

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SHARON ANN NOWAK,)	
Plaintiff)	
)	
v.)	
)	Civil Action No. 11-30095-KPN
MICHAEL J. ASTRUE,)	
COMMISSIONER OF SOCIAL)	
SECURITY ADMINISTRATION,)	
Defendant)	
)	

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION FOR
JUDGMENT REVERSING THE COMMISSIONER'S DECISION and
DEFENDANT'S MOTION TO AFFIRM THE COMMISSIONER'S
DECISION (Document Nos. 10 and 14)
March 21, 2012

NEIMAN, U.S.M.J.

This is an action for judicial review of a final decision by the Commissioner of the Social Security Administration ("Commissioner") regarding an individual's entitlement to Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") benefits pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). Sharon Ann Nowak ("Plaintiff") asserts that the Commissioner's decision denying her such benefits - - memorialized in a November 23, 2010 decision of an administrative law judge - - is not supported by substantial evidence and contains errors of law. She has filed a motion to reverse the decision and the Commissioner, in turn, has moved to affirm.

The parties have consented to this court's jurisdiction. See 28 U.S.C. § 636(c); Fed.R.Civ.P. 73. For the following reasons, the Commissioner's motion to affirm will be

denied and Plaintiff's motion will be allowed to the extent it can be fairly read to include a request for remand.

I. STANDARD OF REVIEW

A court may not disturb the Commissioner's decision if it is grounded in substantial evidence. See 42 U.S.C. §§ 405(g) and 1383(c)(3). Substantial evidence is such relevant evidence as a reasonable mind accepts as adequate to support a conclusion. *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir.1981). The Supreme Court has defined substantial evidence as "more than a mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Thus, even if the administrative record could support multiple conclusions, a court must uphold the Commissioner's findings "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir.1981).

The resolution of conflicts in evidence and the determination of credibility are for the Commissioner, not for doctors or the courts. *Id.*; *Evangelista v. Sec'y of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir.1987). Nonetheless, the court must ensure that an administrative law judge made specific findings to the "relevant evidence" when deciding to disbelieve a claimant. See *Da Rosa v. Sec'y of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986); see also SSR 96-7p (requiring that "[w]hen evaluating the credibility of an individual's statements, the adjudicator must . . . give specific reasons for the weight given to the individual's statements"). In addition, a denial of

benefits will not be upheld if there has been an error of law in the evaluation of a particular claim. See *Manso–Pizarro v. Sec’y of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir.1996). In the end, the court maintains the power, in appropriate circumstances, “to enter ... a judgment affirming, modifying, or reversing the [Commissioner’s] decision” or to “remand [] the cause for a rehearing.” 42 U.S.C. § 405(g).

II. BACKGROUND

Since the parties are well familiar with the pertinent facts, only a brief outline is necessary. Plaintiff filed her application for SSDI and SSI benefits on October 8, 2008. (Administrative Record (“A.R.”) at 65.) She was born in 1968, has a high school education and a certificate in medical coding, and has worked as a personal care attendant and store manager. (*Id.* at 76.) In her application, Plaintiff reports that in 2005 she began suffering from debilitating back pain that interfered with her ability to work. (*Id.* at 70.) Since then she has unsuccessfully attempted to alleviate the pain with three back surgeries: an L5-S1 microdiscectomy on May 16, 2007, L4-L5 and L5-S1 disc extension and fusion on August 14, 2008, and an L5 re-exploration and decompression on August 4, 2009. (*Id.* at 71-72.) Plaintiff has been diagnosed with lumbar degenerative disc disease and failed back syndrome. (*Id.* at 71, 302.) In addition, Plaintiff testified that she has developed erosive esophagitis resulting from ibuprofen overuse during the pendency of her claim. (*Id.* at 37.)

After her claim was denied both initially and on reconsideration, Plaintiff requested a hearing before an administrative law judge (“ALJ”), which occurred on

November 1, 2010. (*Id.* at 65.) Both Plaintiff and her mother, Rita Nowak, testified at the hearing regarding her limitations. (*Id.* at 71.) In a decision dated November 23, 2010, the ALJ denied Plaintiff's claim, concluding that she was not disabled as defined by the Social Security Act ("the Act"). (*Id.* at 78.) Plaintiff was also informed that the Commissioner's Decision Review Board had selected the ALJ's decision for review. (*Id.* at 62.) However, because the Board failed to act within ninety days, the ALJ's decision became final. In due course, Plaintiff filed the instant action. The Commissioner then compiled the administrative record and the parties submitted the cross-motions currently at issue.

III. DISABILITY STANDARD AND THE ALJ'S DECISION

An individual is entitled to SSDI benefits if, among other things, she has an insured status and, prior to its expiration, is disabled. See 42 U.S.C. § 423(a)(1)(A) and (D). Entitlement to SSI, on the other hand, requires a showing of both disability and financial need. See 42 U.S.C. § 1381a. Plaintiff's need, for purposes of SSI, and her insured status, for purposes of SSDI, are not challenged.

The Act defines disability, in part, as the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . 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). An individual is considered disabled under the Act

only if [her] physical or mental impairment or impairments are of such severity that [s]he is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of

substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which [s]he lives, or whether a specific job vacancy exists for [her], or whether [s]he would be hired if [s]he applied for work.

42 U.S.C. §§ 423(d)(2)(A) and 1382c(a)(3)(B). See generally *Bowen v. Yuckert*, 482 U.S. 137, 146–49 (1987).

In determining disability, the Commissioner follows the five-step protocol described by the First Circuit:

First, is the claimant currently employed? If [s]he is, the claimant is automatically considered not disabled.

Second, does the claimant have a severe impairment? A "severe impairment" means an impairment "which significantly limits the claimant's physical or mental capacity to perform basic work-related functions." If [s]he does not have an impairment of at least this degree of severity, [s]he is automatically not disabled.

Third, does the claimant have an impairment equivalent to a specific list of impairments in the regulations' Appendix 1? If the claimant has an impairment of so serious a degree of severity, the claimant is automatically found disabled.

....

Fourth does the claimant's impairment prevent [her] from performing work of the sort [s]he has done in the past? If not, [s]he is not disabled. If so, the agency asks the fifth question.

Fifth, does the claimant's impairment prevent [her] from performing other work of the sort found in the economy? If so [s]he is disabled; if not [s]he is not disabled.

Goodermote v. Sec'y of Health & Human Servs., 690 F.2d 5, 6-7 (1st Cir. 1982).

Here, the ALJ found at step one that Plaintiff has not engaged in substantial gainful activity since her alleged disability onset date. (A.R. at 67.) At steps two and three, the ALJ determined that Plaintiff has certain severe impairments - - degenerative disc disease of the lumbosacral spine with radiculopathy and pain associated with her

disc disorder -- but concluded that these impairments do not meet or medically equal one of the impairments listed in the regulations. (*Id.* at 68.) At step four, the ALJ determined that Plaintiff could not return to her past work and, at step five, found that, given her age, education, work experience, and residual functional capacity, jobs exist in significant numbers in the national economy that she can perform. (*Id.* at 76.)

IV. DISCUSSION

Plaintiff essentially makes two arguments in support of her motion: first, that the ALJ's credibility assessments of both Plaintiff and her mother were flawed, and second, that the ALJ ignored and mischaracterized evidence in the record. In response, the Commissioner asserts that, although some of the ALJ's findings are unsupported by the record, the decision is still based on substantial evidence. The court finds Plaintiff's arguments more persuasive and will therefore remand the matter for further proceedings.

A. The ALJ's Credibility Assessment of Plaintiff

Relying in part on an August of 2010 report by Dr. Alfred McKee (A.R. at 511-15), the ALJ found Plaintiff not credible because she contradicted herself regarding the amount of alcohol she regularly consumes. (*Id.* at 74.) After scouring the record, the court finds the factual basis for that determination unsupported.

Dr. McKee wrote that Plaintiff, when asked about her history of substance abuse, responded that she "had crazy weekends" in her twenties and drank a half to one beer a day. (*Id.* at 513.) On the next page Dr. McKee, in evaluating Plaintiff's social history, noted that Plaintiff has an occasional beer, lives with her mother, and does not use

tobacco. (*Id.* at 514.) These statements refer to different periods of time in Plaintiff's life, and are not contradictory. The history of substance abuse section is written in the past tense, while the social history section is phrased in the present tense. In addition, Dr. McKee's notes concerning Plaintiff's history of substance abuse specifically refer to Plaintiff's drinking habits when she was in her twenties; there is no such reference in Dr. McKee's notes on Plaintiff's social history, which appear to describe only her current circumstances. Thus, although Dr. McKee's report indicates that Plaintiff used alcohol regularly in the past, it does not contradict her testimony that she currently drinks only occasionally.

Similarly, there is no support in the record for the ALJ's finding that Plaintiff's testimony was either internally inconsistent or contradicted by her mother's testimony. As best as the court can determine, the ALJ reasoned that Plaintiff and/or her mother was not entirely credible because either Plaintiff had been consuming alcohol outside the home, which would contradict her own testimony that she "does not socialize," or had been drinking in the home, which would contradict her mother's testimony to the contrary. In the court's view, this is a false choice.

First, Plaintiff did not testify, as the ALJ states, that she "does not socialize." (*Id.* at 74.) Rather, Plaintiff testified that she finds it "hard to get out" of her home and finds it "hard to do things socially." (*Id.* at 25.) Thus, it is possible that Plaintiff could occasionally purchase beer and consume it outside the home, albeit with difficulty. Second, the ALJ wrongly assumed that Plaintiff drinks one half to one beer daily. As described, the record indicates that, though this may have been a past habit of Plaintiff,

she recently only had an “occas[ional] beer.” (*Id.* at 513-514.) Third, the medical records indicating that Plaintiff drank one half to one beer daily in the past are not inconsistent with her mother’s testimony that Plaintiff no longer drinks at home. (*Id.* at 43.) This testimony coincides with Plaintiff’s statements to Dr. McKay that she only drinks occasionally, but used alcohol more regularly in the past.

Finally, the ALJ’s statement that “physicians have documented [Plaintiff’s] refusal to see Dr. Kent Higgins (psychiatrist at pain management clinic) again” is also belied by the record. (*Id.* at 73.) At the hearing Plaintiff stated, in response to the ALJ’s suggestion that she had declined to see Dr. Higgins, “[t]hat must be a typo, because they never told me to follow-up with Dr. Higgins.” (*Id.* at 46.) At best, there is only one mention in the record that Plaintiff had refused to see Dr. Higgins, and it comes from a nurse practitioner. (*Id.* at 517.) Thus, there is no basis in the record for the ALJ’s finding that multiple “physicians” (emphasis added) had noted Plaintiff’s refusal to follow up with her psychiatrist.

B. The ALJ’s Credibility Assessment of Plaintiff’s Mother

As Plaintiff argues, the ALJ’s determination that her mother was not credible is flawed. The ALJ found that Plaintiff’s mother testified inconsistently regarding whether she had ever purchased beer for Plaintiff. The ALJ found that, although Plaintiff’s mother initially denied purchasing beer for her daughter on the way to her doctor’s appointments, “she [later] admitted that she had purchased beer for [her] daughter - - which [Plaintiff] consumed on her way to her physician’s appointment.” (A.R. at 71.) These findings, however, are directly contradicted by the record. First, Plaintiff’s

mother did not change her testimony regarding whether she purchased beer for Plaintiff but, rather, twice testified that she did not purchase beer for her. (*Id.* at 43.) Second, when asked if Plaintiff drank beer on the way to her appointments, her mother explicitly replied “[n]o,” directly contrary to the ALJ’s description of her testimony. (*Id.* at 44.)

C. Mischaracterization of Objective Evidence

Finally, Plaintiff argues that the ALJ misinterpreted a medical report by Dr. Natasha McKay and erroneously concluded that there was a lack of objective evidence supporting Plaintiff’s subjective complaints of pain. In response, the Commissioner asserts that the ALJ drew a permissible inference from Dr. McKay’s treatment notes. The court again finds Plaintiff’s argument more persuasive.

To be sure, it is the responsibility of an administrative law judge to draw inferences from the evidence. *Rodriguez*, 647 F.2d at 222. However, Dr. McKay’s notes contain no indication that there was no objective basis for Plaintiff’s pain. To the contrary, Dr. McKay’s records describe Plaintiff’s complaints of pain and prescribed treatments, note Plaintiff’s diagnosis of lumbar degenerative disc disease and failed back syndrome, and indicate that she had performed the third of Plaintiff’s back surgeries. (*Id.* at 302, 484-486.) Indeed, Dr. McKay even recommended that Plaintiff seek further physical treatment for her pain via a specialist familiar with spinal cord stimulators. (*Id.* at 484.) These facts in no way support an inference that Dr. McKay found no objective basis for Plaintiff’s pain. In short, the ALJ’s conclusion is

unsupported by the record.¹

V. CONCLUSION

As described, the ALJ made numerous factual errors and drew inferences unsupported by the record when making her credibility assessments. See *Da Rosa*, 803 F.2d at 26; SSR 96-7p (“The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision.”). “The cumulative effect of these mistakes undermines any confidence either that the evidence in the plaintiff’s case has been fully and fairly considered or that the ALJ’s decision was supported by substantial evidence.” *Renaudette v. Astrue*, 482 F.Supp.2d 121, 132 (D. Mass. 2007). Thus, remand is necessary to allow the ALJ to more accurately review Plaintiff’s disability claim. Accordingly, the Commissioner’s motion to affirm is DENIED and Plaintiff’s motion is ALLOWED insofar as it may fairly be read to include an alternative request for a remand.

IT IS SO ORDERED.

DATED: March 21, 2012

/s/ Kenneth P. Neiman
KENNETH P. NEIMAN
U.S. Magistrate Judge

¹ Plaintiff also argues that the ALJ ignored her erosive esophagitis when making her disability determination. In fact, the ALJ did mention the condition. (*Id.* at 73.) Furthermore, Plaintiff has failed to provide any evidence indicating that this condition causes any significant limitations on herself. See *Bowen*, 482 U.S. at 138 (1987) (stating claimant bears the burden of proving severity at Step 2).