Judges Copy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WILLIAM M. SHEPHERD,	*	
	*	4-99-CV-90555
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, William M. Shepherd, filed a Complaint in this Court on September 24, 1999, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq*. This Court may review a final decision by the Commissioner. 42 U.S.C. § 405(g). The Commissioner has moved to remand the case for further development and Plaintiff has joined the motion. In the opinion of the Court, however, a remand to take further evidence will only delay the receipt of benefits to which Plaintiff is entitled. For the reasons set out herein, therefore, the Motion To Remand is denied, and the decision of the Commissioner is reversed.

Plaintiff filed an application for benefits on February 23, 1994. Tr. at 96-98. After the application was denied initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. On July 27, 1995, Administrative Law Judge Jean M. Ingrassia issued a partially favorable decision (Tr. at 207-20) finding Plaintiff disabled with the condition that alcoholism was a contributing factor material to the determination of disability. Plaintiff,

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therefore, was required to receive his benefits through a representative payee, and to submit to treatment upon request by the Social Security Administration. Tr. at 214. On July 26, 1996, after being notified that his benefits would be terminated due to recent amendments to the Social Security Act, Plaintiff filed a notice of disagreement stating that he felt he is disabled due to impairments other than alcoholism. Tr. at 250-51. On February 4, 1998, Plaintiff appeared and testified at a hearing in front of Administrative Law Judge Thomas Donahue (ALJ). The ALJ issued a Notice Of Decision – Unfavorable on April 30, 1998. Tr. at 14-37. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on August 19, 1999. Tr. at 6-8. The Complaint in this court was filed September 24, 1999.

At the time of his hearing, Plaintiff was 52 years old. Tr. at 56. The record of this case indicates that Plaintiff was treated, on an inpatient basis, for alcoholism numerous times. For example, Plaintiff was admitted to the Mental Health Institute at Mt. Pleasant, Iowa on October 12, 1982. Tr. at 182. He was admitted again on April 29, 1983 after he was charged with drunk and disorderly conduct. Tr. at 186. Plaintiff was admitted to the hospital on July 30, 1984. Tr. at 190. "After the patient was discharged in early August 1994, for his fourth Mental Health Institute admission, the patient apparently was found to be publically intoxicated. His alcohol level was reported to be 154." Tr. at 189. The admission history, which was dictated on August 30, 1994 states that it was Plaintiff's fourth Mental Health Institute and the sixteenth hospitalization. Id. On June 12, 1995, Plaintiff was admitted to Ottumwa Regional Health Center on June 12, 1995, with complaints of "coffee ground emesis". Tr. at 283. The social history states that Plaintiff "drinks alcohol every day." Tr. at 285. It was noted that Plaintiff had a history of drinking two 12-packs of beer per day for almost 30 years. Tr. at 287. The bloody vomitus was

attributed to, among other things, alcohol and tobacco abuse. In addition, Plaintiff was diagnosed with "Coagulopathy secondary to alcoholic liver disease" and "Presumed chronic obstructive pulmonary disease." Tr. at 286.

A medical note from Steven Ellison, M.D. (Tr. at 296), dated April 16, 1996, states that Plaintiff smokes two packs of cigarettes and drinks a six pack of beer every day. On examination, it was noted that the room smelled of alcohol and tobacco. Tr. at 298.

In addition to alcoholism, the ALJ found that Plaintiff suffers from chronic obstructive pulmonary disease, and degenerative disc disease. Tr. at 27. Plaintiff was seen by Paul D. Poncy, D.O. on August 14, 1996. Tr. at 301-06. Plaintiff's chief complaints were pain in his back and left leg and breathing distress. Plaintiff attributed his back and leg pain to his twenty year history of work in a foundry. Plaintiff told the doctor that walking was "rather painful". Tr. at 301. Regarding his breathing difficulty, Plaintiff said that this was what caused him the most degree of distress and chronicity. Plaintiff said that his breathing problems began twenty years earlier when he was shot in the chest with a shotgun[1]. Tr. at 302. A report of a chest x-ray dated December 18, 1996, showed "a lot of gun shot pellets overlaying the right chest." Tr. at 318. "At this point," wrote Dr. Poncy, "he uses a Ventolin inhaler as well as intermittently using a mini-nebulizer for breathing treatments as well." The doctor said that Plaintiff takes medication for his stomach, blood pressure, breathing, heart, and for pain. Tr. at 302. After a physical examination (Tr. at 303), Dr. Ponce wrote: "Unquestionably, his largest degree of disability has to do with his breathing. ... His current workable diagnoses certainly as it relates to the findings to-

1. In 1973, Plaintiff "accidently shot himself in the right shoulder and lung ... with a shotgun." Tr. at 184.

day and also in part by the history of the patient include: Moderately COPD, degenerative disc disease in the lumbar area with left radiculopathy, personal history of coronary artery disease, and exertional angina, essential hypertension, and tobacco and ETOH abuse." Tr. at 304. In a letter dated August 8, 1997, Dr. Poncy wrote:

> My opinion on his working ability would certainly fall into the classification of sedentary work. The major physical impairment that would make this the most reasonable category for him is more to do with his breathing impairment than with his low back deterioration. I just don't think that in a light work category that Mr. Shepherd would be able to do a lot of walking or prolonged standing.

Tr. at 342.

Plaintiff was seen for a psychiatric evaluation by Teresa B. Rosales, M.D. on September 25, 1996. Tr. at 313-15. Plaintiff admitted to Dr. Rosales that he is an alcoholic. Tr. at 313. On mental status examination, Plaintiff smelled of alcohol and appeared somewhat intoxicated with slurred speech. Tr. at 314. Plaintiff was seen for a psychological evaluation by Kevin Krumvieda, Ph.D. on November 25, 1997. Tr. at 331-37. Plaintiff is the twelfth of seventeen children. Tr. at 331. Plaintiff described a typical day as rising between 3:30 and 5:00 a.m. and sitting and meditating until his grandchildren got up. After breakfast, he said that he rode around with his son-in-law who hunted. Tr. at 333. Plaintiff was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and the Wide Range Achievement Test-3 (WRAT-3). On the WAIS-R, Plaintiff scored a verbal IQ of 80, a performance IQ of 75, and a full scale IQ of 77. Tr. at 334. The IQ scores indicate that Plaintiff functions in the borderline intellectual range. Testing of Plaintiff's ability in reading, spelling and arithmetic, using the WRAT-3, showed that he functions in the deficient range in all three areas and, according to Dr. Krumvieda, was consistent

with Plaintiff's report of difficulties in school. Tr. at 335.

On September 25, 1997, while hitchhiking, Plaintiff was struck by a car. Tr. at 344-57. Plaintiff's right arm sustained a "rather significant laceration which was repaired by the emergency room physician." It was noted that Plaintiff was intoxicated upon admission to the hospital. Tr. at 344. A police officer reported that the driver of a van that struck Plaintiff, was driving on her side of the highway when Plaintiff suddenly put his hand in front of the vehicle. It was also noted that on arrival at the hospital, Plaintiff was short of breath, frequently coughing with audible wheezing. Tr. at 346. Plaintiff returned to the hospital on September 28th complaining of extreme pain in his injured arm. Plaintiff told the doctor that he had not taken the prescribed antibiotics because he did not have the money to buy them. He was taken to surgery and the wound was opened and cleaned. Tariq Niazi, M.D. wrote: "Compartment syndrom [was] obvious, with large amounts of blood clots exuding as soon as the laceration was opened." Tr. at 359.

On January 1, 1998, Plaintiff went to the emergency room after he fell against the bath tub at his home and injured himself on the left rib cage. Tr. at 366.

On March 6, 1998, after he was discharged from jail, Plaintiff was ordered to undergo out-patient mental health treatment under the care of a Doctor Fleming. The Judicial Hospitalization Referee's order states that failure to undergo the outpatient treatment would result in an inpatient program at the Mental Health Institute. Tr. at 386.

Plaintiff was seen at the University of Iowa Hospitals and Clinics on March 5, 1999 complaining of chronic lower back and leg pain. In addition to the pain, which Plaintiff said was quite severe, he reported some numbing paresthesias that travel down his leg. "These come

about mainly when he is upright walking. He currently uses a cane for walking assistance." X-rays showed significant spondylosis of the lumbar spine. Plaintiff was given a soft corset brace for lumbar support. Tr. at 377.

At the administrative hearing, after Plaintiff testified, the vocational expert was asked two hypothetical questions. Tr. at 66 and 67.

> Mr. Jeff Johnson, I'd like to ask you a hypothetical question or two. The first one being age 51, a male, eighth grade education, past relevant work as set forth in Exhibit 62, the ability to lift up to 20 pounds occasionally, 10 pounds frequently, no limitation on sitting, standing up to two hours at a time, walking up to two blocks at a time for a total of eight of eight hours sitting, minimum of six of eight hours, a combination of walking and standing, only occasional climbing of ramps and stairs, only occasionally balancing, stooping, crouching, crawling, kneeling, and bending. Based on this first hypothetical, could the claimant do any of his past relevant work?

Tr. at 66. In response, the vocational expert testified that Plaintiff would not be able to do his past work. The vocational expert also said that, although Plaintiff had no transferable skills, the hypothetical allowed for the performance of a full range of unskilled light[2] work. Tr. at 67. Thereafter, the ALJ asked a second hypothertical:

> Okay. I'd like to ask you a second hypothetical. This would be age 51, a male, eighth grade education, past relevant work as set forth in Exhibit 62, ability to lift up to 10 pounds occasionally, 10 pounds frequently, no limitations on sitting, standing up to two hours at a time, walking up to two blocks. Eight of eight hours sitting, six of eight with standing and walking. Only occasionally climbing of

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2. Light work is defined as: "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time." 20 C.F.R. § 404.1567(b).

> ramps and stairs, only occasional balancing, stooping, kneeling, bending, crouching crawling. Based on this hypothetical, could the claimant do any of his past relevant work?

Tr. at 67. Again, the vocational expert responded that Plaintiff would be unable to do his past relevant work, and that he would have no transferable skills. The vocational expert said that the hypothetical would allow for a full range of sedentary[3] unskilled work and less than a full range of light work. Tr. at 68. When he was asked if Plaintiff's limited ability to read, write, and do arithmetic would affect the jobs identified, the vocational expert said the jobs he had identified would be precluded. When asked if any jobs would be available, he responded: "Most of the jobs, Your Honor, would require the individual to be able to read and write to some degree. It may require them to make simple change." Tr. at 69.

In his decision, the ALJ found that Plaintiff suffers from the following severe impairments: chronic obstructive pulmonary disease, degenerative disc disease, severe alcohol addiction disorder, alcohol liver disease, a history of gastrointestinal bleed, and borderline intelligence. Tr. at 27. The ALJ found that Plaintiff is unable to do his past work. He also found that: "Aside from his dependence upon alcohol, the claimant would have the residual functional capacity to perform a wide range of light work." The ALJ found

> 10. Absent alcohol dependence, pursuant to Section 416.969 of Regulations No. 4 and Rule No. 202.10, Table No. 2 of Appendix 2, Subpart P, Regulations No. 4, would find that, considering the claimant's residual functional capacity, age, education, and work experience he is not disabled.

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3. Sedentary work is defined as: "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a).

> 11. The claimant's non-exertional limitations further limit the claimant's range of work he is capable of performing. However, using the above-cited rule for a framework, the claimant is not disabled.
>
> 12. The claimant's alcohol dependency is a contributing factor material to the determination of disability.

Tr. at 28. The ALJ found that Plaintiff is not disabled nor entitled to Supplemental Security Income benefits. Tr. at 29.

DISCUSSION

> The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. § 405(g). *See Lorenzen v. Chater*, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support the conclusion. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. *Johnson v. Chater*, 87 F.3d 1015, 1017 (8th Cir. 1996)(citations omitted). When evaluating contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's findings, this Court must affirm. *Orrick v. Sullivan*, 966 F.2d 368, 371 (8th Cir. 1992)(citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. *Wilcutts v. Apfel*, 143 F.3d 1134, 136-37 (8th Cir. 1998) citing *Brinker v. Weinberger*, 522 F.2d 13, 16 (8th Cir. 1975).

The regulations implementing the relevant portions of the Contract with America Advancement Act of 1996 and the Technical Amendments Relating to Drug Addicts and Alcoholics, Balanced Budget Act of 1997 are found at 20 C.F.R. § 416.935. *See Jackson v. Apfel*, 162

F.3d 533, 537 (8th Cir. 1998). The regulation states that the key factor in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether the claimant would still be found disabled if the claimant stopped using drugs or alcohol. Subsection 2 states:

> (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.
>
> ...
>
> (ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

A key issue in this case, therefore, is whether the ALJ's finding that "the claimant's alcohol dependency is a contributing factor to this determination of disability" is supported by substantial evidence on the record as a whole, and whether that finding is consistent with the above cited regulation. "A claimant has the initial burden of showing that alcoholism or drug addiction is not material to the finding of disability. *See Brown v. Apfel,* 192 F.3d 492, 497-98 (5th Cir. 1999), cited with approval in *Mittlestedt v. Apfel,* 204 F.3d 847, 852 (8th Cir. 2000)." *Pettit v. Apfel,* — F.3d —, No. 99-3311, slip op. at 3 (8th Cir. July 18, 2000). In this case, there is no doubt that Plaintiff suffers from very severe alcoholism. In addition, however, Plaintiff suffers from other severe impairments. The ALJ found, and the evidence supports, that Plaintiff also suffers from, among other things, chronic obstructive pulmonary disease, degenerative disc disease, and borderline intelligence. Dr. Poncy, who examined Plaintiff on August 22, 1996, wrote: "Unquestionably his largest degree of disability has to do with his breathing." As will

be shown below, because of Plaintiff's chronic obstructive pulmonary disease (COPD), he is limited to sedentary work. Furthermore, because Plaintiff is limited to sedentary work by the COPD, a finding of disability is appropriate based on that impairment alone. Therefore, the finding that alcoholism is a contributing factor material to the determination of disability is not supported by substantial evidence on the record as a whole. Plaintiff met his burden in this respect.

Plaintiff also met his burden of proving that he is unable to do his past relevant work. The ALJ found that Plaintiff is unable to do his past relevant work. The burden of proof, therefore, shifted to the Commissioner to prove with medical evidence that Plaintiff has a residual functional capacity to work, and that jobs exist that Plaintiff is able to perform. *Nevland v. Apfel, 204* F.3d 853, 857 (8th Cir. 2000) citing *McCoy v. Schweiker,* 683 F.2d 1138, 1146-47 (8th Cir. 1982)(en banc), and *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983); *Weiler v. Apfel,* 179 F.3d 1107, 1109 (8th Cir. 1999). *See also Singh v. Apfel*, — F.3d —, No. 99-2366 slip op. at 5 (8th Cir. June 20, 2000). There is only one piece of evidence in this record which speaks to Plaintiff's residual functional capacity as it relates to Plaintiff's COPD. On August 8, 1997, Dr. Poncy wrote that based on the examination of August 14, 1996, Plaintiff's major physical impairment was his breathing. Dr. Poncy also opined that due to Plaintiff's breathing impairment he would be limited to sedentary work. Dr. Poncy specifically stated that Plaintiff would not be able to do the standing or walking demanded of light work activity. The ALJ rejected Dr. Poncy's opinion because it was rendered a year after his examination and because "it was based largely on the claimant's description of his dysfunction." Tr. at 24. These are insufficient reasons. In the first place, a patient's report of complaints, or history, is an

essential diagnostic tool. *Flanery v. Chater*, 112 F.3d 346, 350 (8th Cir. 1997) citing *Brand v. Secretary of the Dep't of Health, Educ. And Welfare,* 623 F.2d 523, 526 (8th Cir. 1980), the *Flanery* Court continued: "[a]ny medical diagnosis must necessarily rely upon the patient's history and subjective complaints." In the second place, Dr. Poncy's opinion was based on his opinion of Plaintiff's condition at the time of his examination. In his August 14, 1996 report, Dr. Poncy stated that his opinion was based on his medical findings as well as on the history he had taken from Plaintiff. Absent any evidence that Plaintiff's COPD improved during the time between Dr. Poncy's examination and his 1997 letter, the Court finds that Plaintiff's residual functional capacity is no greater than sedentary work. In finding that Plaintiff has the residual functional capacity for light work, the ALJ relied on the reports of doctors who did not examine Plaintiff. Tr. at 24. It is well settled law that the opinions of physicians who do not examine the claimant do not constitute substantial evidence upon which to base a denial of benefits. *Nevland v. Apfel*, 204 F.3d 853, 858 (8th Cir. 2000). The finding that Plaintiff has a residual functional capacity for light work, therefore, is not supported by substantial evidence on the record as a whole.

In *McCoy v. Schweiker,* 683 F.2d at 1148, the Court wrote: "Where an individual has a combination of exertional and nonexertional impairments, the Guidelines are first considered to determine whether he is entitled to a finding of disability based on exertional impairments alone." Rule 201.10 provides that a claimant who is limited to sedentary work, who is between 50 and 54 years old, who has a limited or less education, who has past relevant work that was skilled or semi-skilled but who has no transferable skills, is entitled to a finding of disability.

Because substantial evidence on the record of this case supports a finding of disability, a

remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is entitled.

CONCLUSION AND DECISION

It is the holding of this Court that Commissioner's decision is not supported by substantial evidence on the record as a whole. The Court finds that the evidence in this record is transparently one sided against the Commissioner's decision. *See Bradley v. Bowen*, 660 F.Supp. 276, 279 (W.D. Arkansas 1987). The evidence in this record does not support a finding that alcoholism is a contributing factor material to a finding of disability. Substantial evidence supports a finding that Plaintiff is limited to sedentary work. Rule 201.10 of the Medical Vocational Guidelines requires a finding of disability. A remand to take additional evidence, therefore, would only delay the receipt of benefits to which Plaintiff is entitled.

Defendant's motion to remand the case to take additional evidence is denied. **This cause is remanded to the Commissioner for computation and payment of benefits.** The judgment to be entered will trigger the running of the time in which to file an application for attorney's fees under 28 U.S.C. § 2412 (d)(1)(B) (Equal Access to Justice Act). *See Shalala v. Schaefer*, 509 U.S. 292 (1993). *See also, McDannel v. Apfel*, 78 F.Supp.2d 944 (S.D. Iowa 1999).

IT IS SO ORDERED.

Dated this 19th day of July, 2000.

ROBERT W. PRATT
U.S. DISTRICT JUDGE