

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

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SOUA KHANG,

Plaintiff,

REPORT AND  
RECOMMENDATION

v.

00-C-648-C

WILLIAM HALTER, Acting Commissioner  
of Social Security,

Defendant.

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REPORT

This is an action for judicial review of an adverse decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).<sup>1</sup> Plaintiff Soua Khang challenges a decision by the Appeals Council denying her application for supplemental security income under the Social Security Act, 42 U.S.C. §§ 1381 and 1382c(a)(3)(A). Because there is substantial evidence in the record to support the Appeals Council's conclusion that plaintiff's peptic ulcer disease did not constitute a severe impairment, I recommend that this court affirm the decision of the Commissioner.

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<sup>1</sup> On January 20, 2001, William A. Halter became the Acting Commissioner of Social Security. In accordance with Fed. R. Civ. P. 25(d)(1) and the last sentence of 42 U.S.C. § 405(g), William A. Halter is automatically substituted for Kenneth S. Apfel as the defendant in this case.

The following facts are drawn from the administrative record:

## **Facts**

### **I. Procedural History**

Plaintiff applied for supplemental security income on December 10, 1997, alleging that she had been disabled since May 10, 1992 as a result of peptic ulcer disease and abdominal pain. Plaintiff requested an administrative hearing after the agency denied her claims initially and on reconsideration. A hearing was held on March 23, 1999 at which plaintiff and her husband testified. On April 17, 1999, the administrative law judge issued a decision finding that plaintiff met the definition of “disabled” and was therefore entitled to supplemental security income payments under the Social Security Act.

On May 13, 1999, the Appeals Council notified plaintiff that it was reviewing the hearing decision on its own motion in accordance with the Social Security regulations. On February 17, 2000, the Appeals Council wrote a letter to plaintiff informing her of its reasons for reviewing the hearing decision and inviting her to submit additional evidence or a written statement within 30 days. Plaintiff did not respond. On August 25, 2000, the Appeals Council issued a decision reversing the ALJ and finding plaintiff ineligible for benefits, finding that the record lacked substantial evidence to show that plaintiff’s peptic ulcer disease constituted a severe impairment. This appeal followed.

## **II. Medical and Vocational Evidence**

At the time of the administrative hearing, plaintiff was 41 years old, married and had six children, ages 19, 16, 14, 11, 8 and four months. Plaintiff has no education or employment history, having worked as a homemaker in Thailand before immigrating to the United States from Thailand in 1985. She does not speak or read English.

On October 31, 1997, plaintiff saw Dr. Thomas Voelker for complaints of abdominal pain and epigastrium. Plaintiff reported that her symptoms had been present for about five years and she had been treated with Zantac in the past. Physical examination of plaintiff's abdomen revealed moderate mid-epigastric tenderness, but there was no guarding, rebound, rigidity or masses. Dr. Voelker diagnosed acid peptic disease and prescribed Zantac. About three weeks later, Dr. Voelker noted that plaintiff's abdominal pain had "abated essentially completely" when plaintiff took Zantac but when she tried a generic brand refill she got significant headaches and discontinued the medication. Again, plaintiff had mid-epigastric tenderness but no guarding, rebound or rigidity in her abdomen. Dr. Voelker wrote a one-year prescription for Zantac.

Plaintiff returned to Dr. Voelker on March 20, 1998, reporting that she had had abdominal pain, a fever, headache and fatigue for the previous couple of weeks. A pregnancy test revealed that plaintiff was pregnant. Dr. Voelker attributed plaintiff's symptoms to her pregnancy.

Meanwhile, Dr. Bahri Gungor examined plaintiff at the request of the social security administration on August 27, 1998. Plaintiff reported that she was unable to work because of tiredness and the pain in her epigastric area; however, she stated that medications helped numb the pain. She reported that she was unable to do any housework or cooking or care for her children and that she depended on her husband and her older children to help her. Plaintiff denied any nausea, bloody stools or vomiting. Physical examination was normal except for tenderness in the epigastric area. Dr. Gungor diagnosed plaintiff with peptic ulcer disease and possibly depression.

Plaintiff did not seek medical care for her abdominal pain again until January 5, 1999. Plaintiff reported abdominal pain for the last couple of months; Dr. Voelker suspected it might be from ulcers. Dr. Voelker refilled plaintiff's prescription for Zantac and scheduled an upper GI x-ray series. X-rays revealed a chronic and active duodenal ulcer.

Plaintiff returned for treatment on February 16, 1999. Although she told Dr. Voelker's assistant that she was doing a lot better, she began crying when she saw Dr. Voelker and stated she was still having pain. Plaintiff reported that she could not refill her last prescription because she could not afford it. She asked for a note stating that she did not have to work or go for a job search because her abdominal pain was so severe that she could not work or care for her child. Dr. Voelker noted moderate tenderness in the mid-epigastric area but otherwise the abdomen was benign. He gave plaintiff samples of Zantac to take for six weeks and advised her to take them until they were gone. He gave her a note

to be off work for the next two weeks so that the pain could start to be controlled with the medication. Testing revealed the presence of H. pylori antibody for which Dr. Voelker prescribed medication.

### **III. Hearing Testimony**

Plaintiff and her husband testified at the administrative hearing. Plaintiff testified that she does not cook any meals or take care of her children, relying on her sister-in-law, her husband and her older children to help take care of the household and the younger children. Plaintiff testified that she was able to do light chores like sweeping and dusting but that she could not lift anything weighing more than five pounds. She testified that when she had a lot of pain she was unable to do anything except sleep. According to plaintiff, she cannot carry her baby in her arms because of pain in her back; when the baby needs a bath, her husband will clean the baby and then hand her to plaintiff who holds the baby in her lap. Plaintiff testified that the Zantac helps her “a little bit” but she has a hard time getting her prescription filled because she does not have insurance.

Plaintiff’s husband corroborated her testimony, stating that he gets up early in the morning to prepare the children for school and to prepare the meals for the day. He testified that he and his wife rely on relatives for help with shopping or emergencies, and that his wife does very little around the house.

#### **IV. The ALJ's Decision**

On April 17, 1999, the ALJ issued a brief opinion in which he concluded that plaintiff was disabled and therefore eligible for supplemental security income payments. The ALJ found that the medical records were consistent in showing a diagnosis of peptic ulcer and severe abdominal pain, which the ALJ found to constitute a severe impairment. The ALJ rejected the opinions of the agency examiners who concluded that plaintiff's impairment was not "severe," noting that they had failed to take into account medical documentation of severe peptic ulcer disease and the "credible testimony regarding her limitations." AR 20. Without offering any explanation, the ALJ found that plaintiff had the residual functional capacity for less than the full range of sedentary work. Because plaintiff had no past relevant work, the ALJ proceeded to the last step of the sequential evaluation process and found that there were not a significant number of jobs in the national economy that plaintiff could perform with her limited residual functional capacity.

#### **V. The Appeals Council's Decision**

On May 13, 1999 and February 17, 2000, the Appeals Council notified plaintiff that it was reviewing the ALJ's decision on its own motion. On August 25, 2000, the Appeals Council issued a decision reversing the ALJ's award of benefits. The Appeals Council disagreed with the ALJ's conclusion that plaintiff's peptic ulcer disease was a severe impairment. Noting that a severe impairment is one that limits a person's ability to perform

basic work activities such as walking, standing and sitting, the Appeals Council found that there was nothing in the medical records to indicate that plaintiff was limited in any of these functions. Additionally, it credited the opinions of the medical consultants retained by the State agency who concluded after reviewing the record that plaintiff's impairments were not severe.

The Appeals Council also found that plaintiff's complaints of debilitating pain were out of proportion to the medical evidence which showed that she had no guarding, rebound, rigidity, masses or organomegaly in her abdomen, her weight was stable, and she had no gastrointestinal bleeding, nausea or vomiting. The Council noted that plaintiff did not see her treating physician from March 1998 to January 1999 and that when she did, she responded well to medication without side effects. Further, noted the Council, Dr. Voelker had only released plaintiff from work for two weeks and had declined to issue a statement that she could not work because of disability. Finally, the Council found that plaintiff's testimony that she did almost nothing at home was inconsistent with her written Disability Report in which she admitted to some daily activities.

## **Analysis**

### **I. Statutory and Legal Framework**

Under the Social Security Act, a disability is the "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 physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(C).

The Commissioner has promulgated regulations setting forth a five-step sequential inquiry to determine whether a claimant is disabled:

- (1) whether the claimant is currently employed;
- (2) whether the claimant has a severe impairment;
- (3) whether the claimant's impairment meets or equals one of the impairments listed by the SSA, *see* 20 C.F.R. § 404, Subpt. P, App. 1;
- (4) whether the claimant can perform his past work; and
- (5) whether the claimant is capable of performing work in the national economy.

*See* 20 C.F.R. § 416.920.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, the burden shifts to the Commissioner to show that plaintiff was able to perform other work in the national economy despite the severe impairment. *See Stevenson*, 105 F.3d at 1154; *Brewer*, 103 F.3d at 1391.



Under 42 U.S.C. § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." See *Stevenson v. Chater*, 105 F.3d 1151, 1153 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). "Substantial evidence is more than a mere scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Stevenson*, 105 F.3d at 1153 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), as quoted in *Richardson v. Perales*, 402 U.S. 389, 401 (1971)) (other citations omitted). Where, as here, the Appeals Council reviews the decision of the administrative law judge and issues a decision on the merits, the Appeals Council's decision stands as the final decision of the Commissioner for the purposes of judicial review. See 20 C.F.R. § 416.1481.

## **II. Review of the Appeals Council's Decision**

The Appeals Council found that plaintiff was not eligible for supplemental security income because her peptic ulcer disease was not a severe impairment. According to the social security regulations, an impairment is not "severe" unless it "significantly limit[s] your physical or mental ability to do basic work activities." 20 C.F.R. § 416.921. "Basic work activities" are defined as "the abilities and aptitudes necessary to do most jobs." *Id.* Examples of these include physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling and mental functions such as understanding,

carrying out and remembering simple instructions, using judgment and dealing with changes in a routine work setting. *Id.*

Plaintiff concedes that there is no mention in the medical records of any limitation on her ability to walk, sit, stand, lift, push, pull, reach, carry or handle. However, plaintiff contends that it was her treating physician's job to treat her for her ulcer, not to assess her physical limitations. According to plaintiff, it was "the Social Security Administration and the State Agency's consulting physicians' responsibilities" to assess her functional limitations and physical limitations. *See* Plt.'s Brief, dkt. #8, at 16. Plaintiff argues that in the absence of specific evidence regarding her physical limitations, it was up to the ALJ to assess her limitations and he did so properly. According to plaintiff, the ALJ's conclusion that she could not perform a full range of sedentary work should be entitled to special weight because he had the opportunity to observe plaintiff testify about her limitations and to evaluate her credibility first-hand.

Plaintiff's arguments are not compelling. The Appeals Council owes no special deference to the ALJ's evaluation of the evidence. In addition to cases in which the ALJ committed an error of law or abused his discretion, the Appeals Council may reverse an ALJ's decision if it concludes that "the action, findings or conclusions of the administrative law judge are not supported by substantial evidence." 20 C.F.R. § 416.14701. The question for judicial review then becomes whether the decision of the Appeals Council is supported by substantial evidence, not whether the ALJ was correct in the first place.

The Appeals Council's conclusion that plaintiff does not have a severe impairment is supported by substantial evidence. As noted previously, there is no dispute that there is nothing in the medical records to indicate that plaintiff's peptic ulcer prevents her from performing any basic work activities like sitting, standing, reaching or handling. Although plaintiff's treating physician released her from work for two weeks, he declined her request for a note stating that she was unable to work on a permanent basis. Two state agency physicians reviewed plaintiff's medical records and concluded that they were insufficient to demonstrate that plaintiff had a severe impairment. Dr. Gungor, the consulting physician who conducted an examination of plaintiff, opined that plaintiff had peptic ulcer disease and possibly depression but he expressed no opinion as to whether these impairments were affecting plaintiff's ability to perform basic work activities. This evidence supports the ALJ's conclusion that plaintiff failed to establish the existence of a severe impairment.

Although plaintiff cites to Dr. Gungor's report as evidence that she cannot work, the portion of the report to which she cites merely recites plaintiff's own report of her limitations. The Appeals Council rejected these subjective complaints of disabling pain as incredible, finding that they were out of proportion to the medical evidence, inconsistent with evidence showing that plaintiff's pain had responded well to medication and that she did not see her doctor for a period of several months, and inconsistent with her disability report on which plaintiff had admitted to more activities than she admitted at the administrative hearing. The only of these findings that plaintiff challenges is the last one,

arguing that plaintiff's testimony at the hearing was consistent with her disability report. Although I agree with plaintiff on this point, the other factors cited by the Appeals Council accurately reflect the evidence in the record and amply support its conclusion that plaintiff's complaints of disabling pain were not entirely credible when evaluated in light of the evidence as a whole. *See* Soc. Sec. Ruling 96-7p (setting forth procedure for assessing credibility of individual's statements).

For these reasons, I am recommending that this court affirm the decision of the Commissioner.

#### RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I respectfully recommend that this court AFFIRM the decision of the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 1<sup>st</sup> day of May, 2001.

BY THE COURT:

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STEPHEN L. CROCKER  
Magistrate Judge