Judges Copy

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

PATRICK J. DITTERT,	*	
	*	4-99-CV-90200
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, Patrick J. Dittert, filed a Complaint in this Court on April 8, 1999, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, 1381 *et seq.* This Court may review a final decision by the Commissioner. 42 U.S.C. § 405(g). For the reasons set out herein, the decision of the Commissioner is reversed.

BACKGROUND

Plaintiff filed applications for benefits on January 9, 1998, claiming to be disabled since September 1, 1997. Tr. at 81-84 & 220-23. After the applications were denied initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. A hearing was held before Administrative Law Judge Jean M. Ingrassia (ALJ) on August 26, 1998. Tr. at 37-64. The ALJ issued a Notice of Decision – Unfavorable on September 25, 1998. Tr. at 11-25. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on March 6, 1999. Tr. At 5-7. Plaintiff filed his Complaint in this Court on April 8, 1999.

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MEDICAL EVIDENCE

According to a report written by Douglas R. Koontz, M.D. dated September 12, 1997, Plaintiff, then age 43, had a two or three month history of episodes of slurred speech and having large amounts of saliva with difficulty handling his secretions. Plaintiff reported feeling as if he was talking out of the sides of his mouth. He also complained of headaches and ringing in his ears accompanied by nausea and overall weakness, particularly noticeable in his left arm. Plaintiff's family physician, Ron McHose, D.O., who was concerned that Plaintiff may have had a stroke or some other type of vascular abnormality, ordered an MRI which was done September 8, 1997. The MRI revealed a 14mm left parasagittal meningioma in the frontal region of Plaintiff's brain. After the MRI, Dr. McHose referred Plaintiff to Dr. Koontz who wrote: "I might note that because of the location of the tumor, it is difficult to put all of his symptoms together with that. The patient is aware of that. I would also wonder about some type of seizure, although his symptoms don't really sound like that either." Dr. Koontz noted that Plaintiff's medical history was remarkable for testicular cancer for which he underwent surgery and radiation, a history of "lots of ankle surgery" and knee problems. Plaintiff had suffered a concussion about 18 months prior to the examination after he fell off a ladder. Tr. at 175. Dr. Koontz recommended craniotomy for removal of the meningioma and to see whether or not Plaintiff's symptoms improved. Tr. at 176. Plaintiff underwent the surgery September 16, 1997. Tr. at 165.

Plaintiff saw Dr. Koontz again on December 24, 1997. Plaintiff reported that his condition was about the same as before the surgery. He reported that after 45 minutes of activity, he "gets weak and tired" and that his ears start ringing. Plaintiff wife reported that Plaintiff occasionally slurred his speech, although the doctor did not notice it. On examination, Plaintiff was

bright and alert with no neurologic deficit. The incision was healed, and his gait was "okay". Dr. Koontz opined that Plaintiff was doing well from the craniotomy and that he could return to work as of January 5, 1998, with no lifting over 50 pounds and no heavy pushing, pulling, straining, or other such activities. Dr. Koontz recommended that Plaintiff see a neurologist and an ear, nose and throat physician about the slurred speech and about the ringing in the ears. Tr. at 171.

In a report dated April 6, 1998, Dr. McHose wrote that Plaintiff was having "increasing problems with tinnitus, generalized weakness, and easy fatiguability since his craniotomy". Dr. McHose concluded his report: "I do feel the patient is going to have great difficulty being employed with his limitations to date, including his chronic musculoskeletal problems as well as his aforementioned lack of stamina and fatigue with his mild to moderate sensation of unsteadiness." Tr. at 194.

Plaintiff was seen at the Veterans Administration Medical Center (VAMC) June 5, 1998. The report of this visit states: "He has experienced multiple symptoms which he feels make work improbable. These have included, fatigue, weakness, desire to stay in bed, episodic headaches, weakness in his service connected Right ankle injury, etc. His [unreadable] tinnitus was present prior to meningioma surgery. CTS show normal brain anatomy. We have discussed depression, organic brain syndrome and much more." Tr. at 199. Later in the report, the following is written:

> Patient is a former minister who had meningioma surgery 9 months ago. Since that time he has not returned to his prior level of activity.
>
> He and his wife who was his co-minister gave up their jobs 11/97 due to his tinnitus and their other physical ailments. They both state they have ongoing weakness, pains, etc. She has fibromyalgia.

> Today, patient talks about how he is chronically weak, fatigues easily, [unreadable] to stay in bed, feels guilty about not mowing his yard and more. He states at times his post traumatic right leg tends to give out on him. He still has a good appetite.
>
> We discussed the stress and fatigue that most Americans experience due to our rapid pace of life.
>
> We discussed brain surgery as being a major physical and life stress and that CNS nervous changes, including depression, often occur and persist up to a year later. We discussed depression as being an actual alteration in the neurotransmitter and electrical activity of the nervous system. We discussed St. Johns Wort, SSRIs[1], and Tricyclics.

Tr. at 205.

ADMINISTRATIVE HEARING

Plaintiff appeared and testified at a hearing on August 26, 1998. Tr. at 37-64. Plaintiff said his longest work had been at Woodward State Hospital as a security guard. In addition to doing a lot of walking to check doors, this job required him to assist in the security of unruly patients. Plaintiff said that he also "did investigations as far as abuse, neglect, accidents, just various number of things." After Plaintiff was laid off of the security guard job in November of 1995, he was recalled to a job as Maintenance Worker I in January of 1996 where he worked until September of 1997. Plaintiff said that as a maintenance worker he was required to do very heavy lifting. Tr. at 41. Plaintiff said that he quit his job with the hospital because of the onset of his symptoms of slurred words, headaches, an overall unwell feeling, and fatigue. Tr. at 42. Plaintiff said that his symptoms also caused him to give up his work as a pastor of a church, for which he did not receive any pay. Tr. at 48-49.

Plaintiff testified that he often wakes up with a headache, and ringing in his ears. On

1. Selective serotonin reuptake inhibitor. Neil M. Davis, Medical Abbreviations (8th Ed.)

those days, he has to take three naps a day. Tr. at 53. Plaintiff said that on most days he takes a 20 minute nap in the morning and an hour nap in the afternoon. Tr. at 55.

After Plaintiff testified, the ALJ called Marian Jacobs to testify as a vocational expert. The ALJ asked the following hypothetical question:

> Now, in reviewing his medical record, Dr. Koontz in December of '97, he's a surgeon who did the craniotomy. ... He indicated at that time in December of '97 ... that claimant was doing well and he recommended that the attempt to return to work as of January 5, of '98. And the restrictions that he gave him was no lifting more than 50 pounds, heavy pushing, pulling, straining, snow shoveling or plowing, heavy equipment operating or excessive lawn mowing. He says he does not have a significant problem with his ankle and he has been told to avoid manual labor. He doesn't give him any other restrictions in December of '97, although he does quote some of the restrictions that were given to him by Dr. Girdleman at VA, although he doesn't seem to basically support those restrictions, except for the fact that he should not engage in any repetitive walking on uneven surfaces or stairs. With those restrictions, would he be able to do his past work activity, just those from 1997?

Tr. at 58. In response, the vocational expert testified that such restrictions would allow for the performance of Plaintiff's past work as a security guard. However, when the ALJ added restrictions on Plaintiff's ability to stoop, climb, kneel, and crawl, the vocational expert said that Plaintiff's past work would all be precluded. Tr. at 59. Thereafter, the ALJ asked:

> If we take all of his conditions and combine them and we limit him to occasional lifting of 20 pounds, frequent lifting of 10 pounds, occasional climbing, balancing, stooping, kneeling, crouching, crawling, no manipulated visual or communicative or environmental limitations and basically accept the DDS functional assessment in Exhibit 8F, would he be able to perform any of his past work activities?

The vocational expert testified that Plaintiff could not perform any of his past work, but that he could do jobs such as data entry clerk (Tr. at 60), and lobby guard or gate guard. Tr. at 61. Other

jobs mentioned by the vocational expert were surveillance monitor, assembler of buttons and notions, labeler, and cafeteria attendant. Tr. at 62. Finally, the ALJ asked the vocational expert what effect Plaintiff's need to lie down three times per day would have on his ability to work, and the response was that such a restriction would eliminate the possibility of work. Tr. at 63.

In her decision of September 25, 1998, the ALJ, following the familiar five step sequential evaluation, found that Plaintiff has not engaged in substantial gainful activity since September 1, 1997. Tr. at 23. The ALJ found that the medical evidence establishes the following severe impairments: moderate post traumatic/post surgical arthritis in his right ankle, internal derangement of the left knee, status post meniscectomy, and symptoms of tinnitus, disequilibrium, dizziness, occasional slurred speech, and difficulty concentrating, status post meningiona resection/craniotomy in his brain. The ALJ found that Plaintiff's severe impairments do not meet or equal any impairments listed in Appendix 1 to Subpart P of the Social Security Administration's Regulations No. 4. Tr. at 30. The ALJ found that Plaintiff is unable to do his past relevant work (Tr. at 24), but that he:

> has the residual functional capacity to perform the physical exertional and nonexertional requirements of work except for lifting more than 20 pounds occasionally and 10 pounds frequently. He can sit, stand, or walk a maximum of six hours in an eight hour day, but should avoid walking on uneven surfaces, stairs, or for more than several hundred yards at a time. He can occasionally climb, balance, stoop, kneel, crouch, and crawl.

Tr. at 24. The ALJ found that Plaintiff's residual functional capacity allows him to perform the jobs identified by the vocational expert at the hearing. Therefore, the ALJ found that Plaintiff is not disabled, nor entitled to the benefits for which he applied. Tr. at 25.

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 ALJ found that Plaintiff is unable to return to his past work.. The burden of proof, therefore, was shifted from Plaintiff to the Commissioner to prove with medical evidence that Plaintiff has a residual functional capacity to do other kinds of work, and that other work exists in significant numbers that Plaintiff can 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). *See also Weiler v. Apfel,* 179 F.3d 1107, 1109 (8th Cir. 1999).

In the case at bar, the ALJ found that the severe impairments include "... difficulty concentrating, status post meningioma resection/craniotomy in his brain." In the opinion of the

Court, the ALJ's residual functional capacity finding, and the hypothetical which was based upon it, does not adequately capture the concrete consequences of Plaintiff's severe impairments. In *Fenton v. Apfel*, 149 F.3d 907, 912 (8th Cir. 1998), the Court, quoting *Roe v. Chater*, 92 F.3d 672, 676 (8th Cir. 1996), wrote: "The point of the hypothetical question is to clearly present to the VE a set of limitations that mirror those of the claimant." *See also Taylor v. Chater*, 118 F.3d 1274, 1277 (8th Cir. 1997) (Testimony from a vocational expert is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a claimant's deficiencies.) The concrete consequences of Plaintiff's mental impairment(s) include difficulty concentrating, chronic generalized weakness, easy fatigability, the desire to stay in bed, feelings of guilt, tinnitus, slurred speech, and headaches. It was error for the ALJ not to include these in the hypothetical.

Plaintiff has been consistent in his complaints of the aforementioned problems to his physicians. Although Dr. McHose and Dr. Koontz expressed uncertainty regarding the etiology of the complaints, neither doctor voiced any doubt about the veracity thereof. The best explanation for these complaints are found in the reports of the doctors at the VAMC who pointed to depression and/or organic brain syndrome (it should be remembered that in addition to his brain surgery, Plaintiff had recently fallen off a ladder and had suffered a concussion.)

When the need for rest periods was considered by the vocational expert in a follow-up hypothetical, the response was that no work would be possible. In *Ness v. Sullivan*, 904 F.2d 432, 436 (8th Cir. 1990), the Court wrote:

> We have "repeatedly held that vocational testimony elicited by hypothetical questions that fail to relate with precision the physical and mental impairments of the claimant cannot constitute substantial

> evidence to support the Secretary's decision." *Bradley v. Bowen*, 800 F.2d 760, 763 n. 2 (8th Cir.1986). The ALJ's failure to include rest periods in his hypotheticals forecloses the use of the vocational expert's testimony to support the Secretary's decision in this case.

Because the vocational expert testified that Plaintiff's fatigue renders him unemployable, and since the complaints of fatigue, as well as the other limitations, are well supported by the medical evidence, not only from the VAMC, but also by the other treating physicians including Dr. McHose (Tr. at 194) and Dr. Koontz (Tr. at 171), the Court sees no reason to remand this case for further development.

Where the evidence is transparently one sided against the Commissioner's decision, a remand to take further evidence is unnecessary. *Bradley v. Bowen*, 660 F.Supp 276, 279 (W.D. Arkansas 1987). *See also Gavin v. Heckler*, 811 F.2d 1195, 1201 (8th Cir. 1987) in which the Court wrote: "[W]here the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his disability by medical evidence on the record as a whole, we find no need to remand." The case, therefore, is reversed.

CONCLUSION

It is the holding of this Court that Commissioner's decision is not supported by substantial evidence on the record as a whole. The evidence in this record establishes that Plaintiff is unable to return to past relevant work and that, because of a combination of exertional and non-exertional impairments, he is unable to do his past relevant work or any other work that exists in significant numbers in the national economy. Therefore, Plaintiff is entitled to an award of disability benefits.

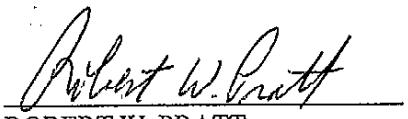
Defendant's motion to affirm the Commissioner is denied.

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), 1999 WL 1269143 (S.D. Iowa).

IT IS SO ORDERED.

Dated this 7th day of April, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE