

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF INDIANA  
 INDIANAPOLIS DIVISION

JAYNE A. MATHEWS-SHEETS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 1:08-CV-1426-WTL-DML
	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of	)	DEFENDANT’S
Social Security,	)	MEMORANDUM IN SUPPORT
	)	OF COMMISSIONER’S DECISION
Defendant.	)	
	)	

Statement of the Case

Plaintiff, Jayne Mathews-Sheets, seeks judicial review of the final decision of the Commissioner of Social Security, which found her not disabled because she could perform her sedentary-level past relevant work as a secretary despite her impairments (Tr. 22-31). This Court has jurisdiction over this action pursuant to 42 U.S.C. § 405(g).

Plaintiff applied for disability insurance benefits in July 2004, alleging disability as of May 2001 due to a variety of impairments (Tr. 98-99). Plaintiff’s application was denied initially and upon reconsideration. An administrative hearing was held on November 20, 2007, at which Plaintiff testified with the assistance of counsel (Tr. 691). The ALJ issued a decision dated January 30, 2008, finding Plaintiff not disabled because she could perform her sedentary-level past work as a secretary despite her impairments (Tr. 22-31). This became the Commissioner’s final decision when the Appeals Council declined Plaintiff’s request for review (Tr. 15-17).

Plaintiff seeks judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

#### Statement of Facts

Plaintiff was a younger individual at all times relevant to the ALJ's decision (Tr. 61). She has a high school education (Tr. 104). Plaintiff performed sedentary-level work in the past as a hospital secretary (Tr. 724).

Plaintiff claimed she was unable to work due to pain and stiffness in all of her joints including her neck, back, shoulders, hands, fingers, legs, and ankles (Tr. 703, 706). She claimed to be very sensitive to touch, said she bruised and developed blood clots easily, and described experiencing headaches (Tr. 703-06). She said her medication caused her to experience decreased concentration, and said her feet swelled (Tr. 707-08). She described needing to get up and walk around after sitting for 20 to 30 minutes (Tr. 709). She did not believe she could perform even a sedentary job on an full-time, ongoing basis (Tr. 716-17). Plaintiff drove short distances, cared for her personal needs, performed household chores including cooking, laundry, shopping, and yardwork, albeit at a slow pace, and assists in the care of her grandchildren (Tr. 94, 714).

Plaintiff has a lengthy record of having received treatment for a number of medically diagnosed conditions including deep venous thrombosis, gastro-esophagheal reflux disorder ("GERD") peptic ulcers, planar fascitis and osteoarthritis (Tr. 162, 207-09, 246-88, 395, 398, 437-57, 560-62, 613-16, 628-33, 659-62, 681-86). Plaintiff has also been described as "morbidly" and "overwhelmingly" obese (Tr. 152, 246, 248, 283). Plaintiff's primary

complaints concern pain throughout her body; she has been diagnosed as exhibiting fibromyalgia (Tr. 528-36, 681-86).

In 2004 Dr. Conrad saw Plaintiff on three occasions for complaints of foot pain; Dr. Conrad opined that Plaintiff's obesity limited her ability to walk (Tr. 152).

Dr. Kennedy examined Plaintiff in August 2004 (Tr. 239-44). Plaintiff demonstrated no atrophy or sensory or reflex deficits. Strength and ranges of motion were normal with the exception of limited right knee motion. Dr. Kennedy observed that Plaintiff could perform full-time sedentary work which required could use her upper and lower extremities for grasping, pushing, pulling, grasping, and manipulating objects (id.).

In March 2005, Dr. Tuttle, Plaintiff's treating physician, referred Plaintiff for a functional capacity evaluation during which it was concluded that she could perform sedentary work activities, but it was not recommended that she return to work based on her subjective complaints of pain and pain behaviors (Tr. 537-40). Dr. Tuttle subsequently relied upon this evaluation in opining that it was "doubtful" that Plaintiff could maintain gainful employment given her medical conditions (Tr. 541).

Dr. Mesquida saw Plaintiff twice in 2007, and recommended that she begin aerobic exercise (Tr. 681-84).

Dr. Farber, the medical advisor at Plaintiff's administrative hearing, testified that Dr. Mesquida's records documented that Plaintiff experienced chronic deep venous thrombosis, fibromyalgia, morbid obesity, gastro esophagheal reflux disease, a peptic ulcer, and a remote knee injury (Tr. 694-95). Dr. Farber concluded that Plaintiff's impairments did not meet or equal a listed impairment either singly or in combination (Tr. 695). He observed that Plaintiff's

medical conditions had existed for some time, and appeared to have “reached some degree of stability” (id.). Dr. Farber testified that the objective evidence of record indicated that Plaintiff could perform sedentary-level work (Tr. 696).

Dr. Farber testified that Plaintiff’s rheumatologist, Dr. Mesquida, had diagnosed her as exhibiting fibromyalgia (Tr. 697-98). Dr. Farber acknowledged that fibromyalgia could be a debilitating impairment, but noted that Plaintiff had demonstrated full ranges of motion and strength upon testing (Tr. 701).

#### Standard of Review

Judicial review of the Commissioner’s final decision is limited in scope by section 205(g) of the Social Security Act, which provides that the findings of the agency as to any fact shall be conclusive if supported by substantial evidence. See 42 U.S.C. § 405(g). Substantial evidence is a deferential standard. It is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotations omitted); see also Diaz v. Chater, 55 F.3d 300, 305 (7th Cir. 1995). In determining whether substantial evidence exists, the Court must review the record as a whole. See Schoenfeld v. Apfel, 237 F.3d 788, 792 (7th Cir. 2001). However, the reviewing court is not permitted to substitute its judgment for that of the Commissioner “by reconsidering facts, reweighing evidence, resolving conflicts in evidence, or deciding questions of credibility.” Williams v. Apfel, 179 F.3d 1066, 1071-72 (7th Cir. 1999). Because substantial evidence supports the ALJ’s findings, and no error of law occurred, this Court should affirm the Commissioner’s final decision that Plaintiff was not disabled. See Cannon v. Apfel, 213 F.3d 970, 974 (7th Cir. 2000).

### Argument

Plaintiff bears the burden of proving that she was unable to perform her past relevant work. Arbogast v. Bowen, 860 F.2d 1400, 1403 (7th Cir. 1988) (citing Bowen v. Yuckert, 482 U.S. 137, 147 n.5 (1987)). The ALJ found Plaintiff could perform the full range of sedentary-level work (Tr. 27). Substantial evidence supports the ALJ's assessment of Plaintiff's capacity to perform the exertional and nonexertional requirements of work. The ALJ found Plaintiff not disabled because she had failed to establish that she was incapable of performing her past relevant secretarial work given her residual functional capacity.

The ALJ's conclusion that Plaintiff could perform sedentary work including her past work, is directly supported by the opinions of several physicians. In 2004, treating physician Dr. Conrad opined only that Plaintiff's obesity would limit her ability to walk (Tr. 152). Dr. Kennedy examined Plaintiff in August 2004, and concluded that she could perform sedentary work (Tr. 239-44). In 2005, Dr. Tuttle referred Plaintiff for a functional capacities evaluation during which she demonstrated an ability to perform sedentary work (Tr. 537-40).

During this evaluation, evaluators recommended that Plaintiff not return to work based on her subjective complaints of pain and pain behaviors (Tr. 540). Plaintiff's impairments include fibromyalgia, a medical condition which has limited objective indicia. Sarchet v. Chater, 78 F.3d 305, 306-07 (7th Cir.1996). While some people may have such a severe case of fibromyalgia as to be totally disabled from working, most do not. Sarchet, 78 F.3d at 307. Because of the nature of Plaintiff's impairments it was imperative that the ALJ assess the credibility of her subjective allegations. Id.

Plaintiff contends the ALJ erred in finding her subjective allegations of incapacitating symptoms and limitations not fully credible. Plaintiff's Brief at 41-51. In assessing Plaintiff's functional capacity, the ALJ expressly found her subjective allegations of incapacitating symptoms and limitations not fully credible (Tr. 29-30). In reaching this conclusion, the ALJ expressly considered appropriate factors including the objective medical evidence, medical opinion evidence, Plaintiff's treatment including medications, her activities, and inconsistencies in her subjective reports over time. 20 C.F.R. § 404.1529(c)(3). The ALJ's weighing of these relevant credibility factors was reasonable, and ought not be disturbed upon judicial review. Skarbek v. Barnhart, 390 F.3d 500, 505 (7th Cir. 2004).

Plaintiff contends the ALJ erred in assessing her condition at the third step of the sequential process for evaluating claims for Social Security disability benefits. Plaintiff's Brief at 7-16. Plaintiff contends the ALJ applied an incorrect section of the Listing of Impairments to assess her fibromyalgia. *Id.*

The ALJ acknowledged that Plaintiff had the severe, medically diagnosed impairment of fibromyalgia (Tr. 24). The ALJ did not rely solely upon objective medical signs and findings to assess the severity of this impairment. Instead, as noted above, the ALJ expressly weighed the credibility of Plaintiff's subjective allegations (Tr. 29-30).

As Plaintiff notes, the Listing of Impairments does not specifically address fibromyalgia. Plaintiff bears the burden of proving that she met or equaled a listed impairment. Maggard v. Apfel, 167 F.3d 376, 379 (7th Cir. 1999). Although Plaintiff contends the ALJ erred in considering the Section of the Listings describing rheumatoid arthritis, Plaintiff does not suggest that any section of the Listing of Impairments other than the one considered by the ALJ would

have been more appropriate. Plaintiff's Brief at 12. Plaintiff does not suggest that she met or equaled any particular listed impairment. Plaintiff's Brief at 7-16. To the contrary, the only physician to have expressed an opinion on the topic concluded that Plaintiff did not meet or equal a listed impairment (Tr. 695). Defendant submits that it was reasonable for the ALJ to find consistent with this uncontradicted expert opinion, that Plaintiff did not meet or equal a listed impairment.

Plaintiff contends the ALJ erred by failing to consider the impact of her obesity on her ability to work. Plaintiff's Brief at 33-38. The ALJ expressly considered the impact of Plaintiff's obesity throughout his decision (Tr. 24, 26, 28). Plaintiff does not identify evidence that required that the ALJ find that her obesity caused her to be limited to less than sedentary work. To the contrary, Dr. Conrad specifically observed that Plaintiff's obesity limited her ability to walk, which should not prevent her from performing a seated job (Tr. 152).

Plaintiff contends the ALJ failed to consider the impact of medically diagnosed conditions including plantar fasciitis and a knee impairment. Plaintiff's Brief at 37-38. As was the case with her obesity, Plaintiff fails to identify evidence establishing that these conditions prevented her from performing sedentary work. Dr. Farber testified that Plaintiff had been treated for these conditions in the past, but considered all of these diagnosed conditions in concluding that Plaintiff could perform sedentary work (Tr. 694-96).

Plaintiff contends the ALJ erred by affording insufficient weight to the opinions of her treating physicians Dr. Watts, Dr. Mesquida, Dr. Tuttle, and Dr. Conrad. Plaintiff's Brief at 16-33. Plaintiff contends the ALJ afforded undue weight to the opinions of doctors who had not examined or treated her. *Id.* at 29-30. In this argument, Plaintiff contends the ALJ

misapprehended the appropriate standard for evaluating claims of disability based on fibromyalgia. Plaintiff's Brief at 30-33.

As noted above, the ALJ did not apply an inappropriate standard for evaluating Plaintiff's fibromyalgia. Instead, the ALJ specifically assessed the credibility of Plaintiff's subjective allegations, whether expressed to doctors or during the course of administrative proceedings. As the ALJ noted, examining consultant Dr. Kennedy and medical advisor Dr. Farber concluded that Plaintiff could perform sedentary-level work (Tr. 243, 696). Treating physician Dr. Conrad opined only that Plaintiff was limited in her ability to walk (Tr. 152).

A physical therapist conducted a functional capacities evaluation during which Plaintiff demonstrated her ability to perform sedentary work activities, but recommended that she not return to work based on her subjective complaints of pain and pain behaviors (Tr. 537-40). Dr. Tuttle subsequently relied upon this evaluation in opining that it was "doubtful" that Plaintiff could maintain gainful employment given her medical conditions (Tr. 541). The ALJ properly noted that he was responsible for making such a determination, rather than Dr. Tuttle (Tr. 28). 20 C.F.R. § 404.1527(e).

Plaintiff contends that the ALJ erred in stating that Dr. Tuttle opined that she could perform sedentary-level work; Plaintiff contends Dr. Tuttle did not express any opinion. Plaintiff's Brief at 23. The record does show, however, that Dr. Tuttle cited with approval to the functional capacities evaluation, which he had ordered, and which did contain such an opinion (Tr. 537-41).

Plaintiff generally avers that the ALJ "refused, without explanation, to even consider the opinions of Dr. Watts, Dr. Conrad, and Dr. Mesquida." Plaintiff's Brief at 24-28. Plaintiff does



not, however, identify any specific portion of those doctors' records that establish that she was unable to perform sedentary-level work. None of these doctors described Plaintiff as disabled, nor did they impose specific functional limitations that exceeded those in the ALJ's assessment of Plaintiff's residual functional capacity.

Plaintiff contends the ALJ erred in finding she could perform substantial gainful activity on an ongoing full-time basis. Plaintiff's Brief at 38-41. In support of this argument, Plaintiff relies upon her subjective allegations either at the administrative hearing or during the functional capacities evaluation. *Id.* As the ALJ noted, he, and not Plaintiff's doctor, is responsible for assessing the credibility of Plaintiff's subjective allegations and her residual functional capacity within the context of Plaintiff's application for Social Security disability benefits (Tr. 28).

#### Conclusion

Substantial evidence supports the ALJ's findings. Accordingly, this Court should affirm the Commissioner's final decision that Plaintiff was not disabled.

Respectfully submitted,

TIMOTHY M. MORRISON  
United States Attorney

By: */s/ Thomas E. Kieper*  
Thomas E. Kieper  
Assistant United States Attorney

OF COUNSEL:

Donna Calvert  
Regional Chief Counsel

Edward P. Studzinski  
Assistant Regional Counsel  
Office of the General Counsel  
Social Security Administration  
200 West Adams Street, 30th Floor  
Chicago, Illinois 60606  
(312) 353-9256

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of July, 2009, I electronically filed the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF COMMISSIONER'S DECISION** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

C. David Little  
[powerlittl@accs.net](mailto:powerlittl@accs.net)

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

NONE.

/s/ Thomas E. Kieper

Thomas E. Kieper  
Assistant United States Attorney

Office of the United States Attorney  
10 West Market Street, Suite 2100  
Indianapolis, IN 46204  
(317) 226-6333