

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CALLIE MILLER,

Plaintiff,

v.

Case Number 00-10386-BC
Honorable David M. Lawson

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

**OPINION AND ORDER REJECTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION, GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT, AND REMANDING FOR AN AWARD OF BENEFITS**

The plaintiff filed the present action on October 11, 2000 seeking review of the Commissioner's decision denying the plaintiff's claim for supplemental security income benefits under Title XVI of the Social Security Act. The case was referred to United States Magistrate Judge Charles E. Binder pursuant to 28 U.S.C. § 636(b)(1)(B) and E.D. Mich. LR 72.1(b)(3). Thereafter, the plaintiff filed a motion for summary judgment seeking reversal of the decision of the Commissioner and an award of benefits. The defendant filed a motion for summary judgment requesting affirmance of the decision of the Administrative Law Judge, to which the plaintiff responded.

Magistrate Judge Binder filed a report and recommendation on May 22, 2001 recommending that the plaintiff's motion for summary judgment be denied, the defendant's motion for summary judgment be granted, and the findings of the Commissioner be affirmed. The plaintiff filed timely objections to the recommendation and this matter is now before the Court.

The Court has reviewed the file, the report and recommendation, and the plaintiff's objections, and has made a *de novo* review of the administrative record in light of the parties' submissions. The plaintiff's main objection is that the magistrate judge failed to address whether the ALJ's finding that the plaintiff's life-long condition of cerebral palsy did not meet the requirements of Medical Listing 11.07D of 20 C.F.R. Pt. 404, Subpt. P, App. 1 is supported by substantial evidence. Indeed, this issue was raised in the plaintiff's motion for summary judgment and discussed by the defendant in his response. The magistrate judge, however, did not even mention the issue. The plaintiff argues that all of the medical and lay evidence in this case supports a finding that she meets Medical Listing 11.07D, and therefore she should be found disabled without further consideration of her work capacity.

The plaintiff, who is now forty-four years old, applied for supplemental security income (SSI) benefits on September 18, 1996. She alleged that she has been disabled since birth, December 23, 1960, and the record indicates that she has no relevant work history. The plaintiff has completed a tenth grade education.

The plaintiff's claim for supplemental security income benefits was based on her disability as a result of cerebral palsy. The plaintiff applied for and received SSI benefits from June 1980 until January 1988 when her benefits stopped due to an increase in her husband's income. Tr. at 74. The plaintiff later separated from her husband and receives Aid for Dependant Children benefits to support her three children, and she has now re-applied for SSI benefits. Tr. at 15, 131. The plaintiff's claim was initially denied, and the denial was upheld on reconsideration. The plaintiff then appeared before Administrative Law Judge (ALJ) William J. Musseman on August 18, 1998 when she was thirty-eight years old. ALJ Musseman filed a decision on August 25, 1998 denying

benefits because he found that the plaintiff was not disabled within the meaning of the Social Security Act. The ALJ reached this conclusion by applying the five-step sequential analysis prescribed by the Secretary in 20 C.F.R. § 416.920. The ALJ concluded that the plaintiff had not engaged in substantial gainful activity since October 1979 (step one); the plaintiff suffered from cerebral palsy (step two); this impairment did not itself or in combination meet or equal a listing in the regulations (step three); and the plaintiff had no prior work experience (step four).

In applying the fifth step, the ALJ concluded that the plaintiff had the residual functional capacity to perform a restricted range of sedentary work. Her limitations included no prolonged standing or walking, no climbing, squatting, crawling or kneeling, no use of right sided foot controls, occasional fine dexterity with the dominant hand, and no fine visual acuity required. Relying on the testimony of a vocational expert, the ALJ found that such jobs as reception clerk, telephone answerer, information clerk, and order clerk fit within those limitations, and that these jobs existed in significant numbers in the local and regional economies. The ALJ also found that the plaintiff did not meet Listing 11.04D even though she has cerebral palsy because the plaintiff does not require the use of an assistance device and does not meet the severity requirements as set forth in the Listing.

The ALJ, acting for the Commissioner, thus determined that the plaintiff was not disabled within the meaning of the Social Security Act. The Commissioner's findings are conclusive if they are supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence 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). *See also Lashley v. Sec'y of Health & Human Servs.*, 708 F.2d 1048, 1053 (6th Cir. 1983). The reviewing court must affirm the Commissioner's findings if they

are supported by substantial evidence and the Commissioner employed the proper legal standard. *Walters v. Comm'r of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997). This Court may not base its decision on a single piece of evidence and disregard other pertinent evidence when evaluating whether substantial evidence in the record exists. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978). Thus, where the Commissioner's decision is supported by substantial evidence, it must be upheld even if the record might support a contrary conclusion. *Smith v. Sec'y of Health & Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989). The substantial evidence standard "presupposes that there is a zone of choice within which decisionmakers can go either way, without interference from the courts." *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc) (internal quotes and citations omitted). Thus, the Court "may not try the case *de novo*, nor resolve conflicts in evidence, nor decide questions of credibility." *Garner v. Heckler*, 745 F.2d 383, 387 (6th Cir. 1984).

However, a substantiality of evidence evaluation does not permit a selective reading of the record. "Substantiality of the evidence must be based upon the record taken as a whole. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 388 (internal quotes and citations omitted). *See also Laskowski v. Apfel*, 100 F. Supp. 2d 474, 482 (E.D. Mich. 2000).

To qualify for an award of SSI benefits, Miller must (a) meet certain income requirements, and (b) be disabled. *See* 42 U.S.C. § 1382(a); *Garner*, 745 F.2d at 386. "Disability" means:

[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 twelve months.

42 U.S.C. § 1382c(a)(3)(A). A claimant suffers from a disability “only if his physical or mental . . . impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 1382c(a)(3)(B). The concept of disability, then, relates to functional limitations. Although these functional limitations must, of course, be caused by a physical or mental impairment, in the end, “[i]t is an assessment of what [the claimant] can and cannot do, not what she does and does not suffer from.” *Howard v. Comm’r of Soc. Sec.*, 276 F.3d 235, 239 (6th Cir. 2002) (referring to assessment of residual functional capacity).

However, the elephant in the room, ignored by both the ALJ and the magistrate judge, is that the plaintiff already had established that she was disabled by her cerebral palsy when she was awarded SSI benefits from 1980 through 1988. She later became unqualified for SSI benefits not because of a medical or functional improvement, but because her then-husband’s income brought her above the allowable income level for this social welfare program. *See* 42 U.S.C. § 1382(a)(2). A person previously determined to be disabled is not entitled to the continuation of benefits if the disability dissipates to the extent that the individual is able to perform gainful activity, *see Cutlip v. Sec’y of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994), and, contrary to the plaintiff’s argument in her summary judgment motion, a prior disability determination does not create a presumption of continuing disability. *See* 42 U.S.C. § 423(f)(4). However, the prior determination generally is used as a reference point from which to evaluate whether any medical improvement has been realized relating to the individual’s ability to work. 42 U.S.C. § 423(f). The ALJ did not make any reference to this benchmark; in fact, the ALJ used the plaintiff’s absence from the workforce

for the previous fifteen years to support an inference of a “motivational deficiency,” Tr. at 15, which is entirely unjustified on the whole record.

Here, the plaintiff contends that the medical evidence, and even the findings of the ALJ, establish a listing-level impairment. The ALJ acknowledged, as confirmed by the medical evidence, that the plaintiff suffered from cerebral palsy since birth; the condition caused involuntary movements of the right leg; her gait was ataxic (she has a “scissor- and waddling-type” gait); her cerebral palsy otherwise impacted her ability to walk, stand, lift, climb, and perform fine motor movements with her hands; she displayed weakness and spasticity in both legs; and she had an unusual alignment of her eyes that caused double vision. The plaintiff herself testified that she has difficulty walking, stumbles daily, and falls every few weeks. Although she was taking driving instructions, she said that she cannot drive a car because of her lack of coordination, unsteadiness on her feet, and poor motor (physiological, not automotive) skills.

The ALJ concluded that the plaintiff had a sever impairment, but she did not prove her case at step three of the sequential analysis – that is, she did not meet the listing for cerebral palsy found in Section 11.07 – because she did not demonstrate that she needed an “assistive device” to walk and therefore her cerebral palsy is not as sever as that which is contemplated in the regulations. The ALJ then proceeded to an assessment of the plaintiff’s residual functional capacity (RFC) for gainful activity. Likewise, the focus of the magistrate judge’s report was on the question of substantial evidence in the record to support the ALJ’s RFC determination. However, if the plaintiff establishes a listing-level impairment, the factors relating to RFC “have no application.” *Gambell v. Bowen*, 823 F.2d 1009, 1012 (6th Cir. 1987).

In this Circuit, in order to qualify as “disabled” under a listing in the Secretary’s regulations, a claimant must demonstrate that he or she meets all of the criteria contained in the listing, *see Duncan v. Sec’y of Health & Human Servs.*, 801 F.2d 847, 855 (6th Cir. 1986), but certainly a claimant need demonstrate no more. The plaintiff contends that the ALJ read an additional requirement into the listing when he required proof of the need of an assistive device for walking. The Court agrees. There is no such requirement in Listing 11.07 or the sections referenced therein. Adding an additional requirement constitutes error. *Gambell*, 823 F.2d at 1013 (holding that the ALJ erred by “imposing an additional severity requirement not contained in the listings” when applying Section 11.04B in a case involving muscular dystrophy).

The plaintiff argues instead that with her confirmed diagnosis of cerebral palsy together with her functional limitations, she meets Listing 11.07D. The listing sets forth the medical and functional criteria for an automatic finding of disability, but it is useful to remember the manner in which the listings are used. According to the Secretary,

(a) Purpose of the Listing of Impairments. The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

* * *

(c) How to use the Listing of Impairments. Each section of the Listing of Impairments has a general introduction containing definitions of key concepts used in that section. Certain specific medical findings, some of which are required in establishing a diagnosis or in confirming the existence of an impairment for the purpose of this Listing, are also given in the narrative introduction. If the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the listing, the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques. Following the introduction in each section, the required level of severity of impairment is shown under

“Category of Impairments” by one or more sets of medical findings. The medical findings consist of symptoms, signs, and laboratory findings.

(d) Diagnosis of impairments. We will not consider your impairment to be one listed in Appendix 1 solely because it has the diagnosis of a listed impairment. It must also have the findings shown in the Listing of that impairment.

20 C.F.R. § 404.1525.

The general description of neurological disorders pertinent to this case is stated in 20 C.F.R.

Part 404, Subpart P, Appendix 1, Section 11.00C:

C. Persistent disorganization of motor function in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to cerebral, cerebellar, brain stem, spinal cord, or peripheral nerve dysfunction) which occur singly or in various combination, frequently provides the sole or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms.

The section dealing specifically with cerebral palsy states:

11.07 Cerebral palsy. With:

A. IQ of 70 or less; or

B. Abnormal behavior patterns, such as destructiveness or emotional instability; or

C. Significant interference in communication due to speech, hearing, or visual defect;
or

D. Disorganization of motor function as described in 11.04B.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 11.07. The plaintiff contends that she falls under subparagraph D, which references Section 11.04B. That section provides:

11.04 *Central nervous system vascular accident*. With one of the following more than 3 months post-vascular accident:

* * *

B. Significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C).

20 CFR Pt. 404, Subpt. P, App. 1, § 11.04B.

The explicit language of the listing calls for a finding of disability for those individuals suffering from cerebral palsy who have “significant” and “persistent” “disorganization of motor function” resulting in “sustained disturbance of . . . gait and station.” The uncontradicted evidence has established that the plaintiff has suffered from cerebral palsy since birth, her condition will last for the duration of her life, and it will not improve with treatment. In addition, the plaintiff’s gait and station are significantly disturbed as a result of the permanent disturbance of motor function in both legs. That the plaintiff can ambulate (albeit with significant difficulty) without an “assistive device” does not diminish the requisite degree of severity conveyed by the plain language of the listing. She has a markedly ataxic gait, spasticity and weakness in both legs, and difficulty with fine motor skills in her hands. There is no question that the plaintiff’s “disturbance of motor function” is “significant” and “persistent.” The plaintiff certainly meets the description in Listing 11.04B, and therefore also Section 11.07D. The ALJ’s decision to the contrary is clearly erroneous and not supported by substantial evidence on the whole record.

Once the determination has been made that the Commissioner’s decision is not supported by substantial evidence, the Court must decide whether further fact-finding is required. “[I]f all essential factual issues have been resolved and the record adequately establishes a plaintiff’s entitlement to benefits,” this Court may remand for an award of benefits. *Faucher v. Sec’y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994). In *Mowery v. Heckler*, 771 F.2d 966 (6th Cir. 1985), the plaintiff sought Social Security disability insurance benefits, which were denied at the agency level, and he did not prevail in the district court. He suffered from hypertension, headaches and dizziness, and aches and pains. He was forced to stop work as a construction laborer because of pain. He had worked several years earlier as a night watchman. His I.Q. was below average.

Psychological tests established that the plaintiff was able to function only in construction and mining jobs, and an orthopedic examination showed that the plaintiff had limitation in movement which precluded that activity. The ALJ had denied benefits, concluding that the plaintiff could perform light work, such as that of a night watchman, although there was evidence in the record that the plaintiff had suffered a hearing loss and could only perform as a night watchman when assisted by his son and daughter. The Court of Appeals reversed the district court and remanded the case to the agency for an award of benefits. The Court held:

The court finds it unnecessary to remand the case to the Secretary for further evaluation. In cases where there is an adequate record, the Secretary's decision denying benefits can be reversed and benefits awarded if the decision is clearly erroneous, proof of disability is overwhelming, or proof of disability is strong and evidence to the contrary is lacking.

Id. at 973.

Likewise, the Court does not believe that additional fact-finding is required in this case and that the record is complete. Moreover, as explained previously, the record establishes that the plaintiff meets Listing 11.07D, so that further consideration of her RFC is unnecessary. Because proof of disability is overwhelming, a remand for an award of benefits is appropriate in this case.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation is **REJECTED**.

It is further **ORDERED** that the plaintiff's motion for summary judgment [dkt #14] is **GRANTED**.

It is further **ORDERED** that the defendant's motion for summary judgment [dkt #15] is **DENIED**. The findings of the Commissioner are **REVERSED**, and the matter is **REMANDED** for an award of benefits.

/s/ _____
DAVID M. LAWSON
United States District Judge

Dated: June 14, 2004

Copies sent to: Donald T. Popielarz, Esquire
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Magistrate Judge Charles E. Binder