.* A person will be found to have a medical determinable impairment of fibromyalgia if the physician who made the diagnoses provides evidence that falls within one of the two sets of criteria for diagnosing the condition: criteria based on the 1990 American College of Rheumatology (ACR) Criteria for the Classification of Fibromyalgia (listed in SSR 12-2p, section II.A.), or; the 2010 ACR Preliminary Diagnostic Criteria (listed in SSR 12-2p, section II.B). In addition, a diagnosis cannot be inconsistent with the other evidence in the person's record.

The section II.A criteria requires that the claimant have at least 11 positive tender points on physical examination, in addition to a history of widespread pain and evidence that other disorders that could cause the symptoms or signs were excluded. The ALJ was correct, under this criteria, to note the absence of testing for tender points. Under the section II.B criteria, the claimant must have a history of widespread pain, repeated manifestations of six or more fibromyalgia symptoms, signs, or co-occurring conditions, and evidence that other disorders that could cause these manifestations were excluded. The deficiency in the Plaintiff's medical evidence under the section II.B criteria is that it contains no "evidence of examinations and testing that rule out other disorders that could account for the person's symptoms and signs" such as "imaging and other laboratory tests (for example, complete blood counts, erythrocyte sedimentation rate, anti-nuclear antibody, thyroid function, and rheumatoid factor)." SSR 12-2p.

Additionally, even if the ALJ found that the Plaintiff had a medically determinable impairment of fibromyalgia, which could reasonably be expected to produce the pain and other symptoms she alleged, the ALJ was still required to consider whether the pain or other symptoms caused a limitation or restriction that had more than a minimal effect on the Plaintiff's ability to perform basic work activities. To this end, the ALJ had already noted the lack of recorded functional limitations and the Plaintiff's statement that many of the activities she performed simply took longer to complete.

As the Defendant notes, step two findings are not based on whether a claimant can show objective medical evidence of mild, moderate, or even severe degenerative changes, but rather how long and to what degree those changes affect the claimant's ability to perform basic work activities. *See* 20 C.F.R. § 416.920(a)(4)(ii). The ALJ's articulation of his analysis of the evidence allows this Court to trace his path of reasoning and be assured that he considered important evidence to conclude that the Plaintiff did not have an impairment or combination of impairments that significantly limited or was expected to significantly limit her ability to perform basic work-related activities for 12 consecutive months. This Court is not to reconsider facts, re-weigh the evidence, resolve conflicts in the evidence, decide questions of credibility, or substitute its judgment for that of the ALJ. *Boiles v. Barnhart*, 395 F.3d 421, 425 (7th Cir. 2005). This Court's review of the record leads to the conclusion that the ALJ's decision was supported by such relevant evidence as a reasonable person might accept as adequate to support the ALJ's finding that the Plaintiff does not suffer from a severe impairment. There is no basis to remand this matter to the ALJ or otherwise modify his decision.

CONCLUSION

For the reasons stated above, the Court AFFIRMS the Commissioner's decision.

SO ORDERED on May 1, 2015.

s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT
FORT WAYNE DIVISION