

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11064
Non-Argument Calendar

D.C. Docket No. 6:18-cv-00484-JA-GJK

IRAIDA MORALES,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(January 9, 2020)

Before WILSON, MARTIN, and HULL, Circuit Judges.

PER CURIAM:

Iraida Morales appeals from the affirmance of the decision of the Commissioner of the Social Security Administration (“Commissioner”) holding that she is not disabled under Sections 216(i) and 223(d) of the Social Security Act.

She argues that the administrative law judge (“ALJ”) violated her due process rights by offering her a fully favorable decision if she amended her alleged disability onset date, and then denying her benefits when she declined to do so. She also argues that the ALJ did not apply the correct legal standard to her testimony regarding her pain and limitations and that the ALJ’s determination was not supported by substantial evidence. After careful review, we affirm.

I.

On August 20, 2012, Morales filed an application for a period of disability and disability insurance benefits, alleging a disability onset date of June 21, 2012. An ALJ found Morales was not disabled. The Appeals Council remanded her claim for further proceedings and, on December 12, 2016, a second hearing was held before a different ALJ. On February 3, 2017, Morales’s attorney sent a letter to the ALJ stating that Morales did not agree to amend her disability onset date from June 21, 2012 to January 1, 2013 and requesting that the ALJ contact her if there was another reason why the onset date should be amended.

On March 24, 2017, the ALJ found Morales was not disabled at any time since her onset date of June 21, 2012. Specifically, the ALJ found Morales has the severe impairments of general arthropathy and cervical spine degenerative disc disease and a number of non-severe impairments including right-side carpal tunnel syndrome, lumbar pain, mental health disorders, gastritis, asthma, and side effects

from medication. The ALJ found that Morales had the residual functional capacity to perform less than the full range of light work, as defined in 20 C.F.R.

§ 404.1567(b). Based on Morales's residual functional capacity, the ALJ found that she could perform past relevant work as a Teacher Aide II and concluded that she was not disabled from her onset date through the date of the decision.

Morales sought review, arguing that the ALJ improperly denied her claim because she would not agree to amend her alleged date of disability onset. The Appeals Council denied the request for review and Morales timely appealed by filing a complaint in the Middle District of Florida.

A magistrate judge issued a report and recommendation ("R&R") recommending that the final decision of the Commissioner be affirmed. Over Morales's objections, the district court adopted the R&R and affirmed the final decision of the Commissioner. Morales timely appealed.

II.

When the Appeals Council denies review of a denial of benefits, "we review the ALJ's decision as the Commissioner's final decision." Doughty v. Apfel, 245 F.3d 1274, 1278 (11th Cir. 2001). We review the Commissioner's factual findings for substantial evidence and the legal principles on which the decision was based de novo. Moore v. Barnhart, 405 F.3d 1208, 1211 (11th Cir. 2005) (per curiam). Even if the evidence preponderates against the decision, we must affirm if it is

supported by substantial evidence. Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991) (per curiam). We will reverse if the Commissioner failed to apply the correct legal standards or provided an insufficient basis to determine whether proper legal principles have been followed. Ingram v. Comm’r, Soc. Sec. Admin., 496 F.3d 1253, 1260 (11th Cir. 2007). We review de novo the district court’s decision on whether substantial evidence supports the ALJ’s decision. Wilson v. Barnhart, 284 F.3d 1219, 1221 (11th Cir. 2002) (per curiam).

III.

Morales argues that the ALJ violated her due process rights by issuing an unfavorable determination because she declined to amend her alleged disability onset date. She claims that on February 3, 2017, the ALJ’s hearing assistant contacted her attorney to see if she would be willing to amend her alleged disability onset date from June 21, 2012 to January 1, 2013. The assistant allegedly said that, if Morales would amend her onset date, then the ALJ would enter a decision in her favor. The same day, Morales’s attorney submitted a letter to the ALJ explaining why Ms. Morales was unwilling to amend her asserted onset date. The ALJ then found that Morales was not disabled.

For the ALJ to decide that Morales was not disabled based on her refusal of an ex parte request to amend her onset date would be improper. See Envtl. Def. Fund, Inc. v. Alexander, 614 F.2d 474, 481 (5th Cir. 1980) (“[N]either ex parte

communication with a judge's clerks nor reliance upon such communication can be condoned.")¹; Lindsey v. Barnhart, 161 F. App'x 862, 870 (11th Cir. 2006) (per curiam) (unpublished) ("Obviously, it would be improper for the ALJ to refuse to award Lindsey social security benefits based on Lindsey's refusal to amend his onset date."). But to warrant reversal on the basis of an improper ex parte communication from the ALJ, Morales must also show that the violation resulted in prejudice. Hilliard v. Comm'r of Soc. Sec., 612 F. App'x 582, 583 (11th Cir. 2015) (per curiam) (unpublished).

Here, there is no evidence that the ALJ made an improper ex parte offer to Morales or that it subsequently issued an unfavorable decision because Morales declined the offer. The only relevant record evidence is a letter signed by Morales's attorney and dated February 3, 2017, which states that Morales "does not agree to amend her onset date of disability." The letter does not mention a call from the ALJ's hearing assistant or an offer to issue a favorable decision in the event that Morales changed her onset date.

Nor does any extra-record evidence support Morales's claim. In some circumstances we may look beyond the administrative record; for example, we

¹ In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. Id. at 1207.

may do so when “an agency’s failure to explain its action effectively frustrates judicial review” or when “there is a strong showing of agency bad faith or improper behavior.” Pres. Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Eng’rs, 87 F.3d 1242, 1246 n.1 (11th Cir. 1996). The record does not reflect that any such circumstances exist here. We have only the assertions in Morales’s brief, which are not evidence. See Skyline Corp v. NLRB, 613 F.2d 1328, 1337 (5th Cir. 1980) (“Statements by counsel in briefs are not evidence.”). And even if such circumstances existed, Morales has submitted no extra-record evidence to support her claim. Lacking evidence of either improper conduct by the ALJ or resulting prejudice, we find no due process violation.

IV.

In order to show disability based on pain, a claimant must show an underlying medical condition and either (1) objective medical evidence confirming the severity of the alleged pain arising from that condition or (2) that the medical condition is severe enough that it can reasonably be expected to give rise to the alleged pain. Foote v. Chater, 67 F.3d 1553, 1560 (11th Cir. 1995) (per curiam); see also 20 C.F.R. § 404.1529(a). Once a claimant establishes a qualifying medical condition, the ALJ must consider “all evidence about the intensity, persistence, and functionally limiting effects of pain or other symptoms” in deciding whether the claimant is disabled. Foote, 67 F.3d at 1561. “The

claimant's subjective testimony supported by medical evidence that satisfies the standard is itself sufficient to support a finding of disability." Holt v. Sullivan, 921 F.2d 1221, 1223 (11th Cir. 1991) (per curiam). If the ALJ does not credit the claimant's subjective testimony, she must articulate "explicit and adequate reasons" for her decision. Id.

The ALJ found Morales's medical condition could reasonably be expected to cause her alleged symptoms but concluded her allegations regarding the intensity, persistence, and limiting effects of these symptoms were "not entirely consistent" with other evidence in the record. Morales argues that the ALJ's decision to discredit her testimony regarding her pain was not supported by substantial evidence. But three factors discussed by the ALJ were sufficient to support the ruling: (1) that Morales's treatment was conservative and non-aggressive; (2) that her complaints of disabling pain were not consistent with objective medical evidence; and (3) that her medications were stabilized during the period at issue and the side effects from them were mild.

The ALJ properly concluded that Morales's "conservative and non-aggressive" treatment undermined her testimony about the intensity and limiting effects of her symptoms. A conservative treatment plan tends to negate a claim of disability. See Wolfe v. Chater, 86 F.3d 1072, 1078 (11th Cir. 1996). In support of the finding that Morales's treatment plan was conservative and nonaggressive,

the ALJ noted that Morales was prescribed medication for her headaches, gastrointestinal impairments, fibromyalgia, and rheumatoid arthritis. At various points during her treatment she was instructed to increase her activity levels, build up a low-impact exercise program, start physical therapy, and take up exercises such as fast walking, swimming, yoga, tai chi, and weight bearing exercises for her stiffness, arthralgias, and myalgias.

Morales does not contest that her treatment plan was conservative. Instead, she argues that conservative treatment is consistent with fibromyalgia. But conservative treatment can support discrediting subjective symptoms even in cases where, like here, a claimant alleges pain from both fibromyalgia and other conditions. See Horowitz v. Comm’r of Soc. Sec., 688 F. App’x 855, 863 (11th Cir. 2017) (per curiam) (unpublished) (holding that conservative treatment for both mental impairments and pain from fibromyalgia supported ALJ’s adverse credibility finding); Brown v. Comm’r of Soc. Sec., 680 F. App’x 822, 826 (11th Cir. 2017) (per curiam) (unpublished) (same). Here, Morales’s treatment included recommendations to perform various kinds of physical activity, which are inconsistent with her claims of completely disabling pain.

The ALJ’s finding that Morales’s subjective complaints were inconsistent with her “objective signs” was also supported by substantial evidence. Objective medical evidence “is a useful indicator” to assist the Commissioner in evaluating

the intensity and persistence of symptoms and pain. 20 C.F.R. § 404.1529(c)(2). Here, the ALJ noted that Morales underwent numerous forms of imaging with unremarkable results. It also gave great weight to the agency experts who found Morales can “understand and execute instructions and maintain concentration, persistence, pace and attendance,” can “relate and adapt in work settings,” and could “perform light exertional work.” The ALJ gave some weight to Dr. Ferrer, whose treatment notes showed that Morales exhibited some tenderness due to fibromyalgia but otherwise reported that her exam findings were “unremarkable” and that she had “full motor strength and sensation.” And the ALJ gave little weight to Dr. McGee’s, Dr. Williams’s, Dr. Candela’s, and Dr. Hoffman’s conclusions that Morales was unable to do less than sedentary activity, finding them unsupported by their exam results. Morales does not contest these findings on appeal, arguing only that the ALJ failed to specify which “objective signs” were inconsistent with her subjective complaints. But this takes the concluding paragraph of the ALJ’s detailed discussion of Morales’s treatment and evaluation history out of context. In light of the preceding analysis, it is clear that “objective signs” refers to medical evidence. Morales does not challenge the ALJ’s analysis of the medical record on appeal, and we conclude that the ALJ’s credibility determination was supported by substantial evidence. See Wilson, 284 F.3d at

1226 (medical evidence inconsistent with disabling pain supports adverse credibility determination).

Nor did the ALJ err in finding that Morales's allegations of disability were inconsistent with the fact that her medication had been stabilized and was producing only mild side effects. The "type, dosage, effectiveness, and side effects" of medication taken to alleviate pain or other symptoms may be taken into account when evaluating subjective symptoms. 20 C.F.R. § 404.1529(c)(3)(iv); Walker v. Comm'r of Soc. Sec., 404 F. App'x 362, 366 (11th Cir. 2010) (per curiam) (unpublished) ("In determining whether a claimant's impairments limit her ability to work, the ALJ considers the claimant's subjective symptoms, which includes the effectiveness and side effects of any medications taken for those symptoms."). Taken alone, that Morales's medications had been stabilized does not mean that she no longer suffered pain or could work full time. However, Morales also reported that she felt improvement to her headaches resulting from changes to her medication, which suggests that some of her symptoms were responsive to medication. While Morales's medication history provides only limited support for the conclusion that her subjective symptoms were not consistent with the objective evidence in the record, it was not improper for the ALJ to consider it. See 20 C.F.R. § 404.1529(a) (the Commissioner considers "all

of the available evidence . . . about how your symptoms affect you” in evaluating the intensity and persistence of a claimant’s symptoms).

We do not agree with the ALJ’s finding that Morales’s ability to perform basic housework, clean, bathe, and dress herself was itself inconsistent with a disabling level of pain. See Lewis v. Callahan, 125 F.3d 1436, 1441 (11th Cir. 1997) (holding that ability to perform housework did not support a conclusion that claimant was able to work); Foote, 67 F.3d at 1561 (holding that claimant’s ability to do basic daily activities did not support the ALJ’s finding that her pain was not so disabling as to reduce her residual functional capacity). However, taken together, the other evidence considered by the ALJ was sufficient to support the conclusion that the “intensity, persistence and limiting effects” of her symptoms were not consistent with other evidence in the record.

AFFIRMED.