

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

JULIA ASH,)
Plaintiff,)
v.) No. CIV-17-127-HE
NANCY A. BERRYHILL,)
Acting Commissioner of Social)
Security Administration,)
Defendant.)

REPORT AND RECOMMENDATION

Plaintiff seeks judicial review pursuant to 42 U.S.C. § 405(g) of the final decision of Defendant Commissioner denying her application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 416(i), 423. Defendant has answered the Complaint and filed the administrative record (hereinafter AR___), and the parties have briefed the issues. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the following reasons, it is recommended that the Commissioner’s decision be affirmed.

I. Administrative History and Final Agency Decision

Plaintiff applied for Title II disability insurance benefits on October 15, 2013. In her application, Plaintiff alleged that she became disabled on December 10, 2001,

due to Perthes disease¹ in her right hip and slipped capital femoral epiphysis² (“SCFE”) in her left hip.

Plaintiff’s work history reveals that she worked full-time after the date on which she allegedly became disabled. (AR 176). Plaintiff herself admitted that she did not stop working until July 31, 2013, and that she stopped working for “other reasons,” specifically, “[t]hey didn’t have any more work for me.” (AR 225). The agency determined that Plaintiff’s earnings did not entitle her to disability insurance benefits after March 31, 2003. Therefore, Plaintiff was required to demonstrate that she was disabled on or before that date. Wilson v. Astrue, 602 F.3d 1136, 1139 (10th Cir. 2010); Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990)(per curiam); accord, Adams v. Chater, 93 F.2d 712, 714 (10th Cir. 1996); Henrie v. United States Dep’t of Health & Human Servs., 13 F.3d 359, 360 (10th Cir. 1993).

¹ Legg-Calve-Perthes disease is a “childhood condition that affects the hip” and “occurs when blood supply is temporarily interrupted to the ball part (femoral head) of the hip joint. Without sufficient blood flow, the bone begins to die – so it breaks more easily and heals poorly.” <https://www.mayoclinic.org/diseases-conditions/legg-calve-perthes-disease/basics/definition/CON-20035572y> Treatment options for the condition include joint realignment and joint replacement.

² “Slipped capital femoral epiphysis (SCFE) is a hip condition that occurs in teens and pre-teens who are still growing. For reasons that are not well understood, the ball of the head of the femur (thighbone) slips off the neck of the bone in a backwards direction. . . . Treatment for SCFE involves surgery to stop the head of the femur from slipping any further.” <http://orthoinfo.aaos.org/topic.cfm?topic=A00052>. With stable or mild SCFE, surgical treatment involves in situ fixation with insertion of a metal screw across the growth plate to maintain the position of the femoral head and prevent any further slippage. Id. “Over time, the growth plate will close, or fuse. Once the growth plate is closed, no further slippage can occur.” Id.

Plaintiff's sparse medical record reflects that she was diagnosed with Legg-Perthes disease in her right hip in May 1991. (AR 335). Plaintiff was treated by Dr. Gruel in 1994 and in 2001. Dr. Gruel's surgical note in October 1994 indicates Plaintiff, who was then 14 years old, had a 4 year history of right hip Perthes disease and she was experiencing pain and decreased range of motion in her left hip. (AR 322). The diagnostic impression based on x-rays of Plaintiff's left hip was chronic SCFE, stable. (AR 323).

In October 1994, Dr. Gruel performed a surgical osteotomy on Plaintiff's left hip with spica casting of the hip. (AR 311). Two months later, Dr. Gruel performed a second surgical procedure on Plaintiff to remove a compression hip screw and implant a cannulated screw in her left hip "to ensure closure." (AR 297). In October 2000 and September 2001, x-rays of Plaintiff's hips were interpreted as showing no evidence of fracture, dislocation, or soft tissue abnormality. (AR 286, 287).

There are no further records of medical treatment of Plaintiff until August 2011 when she sought treatment from Dr. Blair, an orthopedic surgeon. Dr. Blair noted that Plaintiff, who was then 30 years old, complained of bilateral hip pain increasing over the previous six months. (AR 337). X-rays of Plaintiff's hips were interpreted as showing "significant degenerative changes with a pistol grip coxa vara deformity bilaterally with significant narrowing and osteophytes and generalized thickening of the bone bilaterally and the left also show[ed the] presence of a screw."

(AR 338). Dr. Blair recommended hip joint replacement, noting that “given her weight at age 30, it is going to be problematic,” and advised Plaintiff concerning other treatment options, including physical therapy, hip injections, and pain medication management. (AR 338).

Two years later, in 2013, Plaintiff again sought treatment for right hip pain. Dr. White, an orthopedic specialist, noted that Plaintiff complained her left hip “is not significantly painful but the right hip is very painful and limits her activities.” (AR 267). She was taking non-narcotic, over-the-counter pain medication and occasionally using a crutch when her symptoms were severe. Dr. White noted he discussed surgical and non-surgical treatment options with her, and that she decided to undergo right hip steroid injections, to undertake pain management with a nonsteroidal anti-inflammatory medication, and to obtain a referral to a nutritionist for weight loss. (AR 268). There are no further notes of medical treatment of Plaintiff.

Plaintiff appeared with counsel and testified at an administrative hearing conducted on June 2, 2015, before Administrative Law Judge Parrish (“ALJ”). (AR 21-55). A vocational expert (“VE”) also testified at the hearing.

The ALJ issued a decision in which the ALJ found that Plaintiff

(1) “last met the insured status requirements of the Social Security Act on March 31, 2003,”

(2) “did not engage in substantial gainful activity during the period from her alleged onset date of December 11, 2001 through her date last insured of March 31, 2003,”

(3) had a severe impairment due to history of Perthes disease through her date last insured, and

(4) did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairment in the regulations at 20 C.F.R. part 404, subpt. P, App. 1 through the date she was last insured.

The ALJ further found that (5) through the date she was last insured Plaintiff had the residual functional capacity (“RFC”) to perform light work as defined in 20 C.F.R. § 404.1567(b) except she should never climb ladders, ropes, or scaffolds and never climb ramps or stairs, and she is limited to occasional stooping, crouching, and kneeling.

Finally, the ALJ found that (6) through the date she was last insured Plaintiff was capable of performing all of her past relevant work, including her jobs as a database entry clerk, dispatcher, and companion, and (7) she was not under a disability, as defined by the Social Security Act, at any time from December 11, 2001, the alleged onset date, through March 31, 2003, the date last insured.

The Appeals Council denied Plaintiff’s request for review of the ALJ’s decision, and therefore the ALJ’s decision is the final decision of the Commissioner.

See 20 C.F.R. § 404.981; Wall v. Astrue, 561 F.3d 1048, 1051 (10th Cir. 2009).

II. Issues Raised

Plaintiff raises one issue in her brief. She alleges “Flawed RFC Due to an Improper Medical Analysis.” Plaintiff’s Opening Brief (Doc. # 17), at 2.

III. General Legal Standards Guiding Judicial Review

The Court must determine whether the Commissioner’s decision is supported by substantial evidence in the record and whether the correct legal standards were applied. Wilson v. Astrue, 602 F.3d 1136, 1140 (10th Cir. 2010); Doyal v. Barnhart, 331 F.3d 758, 760 (10th Cir. 2003). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It requires more than a scintilla, but less than a preponderance.” Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007). The “determination of whether the ALJ’s ruling is supported by substantial evidence must be based upon the record taken as a whole. Consequently, [the Court must] remain mindful that evidence is not substantial if it is overwhelmed by other evidence in the record.” Wall, 561 F.3d at 1052 (citations, internal quotation marks, and brackets omitted).

The Social Security Act authorizes payment of benefits to an individual with disabilities. 42 U.S.C. § 401 *et seq.* A disability is 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); accord, 42 U.S.C. § 1382c(a)(3)(A); see 20 C.F.R. § 416.909 (duration requirement). Both the “impairment” and the “inability” must be expected to last not less than twelve months. Barnhart v. Walton, 535 U.S. 212 (2002).

The agency follows a five-step sequential evaluation procedure in resolving the claims of disability applicants. See 20 C.F.R. § 404.1520(a)(4), (b)-(g). In this case, the ALJ denied Plaintiff’s application at the fourth step.

At step four, the claimant bears the burden of proving her inability to perform the duties of her past relevant work. See Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1051 (10th Cir. 1993). At this step, the ALJ must “make findings regarding 1) the individual’s [RFC], 2) the physical and mental demands of prior jobs or occupations, and 3) the ability of the individual to return to the past occupation, given his or her [RFC].” Henrie v. United States Dep’t of Health & Human Servs., 13 F.3d 359, 361 (10th Cir. 1993). As defined by the regulations, RFC represents what the claimant can still do despite his or her limitations. 20 C.F.R. § 404.1545(a). RFC categories include sedentary, light, medium, heavy, and very heavy, based on the exertional demands of the various jobs available in the national economy. See 20 C.F.R. § 404.1567.

IV. No Error in RFC Finding

In this case, the ALJ found that Plaintiff had a severe impairment due to

Perthes disease and that she had the RFC to perform a limited range of light work. At Plaintiff's administrative hearing, the VE described the exertional and skill requirements of Plaintiff's previous jobs as a database entry clerk, dispatcher, and companion. The VE testified that the first two of these jobs were generally performed at the sedentary level and that the third job, as a companion, was generally performed at the light level. (AR 50). The VE testified at the administrative hearing that an individual with Plaintiff's vocational characteristics (age, education, and work experience) and RFC for work could perform the requirements of Plaintiff's previous jobs. (AR 51-52).

In finding that Plaintiff was not disabled within the meaning of the Social Security Act, the ALJ properly relied on the VE's testimony. The ALJ also reviewed the scant medical evidence in the record and reasoned that the opinions of state agency consultative physicians, who reviewed the medical evidence and determined that Plaintiff was not disabled, were entitled to "some weight" as the opinions were "consistent with the medical evidence of record." (AR 15).

Other than citing some extra-record evidence regarding Perthes disease gleaned from a website, Plaintiff does not offer any substantive argument to support her assertion that the ALJ's RFC finding lacks sufficient evidence in the record. She does not point to any medical evidence in the record that was not considered by the ALJ and was probative of the crucial issue of Plaintiff's disability on or before

March 31, 2003. Plaintiff's counsel's subjective assessments of Plaintiff's medical condition and symptoms, which are sprinkled throughout her brief, are simply irrelevant.³

Plaintiff also complains that the RFC did not include limitations for "crutches and wheelchair." Plaintiff's Opening Brief (Doc. # 17), at 12. Plaintiff does not provide any references to the record or any evidentiary support for the implied assertion that Plaintiff medically required "crutches and [a] wheelchair" for a significant period of time on or before the date she was last insured for benefits. Plaintiff advised Dr. White in 2013 that she occasionally used a crutch when her right hip pain was severe, and she testified at the administrative hearing that she sometimes used a crutch or a wheelchair at the time of the hearing. She did not relate any use of assistive devices to the period preceding the date in 2003 on which she was last insured for benefits. The ALJ did not err in failing to include additional limitations in the RFC finding for the use of assistive devices such as a crutch or a wheelchair.

Further, the ALJ did not disregard Plaintiff's severe impairment, as Plaintiff suggests, in determining her RFC for work through the date she was last insured for benefits. Rather, the ALJ's decision reflects that the ALJ carefully reviewed the

³ For instance, Plaintiff states that "the highlighted underlined portions from the website apply to" Plaintiff, and "[p]eople with bad hips do not like to stand most all day due to the pain." Plaintiff's Opening Brief, at 7, 12.

medical record and properly reasoned that “for the period under consideration from the alleged onset date of December 11, 2001 through the date last insured of March 31, 2003, the claimant has no supporting medical evidence to sustain her allegations of a disabling condition.” (AR 15). The ALJ further reasoned, appropriately, that imaging studies of Plaintiff’s hips had shown stability of her condition with no worsening during the relevant period of time, and she did not persistently seek medical treatment for hip pain or related symptoms.

Although Plaintiff testified that she was having the same problems with hip pain in 2003 as she was having at the time of the hearing, the record indicates that Plaintiff worked after the date on which she alleged she became disabled, and no physician imposed limitations upon her suggesting she was unable to work for any twelve-month period during the relevant time period.

In the ALJ’s decision, the ALJ imposed limitations in the RFC finding that are supported by the record, including climbing and postural limitations. There is substantial evidence in the record to support the RFC determination, and the Commissioner’s final decision should be affirmed.

RECOMMENDATION

In view of the foregoing findings, it is recommended that judgment enter AFFIRMING the decision of the Commissioner to deny Plaintiff’s application for benefits. The parties are advised of their respective right to file an objection to this

Report and Recommendation with the Clerk of this Court on or before November 20th, 2017, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 30th day of October, 2017.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE