

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IVYE P. HAWKINS,

Plaintiff,

v.

LARRY G. MASSANARI,
Commissioner, Social Security Administration

Defendant.

Civil Action No. 00-2102
JR/DAR

REPORT AND RECOMMENDATION

Pending for consideration by the undersigned United States Magistrate Judge are Plaintiff's Motion for Judgment of Reversal on the Pleadings (Docket No. 12), and Defendant's Motion for Remand (Docket No. 14). For the reasons discussed herein, the undersigned recommends that plaintiff's motion for judgment of reversal be granted, and that defendant's motion for remand be denied.

BACKGROUND

Plaintiff applied for Social Security disability insurance benefits ("disability insurance benefits") on or about January 27, 1997, and for supplemental security income ("SSI") on or about February 11, 1997, alleging that she could not work due to acquired immune deficiency syndrome ("AIDS"). Administrative Record ("R.") at 18; 270-282; 283-294. On August 21, 1997, the Social Security Administration determined in accordance with Listing 14.08 N that plaintiff was disabled, and awarded

her disability insurance benefits and supplemental security income as of an onset date of July 17, 1997.

R. 18. Plaintiff filed a timely request for a hearing for reconsideration of the determination regarding the onset date, which she alleged was January 1, 1997 rather than July 17 of that year. R. 63-64. The hearing was conducted by an Administrative Law Judge on October 28, 1998. In his January 13, 1999 Decision, the ALJ made eight findings, including the finding that plaintiff “continued to perform work activity after her alleged onset date of disability”; earned over \$500 each month from January, 1997 through July, 1997; and her “work activity” during those months “constitutes substantial gainful activity within the meaning of the regulations.” R. 20. The ALJ held that plaintiff was not “under a ‘disability’” at any time from January 1, 1997 through July 16, 1997, and therefore was not entitled to disability insurance benefits or supplemental security income during that period. R. 21.

On March 5, 1999, plaintiff filed her Request For Review of Hearing Decision. R. 5, 9-11. As a basis of the request for review, plaintiff’s representatives maintained that (1) the ALJ’s finding regarding the onset date was inconsistent with Social Security Administration rulings; and (2) plaintiff’s evidence was sufficient to overcome the presumption that a claimant’s earnings constitute “substantial gainful activity.” R. 11, 314-340. On June 22, 2000, the Appeals Council affirmed the decision of the ALJ. R. 3-4.

Plaintiff filed her Complaint for Reversal of the Secretary’s Final Decision on August 31, 2000 (Docket No. 1), and thereafter filed her Motion for Judgment of Reversal on the Pleadings (Docket No. 12). Defendant did not file an opposition to plaintiff’s motion, and instead, filed a Motion for Remand and Memorandum in Support Thereof (“Defendant’s Motion”) (Docket No. 14). Plaintiff timely filed her opposition (Docket No. 15), and defendant timely filed his reply to plaintiff’s opposition

(Docket No. 16).

CONTENTIONS OF THE PARTIES

Plaintiff seeks reversal of the ALJ's decision denying her application for disability insurance benefits and supplemental security income for the period January 1, 1997 through July 16, 1997.

Plaintiff's Motion for Judgment of Reversal on the Pleadings at 1. Plaintiff seek payment of disability insurance benefits and supplemental security income for that period, as well as an award of attorneys' fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504. Id. In the memorandum in support of her motion, plaintiff contends that the ALJ "failed to evaluate record evidence to determine [plaintiff's] countable income (as distinct from gross income), relevant to a determination of whether or not she was engaged in substantial gainful activity during the period in dispute, or to evaluate the evidence that she was not able to fulfill the responsibilities of her job because of her disabling medical condition." Memorandum of Points and Authorities in Support of Plaintiff's Motion for Judgment of Reversal on the Pleadings Under Fed. R. Civ. P. 12(c) ("Plaintiff's Memorandum") at 2. Plaintiff further submits that "[t]here is substantial record evidence of medical disability from January 1 through July 16, 1997." Id. Plaintiff advances three arguments in support of her motion: (1) the Commissioner's conclusion that she was engaged in substantial gainful activity within the meaning of the relevant regulations from January 1, 1997 until July 16, 1997, and therefore was not disabled despite her medical condition, was not supported by substantial evidence; (2) the Commissioner erred by his failure to evaluate evidence that her employment was subsidized, and therefore not substantial gainful activity; (3) the combination of her HIV-related impairments met the Social Security regulations

standard for medical disability at all times from January 1, 1997. Plaintiff's Memorandum at 7-19.

Defendant did not file an opposition to plaintiff's motion. Rather, defendant requested that this action be remanded to the Commissioner of the Social Security Administration "for further proceedings pursuant to sentence four of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g)."

Defendant's Motion for Remand and Memorandum in Support Thereof ("Defendant's Motion") at 1.

Defendant submits that remand is warranted (1) "to determine whether plaintiff engaged in substantial gainful activity during the period in dispute"; and (2) "to evaluate the evidence of whether plaintiff was able to fulfill the responsibilities of her job despite her disabling medical condition."

Defendant's Motion at 1.¹ Absent from defendant's memorandum is any assertion that the challenged findings were supported by substantial evidence; rather, defendant states that he "submits this motion as a matter of fundamental fairness in lieu of a brief in support of the Commissioner's denial of benefits."

Id. at 2.

Plaintiff, in her opposition to defendant's motion for remand, submits that (1) the Commissioner "concedes that the ALJ made an error of law"; (2) the Commissioner fails to establish good cause for a remand; and (3) the record is "fully developed with substantial evidence." Plaintiff's Opposition to Defendant's Motion for Remand and Memorandum of Points and Authorities in Support Thereof ("Plaintiff's Opposition") at 1. Plaintiff maintains that the Court should reverse the ALJ's decision,

¹ Defendant maintains that plaintiff's supervisor, Nancy Cranford, "was unable to estimate the actual value of plaintiff's services for the period in question[,] and that "[a]bsent further factfinding, the Commissioner submits that the plaintiff cannot meet her burden of proof, as the record currently indicates that her actual earnings for the period in question far exceed the regulatory guidelines for a presumption of substantial gainful activity, which would preclude the awarding of disability benefits for the period at issue." Defendant's Motion at 1-2.

remand the case to the agency “solely for calculation and award of benefits[,]” and award fees and costs under the Equal Access to Justice Act. Id.

Plaintiff maintains that “implicit in Defendant’s Motion is the concession that the Commissioner now agrees with Plaintiff’s argument in her Motion for Reversal that the agency applied an incorrect legal standard when it looked solely at the actual gross FICA earnings in determining whether Ms. Hawkins was engaged in substantial gainful activity.” Plaintiff’s Opposition at 2. Plaintiff further maintains that because she provided “uncontradicted record evidence on subsidy, and because SSA does not require the evidence it now identifies as critical, the Commissioner has not established good cause for remand.” Plaintiff’s Opposition at 4.

In his reply to plaintiff’s opposition, defendant submits that by its motion for remand, “the agency seeks to determine if plaintiff’s employment earnings during the period in question were a ‘gift’ as alleged by plaintiff.” Defendant’s Reply to Plaintiff’s Opposition to Remand (“Defendant’s Reply”) at 1. Defendant suggests that “care should be used not to award such benefits for a period in which plaintiff earned wages which would ordinarily be deemed substantial.” Id. at 2. Defendant does not dispute plaintiff’s contention that the Commissioner concedes that the ALJ erred in his determination that plaintiff was engaged in substantial gainful activity during the six-month period at issue, and that plaintiff was indeed disabled during that period.²

² See Plaintiff’s Opposition at 2-3, 5-6.

DISCUSSION

A. Standard of Review

Judicial review of an ALJ's decision to grant or deny benefits is limited to evaluating the administrative record; ensuring that the decision rendered is in accordance with the applicable law; and affirming the decision if it is supported by "substantial evidence." Davis v. Shalala, 862 F. Supp. 1, 4 (D.D.C. 1994). Thus,

[t]he standard of review in cases of this kind requires considerable deference to the decision rendered by the ALJ and the Appeals Council, but the reviewing court remains obligated to ensure that any decision rests upon substantial evidence. Accordingly, this standard of review "calls for careful scrutiny of the entire record," to determine whether the [Commissioner], acting through the ALJ, "has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits[.]"

Id. at 4 (quoting Simms v. Sullivan, 877 F.2d 1047, 1050 (D.C. Cir. 1989) (citations omitted)). See also Martin v. Apfel, 118 F. Supp. 2d 9, 13 (D.D.C. 2000). A district court "is not permitted to reweigh the evidence and reach its own determination," and must confine its review to the determination of whether the decision is supported by substantial evidence. Maynor v. Heckler, 597 F. Supp. 457, 460 (D.D.C. 1984). "It is the duty of the ALJ to make findings of fact and to resolve conflicts in the evidence[.]" but in doing so "[the] ALJ cannot merely disregard evidence which does not support his conclusion." Martin, 118 F. Supp. 2d at 13 (citations omitted). Accordingly,

[i]t is reversible error for an ALJ to fail in his written decision to explain sufficiently the weight he has given to certain probative items of evidence. . . . Failure to develop the record makes it difficult for a reviewing court to determine errors in application of law. The requirement to explain findings supported by substantial evidence facilitates proper application of their limited scope of review. A

reviewing court should not be left guessing as to how the ALJ evaluated probative evidence.

Id. (citations omitted).

The “exclusive methods” by which district courts may remand a case are described in sentence four and sentence six of 42 U.S.C. § 405 (g). Outlaw v. Chater, 906 F.Supp. 1, 3 (D.D.C. 1995), aff’d, No. 96-5031, 1997 WL 68322 (D.C. Cir. Jan. 15, 1997).³ While no judge of this Court, in a published opinion, has addressed the showing the Commissioner must make in support of a motion for remand pursuant to sentence four, or the scope of the court’s discretion in the determination of such motion, one court has held that

where the evidence on the record as a whole is clearly indicative of disability and additional hearings would serve no purpose other than to delay the inevitable receipt of benefits, remand is inappropriate and an

³ Section 405(g) of Title 42 provides, in relevant part:

The court shall have 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, with or without remanding the cause for a rehearing [sentence four] . . . The court may, on motion of the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . [sentence six].

42 U.S.C. § 405(g) (2000).

immediate order granting benefits is justified.

Johnson v. Callahan, 968 F.Supp. 449, 465 (N.D. Iowa 1997)(citations omitted); see Martin, 118 F.Supp. 2d at 18 (reversal, rather than remand, is appropriate “where the record in the case has been thoroughly developed, and a rehearing would merely function to delay the award of benefits[.]”). Other courts have observed, without relying on the distinction between the two remand provisions, that remand is appropriate “if the record is incomplete and additional evidence could complete [it][.]” Payan v. Chater, 959 F.Supp. 1197, 1205 (C.D. Calif. 1996);⁴ where “the ALJ failed to adequately set forth “a clear and satisfactory explication of the basis’ for his decision in accordance with the appropriate legal standards,” Terwilliger v. Chater, 945 F.Supp. 836, 844 (E.D. Pa. 1996); or the district court makes “[a] finding of gaps in the record[.]” Batista v. Chater, 972 F.Supp. 211, 217 (S.D.N.Y. 1997).

B. Analysis

1. Plaintiff’s Motion for Judgment of Reversal

Plaintiff suggests, and defendant does not dispute, that the principle issue for review by this Court is whether the ALJ’s finding regarding the onset date of plaintiff’s disability is supported by substantial evidence. See Plaintiff’s Memorandum at 1-2; Defendant’s Motion at 1. Similarly, the parties agree that the only inquiry relevant to this issue is whether, during the approximately six-month period prior to the onset date determined by the ALJ, plaintiff was engaged in substantial gainful

⁴ See also Bailey v. Heckler, 576 F.Supp. 621, 624 (D.D.C. 1984)(remand is appropriate remedy “[w]hen the record is incomplete on a dispositive factual issue[.]”).

activity. Id. See also Defendant's Reply at 1. Plaintiff contends that the ALJ's finding that plaintiff was engaged in substantial gainful activity from January 1, 1997 through July 16, 1997 is not supported by substantial evidence. Defendant, in neither its motion for remand nor its reply to plaintiff's opposition, suggests otherwise. Nor does defendant suggest that plaintiff, in the memorandum in support of her motion for judgment of reversal, mischaracterizes the evidence in the record, relies upon evidence which is irrelevant, or improperly cites the regulations governing the determination of whether a claimant engaged in substantial gainful activity during a relevant period. Rather, defendant's response to plaintiff's motion for judgment of affirmance is that remand is warranted, at least in part, "to determine whether plaintiff engaged in substantial gainful activity during a period in dispute[.]" Defendant's Motion at 1.

The undersigned thus finds that defendant implicitly concedes plaintiff's argument. See Plaintiff's Opposition at 2-3. Nonetheless, the undersigned has carefully reviewed the administrative record, and finds that the ALJ's finding that plaintiff was engaged in substantial gainful activity from January 1, 1997 through July 16, 1997 is not supported by substantial evidence.

This Court previously has articulated the analytical framework for the determination of whether the presumption of substantial gainful activity arising from earnings in excess of a threshold amount has been rebutted. See Wimbish v. Sullivan, No. CIV.A.89-1293, 1990 WL 180704, at *3 (D.D.C. July 24, 1990). The other factors which must be considered include

whether the claimant's work was truly "of use" to his or her employer; whether the claimant required closer supervision than other employees due to his or her disability; whether the claimant had a high absentee rate; whether the claimant was ultimately terminated due to his or her inability to perform the activity in a

satisfactory fashion; whether special concessions were made for the claims, such as fewer and easier duties; whether the claimant's work was lower in production or quality than that of other employees; and whether the claimant required unusual assistance from co-workers.

1990 WL 180704, at *3 (citing Musebeck v. Heckler, 614 F. Supp. 1086, 1090 (E.D. Pa. 1985)).

In addition, SSR 83-33 of the Social Security Administration Program Policy Statement offers guidance with respect to the issue of whether a claimant received a subsidy from his or her employer.

SSR 83-33 provides, in relevant part, that

[in most instances, the amount of a subsidy can be ascertained by comparing the time, energy, skills, and responsibility involved in the individual's services with the same elements involved in the performance of the same or similar work by unimpaired individuals in the community and estimating the proportionate value of the individual's services according to the prevailing pay scale for such work. When precise monetary evaluation is not feasible, it may be possible to determine the approximate extent of a subsidy on the basis of gross indications of a lack of productivity; for example, when unusual supervision or assistance is required in the performance of simple tasks, or the employee is extremely slow, inefficient or otherwise unproductive.

* * *

a. The following circumstances indicate the strong possibility of a subsidy . . . (4) There appears to be a marked discrepancy between the amount of pay and the value of the services; (5) The employer, employee, or other interested party alleges that the employee does not fully earn his or her pay (e.g., the employee receives unusual help from others in doing the work); or (6) The nature and severity of the impairment indicate that the employee receives unusual help from others in doing the work[.]

SSR 83-33.

The ALL plainly considered only plaintiff's gross earnings in finding that she engaged in substantial gainful activity from January 1, 1997 through July 16, 1997, and undertook no evaluation of

the evidence that plaintiff, as a result of her disability, (1) required closer supervision than other employees; (2) had a high absentee rate; (3) ultimately resigned from her employment because of her inability to perform her duties satisfactorily; (4) was allowed special concessions; (5) performed her duties less proficiently than other employees; and (6) required unusual assistance from co-workers. See R. 35-47, 67, 150, 168-69, 339-40. Moreover, the ALL's determination that plaintiff engaged in substantial gainful activity was based entirely on the presumption which arises from arises from plaintiff's FICA earnings, and no evaluation of the evidence relevant to the Musebeck considerations was undertaken.⁵

This Court has held that

[t]he ALL's failure to consider . . . uncontradicted, probative evidence that goes to the very heart of the case before him dooms his opinion. If there is one fundamental principle guiding judicial review of an ALL decision in a Social Security case, it is that the ALL may not ignore evidence inconsistent with his opinion without explanation.

Martin, 118 F.Supp.2d at 15 (citation omitted). Accordingly, the undersigned finds that the ALL's finding that plaintiff engaged in substantial gainful activity from January 1, 1997 through July 16, 1997 is not supported by substantial evidence, and that the ALJ erred in failing to evaluate the evidence that plaintiff's employment was subsidized.

⁵ The evidence relevant to the Musebeck considerations was unrebutted. In his evaluation of the evidence, the ALJ stated simply that plaintiff "performed work activity after [January 1, 1997[,] . . . and earned over \$500.00 in each month from January 1997 through July 1997." R. 19.

2. Defendant's Motion for Remand

Defendant offers no authority in support of his request for a sentence four remand for “further proceedings” to determine whether, during the relevant period, “plaintiff engaged in substantial gainful activity[.]” and “to evaluate the evidence of whether plaintiff was able to fulfill the responsibilities of her job despite her disabling medical condition.” Defendant’s Motion at 1. While a district court has broad discretion with respect to the issue of whether to remand a case pursuant to sentence four, defendant attempts no explanation of why the court should do so here.

Additionally, the undersigned finds that none of the factors which have been found to warrant a remand are present here. More specifically, the undersigned finds that the record in the case was “thoroughly developed, and a rehearing would merely function to delay the award of benefits[.]” See Martin, 118 F.Supp. at 18. The undersigned’s observation is thus identical to that of another court confronted with a motion for remand in the absence of circumstances warranting such relief:

Here, the [Commissioner] has not made any offer as to why the evidence it wants to develop is important enough now so as to warrant a remand, but not important enough to have bothered developing before the initial administrative hearing.

Berestecki v. Secretary of Health and Human Services, 662 F.Supp. 1521, 1524-25 (S.D.N.Y.

1987).⁶ As “the evidence on the record as a whole is clearly indicative of disability and additional hearings would serve no purpose other than to delay the inevitable receipt of benefits,” a remand is “inappropriate.” See Johnson, 968 F.Supp. at 465.

⁶ While the court, in Berestecki, was considering a motion for remand under sentence six, rather than sentence four, the observation is equally apt.

CONCLUSION

For the foregoing reasons, it is, this ____ day of March, 2002,

RECOMMENDED that Plaintiff's Motion for Judgment of Reversal on the Pleadings (Docket No. 12) be **GRANTED**, and that (1) defendant pay plaintiff disability insurance benefits and supplemental security income for the period January 1, 1997 through July 16, 1997; and (2) plaintiff be awarded her costs, including reasonable attorneys' fees, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504; and it is

FURTHER RECOMMENDED that Defendant's Motion for Remand (Docket No. 14) be **DENIED**.

DEBORAH A. ROBINSON
United States Magistrate Judge

Within ten days after being served with a copy, any party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be waived.