

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

TRESA MARTIN,

Plaintiff,

vs.

Case No. 15-1267-EFM

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Tresa Martin seeks review of a final decision by Defendant, the Commissioner of Social Security (“Commissioner”), denying her application for disability insurance benefits under Title II of the Social Security Act. Plaintiff alleges that the administrative law judge (“ALJ”) erred by not addressing or considering her borderline age situation and whether she would be considered disabled in the higher age category. Having reviewed the record, and as described below, the Court reverses and remands the order of the Commissioner.

I. Factual and Procedural Background

Tresa Martin was born on December 27, 1964. On May 15, 2012, Martin applied for disability insurance benefits alleging a disability beginning on June 28, 2011. Martin alleged that she was unable to work due to a variety of ailments. Her application was denied initially and upon reconsideration. Martin then asked for a hearing before an ALJ.

ALJ James Harty conducted an administrative hearing on April 30, 2014. Martin was represented by counsel at this hearing, and Martin testified about her medical conditions. The ALJ also heard from a vocational expert.

On July 11, 2014, the ALJ issued his written decision, finding that Martin had not engaged in substantial gainful activity since the alleged onset date. The ALJ found that Martin suffered from peripheral vascular disease, chronic obstructive pulmonary disease, myalgias/fibromyalgia, hidradenitis suppurativa, positional vertigo, peripheral neuropathy, mild obstructive sleep apnea, obesity, major depressive disorder, and posttraumatic stress disorder. The ALJ found that Martin's impairment or combination of impairments did not meet or medically equal one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.

The ALJ determined that Martin had the residual functioning capacity ("RFC")

to perform sedentary work as defined in 20 CFR 404.1567(a) except the claimant can occasionally push and pull with the upper left non-dominant extremity; occasionally balance, stoop, kneel, crouch, crawl, and climb ramps and stairs, but never climb ladders, ropes, and scaffolds. In addition, the claimant can frequently feel with the left non-dominant upper extremity. Furthermore, the claimant must avoid concentrated exposure to dangerous moving machinery, unprotected heights, dusts, fumes, odors, gases, environments with poor ventilation, cold temperature extremes, and vibrations. Moreover, the claimant is limited to performing simple and intermediate tasks, which means unskilled and semi-skilled work.

The ALJ then determined that Martin was not capable of performing any of her past relevant work. However, considering Martin's age, education, work experience, and RFC, the ALJ determined that jobs existed in the national economy that Martin could still perform. Thus, the ALJ concluded that Martin had not been under a disability from June 28, 2011, through the date of his decision.

Given the unfavorable result, Martin requested reconsideration of the ALJ's decision from the Appeals Council. The Appeals Council denied Martin's request on July 9, 2015. Accordingly, the ALJ's July 2014 decision became the final decision of the Commissioner.

Martin filed a complaint in the United States District Court for the District of Kansas. She seeks reversal of the ALJ's decision and remand to the Commissioner for a new administrative hearing. Because Martin has exhausted all administrative remedies available, this Court has jurisdiction to review the decision.

II. Legal Standard

Judicial review of the Commissioner's decision is guided by the Social Security Act (the "Act") which provides, in part, that the "findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."¹ The Court must therefore determine whether the factual findings of the Commissioner are supported by substantial evidence in the record and whether the ALJ applied the correct legal standard.² "Substantial evidence is more than a scintilla, but less than a preponderance; in short, it is such evidence as a reasonable mind might accept to support the conclusion."³ The Court may "neither reweigh the evidence nor substitute [its] judgment for that of the [Commissioner]."⁴

An individual is under a disability only if she can "establish that she has a physical or mental impairment which prevents her from engaging in substantial gainful activity and is

¹ 42 U.S.C. § 405(g).

² *Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007).

³ *Barkley v. Astrue*, 2010 WL 3001753, at *1 (D. Kan. Jul. 28, 2010) (citing *Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994)).

⁴ *Bowman v. Astrue*, 511 F.3d 1270, 1272 (10th Cir. 2008) (quoting *Casias v. Sec'y of Health & Human Servs.*, 933 F.3d 799, 800 (10th Cir. 1991)).

expected to result in death or to last for a continuous period of at least twelve months.”⁵ This impairment “must be severe enough that she is unable to perform her past relevant work, and further cannot engage in other substantial gainful work existing in the national economy, considering her age, education, and work experience.”⁶

Pursuant to the Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled.⁷ The steps are designed to be followed in order. If it is determined, at any step of the evaluation process, that the claimant is or is not disabled, further evaluation under a subsequent step is unnecessary.⁸

The first three steps of the sequential evaluation require the Commissioner to assess: (1) whether the claimant has engaged in substantial gainful activity since the onset of the alleged disability; (2) whether the claimant has a severe, or combination of severe, impairments; and (3) whether the severity of those severe impairments meets or equals a designated list of impairments.⁹ If the impairment does not meet or equal one of these designated impairments, the ALJ must then determine the claimant’s residual functional capacity, which is the claimant’s ability “to do physical and mental work activities on a sustained basis despite limitations from his impairments.”¹⁰

⁵ *Brennan v. Astrue*, 501 F. Supp. 2d 1303, 1306-07 (D. Kan. 2007) (citing 42 U.S.C. § 423(d)).

⁶ *Barkley*, 2010 WL 3001753, at *2 (citing *Barnhart v. Walton*, 535 U.S. 212, 217-22 (2002); 20 C.F.R. § 416.920 (2005)).

⁷ *Wilson v. Astrue*, 602 F.3d 1136, 1139 (10th Cir. 2010); *see also* 20 C.F.R. §§ 404.1520(a), 416.920(a).

⁸ *Barkley*, 2010 WL 3001753, at *2.

⁹ *Lax*, 489 F.3d at 1084; *see also Barkley*, 2010 WL 3001753, at *2 (citing *Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988)).

¹⁰ *Barkley*, 2010 WL 3001753, at *2 (citing 20 C.F.R. § 416.920(e)); *see also* 20 C.F.R. §§ 404.1520(e), 404.1545.

Upon assessing the claimant's residual functional capacity, the Commissioner moves on to steps four and five, which require the Commissioner to determine whether the claimant can either perform his past relevant work or whether he can generally perform other work that exists in the national economy, respectively.¹¹ The claimant bears the burden in steps one through four to prove a disability that prevents performance of his past relevant work.¹² The burden then shifts to the Commissioner at step five to show that, despite the claimant's alleged impairments, the claimant could perform other work in the national economy.¹³

III. Analysis

Plaintiff contends that the ALJ erred and improperly applied the grid rules by not discussing Plaintiff's age, which was in a borderline situation, on the date of the ALJ's decision. Thus, Plaintiff contends that the ALJ erred by not considering whether she would be considered disabled in the higher age category. Plaintiff was born on December 27, 1964. When she applied for disability benefits in 2012, she alleged a disability that began on June 28, 2011, when she was forty-six years old. At the time of her hearing in April 2014, she was forty-nine years old. On the date of the ALJ's decision in July of 2014, Plaintiff was approximately five and one-half months away from her 50th birthday.

At step five of the evaluation process, the burden is on the Commissioner to demonstrate that the claimant can perform work that exists in the national economy.¹⁴ In meeting this burden,

¹¹ *Barkley*, 2010 WL 3001753, at *2 (citing *Williams*, 844 F.2d at 751).

¹² *Lax*, 489 F.3d at 1084.

¹³ *Id.*

¹⁴ *Id.*

the ALJ may rely on the Medical-Vocational Guidelines (the grid rules).¹⁵ “The grids consider a claimant’s RFC in relation to his age, education, and work experience.”¹⁶ There are three age categories when applying the grid’s rules: younger person (under age fifty), person closely approaching advanced age (age fifty to fifty-four), and person of advanced age (age fifty-five and older).¹⁷ An individual between the age of forty-five and forty-nine may be more limited in some circumstances than those individuals who have not obtained age forty-five.¹⁸

The regulations provide that the age categories should not be applied in a mechanical fashion in a borderline situation.¹⁹ If a claimant is “within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that [the claimant is] disabled, [the Commissioner] will consider whether to use the older age category after evaluating the overall impact of all the factors of [the claimant’s] case.”²⁰

In this case, the relevant age categories are younger person and person closely approaching advanced age. In the ALJ’s decision, he noted that Plaintiff was forty-six years old, which is considered “a younger individual age 45-49, on the alleged disability onset date.” The ALJ, however, did not consider Plaintiff’s age at the time of the decision. On that date, Plaintiff was five and one-half months away from her 50th birthday. The ALJ never discussed whether

¹⁵ *Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988) (citing 20 CFR Part 404, Subpart P, Appendix 2).

¹⁶ *Id.*

¹⁷ 20 CFR § 404.1563(c)-(e).

¹⁸ 20 CFR § 404.1563(c).

¹⁹ 20 CFR § 404.1563(b).

²⁰ *Id.*

Plaintiff fell in a borderline situation or whether to use the higher category of approaching advanced age.

Several cases from the District of Kansas and the Tenth Circuit have addressed an ALJ's failure to consider at the time of the decision whether the claimant fell within a borderline situation and whether the claimant should be considered the next age division. The majority of the District of Kansas and Tenth Circuit cases addressing this issue have found that if a plaintiff is within six months of the next age category, the ALJ erred if the ALJ did not discuss the plaintiff's borderline age situation. In the most recent case, *Albrecht v. Colvin*,²¹ the plaintiff was eighty days away from her 50th birthday. Judge Crow noted the decisions from the District of Kansas and Tenth Circuit that found it was error to not address a borderline age situation if the plaintiff was within six months of the higher age category.²² He then stated that it was error for the ALJ to not consider or address the borderline situation in the case before him before utilizing the grids.

In *Daniels v. Apfel*, the Tenth Circuit noted:

The ALJ never addressed the issue of whether [plaintiff] fell within the borderline or whether he should be considered in the next age bracket. Determining whether a claimant falls within a borderline situation appears to be a factual rather than

²¹ 2013 WL 3449195 (D. Kan. July 9, 2013).

²² *Id.* at *3-4 (citing *Daniels v. Apfel*, 154 F.3d 1129, 1133 (10th Cir. 1998) (concluding that a plaintiff who was within sixty-five days of the advanced age category fell within the borderline situation which precluded a mechanical application of the age categories); *Cox v. Apfel*, 1998 WL 864118 at *4 (10th Cir. Dec. 14, 1998) (finding that because the plaintiff fell within six months of the next age category that plaintiff was of borderline age and it was error for the ALJ not to address the plaintiff's borderline situation); *Ediger v. Astrue*, 2012 WL 10352, at *4-5 (D. Kan. Jan. 3, 2012) (concluding that the ALJ erred by not addressing whether the plaintiff was in a borderline situation when the plaintiff was three months away from advanced age); *Welch v. Astrue*, 2010 WL 5288205, at *5-6 (D. Kan. Dec. 15, 2010) (finding that because the plaintiff was within 5 1/2 months of his 50th birthday, it was error for the ALJ to not discuss the plaintiff's borderline age situation)). The Court finds the above cases representative and notes that Judge Crow included two more District of Kansas cases in which the plaintiffs were five months shy of the next age category and it was error for the ALJ to not discuss the borderline age situation.

discretionary matter, and the ALJ erred by not making the necessary factual finding. Even were this considered a discretionary matter, the ALJ would have abused that discretion by failing to exercise it.²³

If a plaintiff is in a borderline situation, i.e. within a few days or months of the next higher age category, the ALJ must determine which category the plaintiff best fits.²⁴ Because it is a factual issue, the ALJ's finding of which age category is appropriate must be supported by substantial evidence.²⁵

In this case, the ALJ never discussed Plaintiff's age with the exception of noting it at her disability onset date. As noted by the Tenth Circuit, determining whether a claimant falls within a borderline situation is a factual issue for the ALJ and it is error for the ALJ to not make the necessary factual findings. Thus, remand is required for the ALJ to address Plaintiff's age, whether she fell into a borderline situation, and which age category she should be placed in.²⁶

²³ 154 F.3d at 1133, n. 5 (citations omitted).

²⁴ *Id.* at 1136.

²⁵ *Id.*

²⁶ As far as what impact the determination of age category may have on Plaintiff's particular case, the Commissioner does not specifically discuss whether Plaintiff's borderline age would potentially place her in a higher age category and thus whether she would be considered disabled in this higher age category. Nor does the Commissioner discuss whether Plaintiff's additional vocational adversities supported placing her in the higher age category. Instead, the Commissioner primarily asserts that Plaintiff was not in a borderline situation because she was not within a "few days to a few months" from the next age category but was almost six months from the next age category. This argument misses the mark. As evidenced by the cited decisions above from the District of Kansas and the Tenth Circuit, an individual who is within six months of the higher age category is generally considered to be in a borderline age situation. The Court will not discuss the potential impact of Plaintiff's disability determination with the exception of noting that placing Plaintiff in the higher age category (with the vocational adversities in the evidence) could potentially render a finding of disabled.

IT IS THEREFORE ORDERED that the decision of the Commissioner is **REVERSED**, and that judgment be entered in accordance with the fourth sentence of 42 U.S.C.

§ 405(g) **REMANDING** the case for further proceedings.

IT IS SO ORDERED.

Dated this 11th day of August, 2016.

A handwritten signature in black ink, reading "Eric F. Melgren". The signature is written in a cursive, flowing style.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE