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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

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

DEAN F. HERNANDES, SR.,	*	
	*	1-99-CV-90021
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, Dean F. Hernandes, Sr., filed a Complaint in this Court on April 15, 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 affirmed in part and reversed in part.

BACKGROUND

Plaintiff filed applications for benefits on July 12, 1996, claiming to be disabled since June 18, 1996[1]. Tr. at 176-78 & 344-47. 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 Jan E. Dutton (ALJ) on October 14, 1997. Tr. at 34-94. The hearing was reconvened on October 28, 1997. Tr. at 95-32. The ALJ issued a Notice of

1. Plaintiff filed previous applications on July 23, 1993 and April 28,1994. On these applications, Plaintiff claimed to have become disabled June 10, 1993. Since Plaintiff claimed an later onset of disability in his 1996 application, there is no issue of reopening to be discussed.

15

Decision – Unfavorable on November 28, 1997. Tr. at 16-31. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on February 24, 1999. Tr. At 7-10. Plaintiff filed his Complaint in this Court on April 15, 1999.

MEDICAL EVIDENCE

According to a report from R. Schulyer Gooding, M.D. dated August 2, 1993, Plaintiff was injured in a truck accident on July 21, 1985. Tr. at 480. Plaintiff was driving a "'82 cab over engine freightliner pulling a refer trailer which ran over an out of control Pontiac Fiero on a rain slick interstate highway ..." Tr. at 323. The truck fell over onto its left side and Plaintiff hit the left side of his body on the inside of the truck cab which resulted in problems with his left neck, left shoulder, and left arm. Dr. Gooding diagnosed C6-7 disc herniation as well as left carpal tunnel syndrome. The doctor stated that the problems with the neck and carpal tunnel syndrome were addressed surgically, but that extensive evaluation of the left shoulder, by two different orthopedic surgeons, did not identify anything more significant than some arthritis. Dr. Gooding wrote that shortly before Plaintiff was released from his care on August 28, 1987, Plaintiff was in a motorcycle accident which caused some recurrent discomfort in the neck and left shoulder. Tr. at 480-81.

Plaintiff was admitted to Jennie Edmundson Memorial Hospital October 16, 1985, and discharged October 27, 1985, for treatment of the injuries to his neck following the accident of July 21, 1985. Myelography showed a large left lateral C6-C7 root defect for which he underwent discectomy and fusion on October 23, 1985. At the time of discharge Plaintiff was "totally asymptomatic." Tr. at 322.

On April 28, 1986, Plaintiff underwent left carpal tunnel decompression. It was noted

that he had undergone a previous carpal tunnel decompression on December 11, 1985, but that he was having a recurrence of the symptoms. Tr. at 317-18.

An office note from James R. Rochelle, M.D., dated July 2, 1993, states that Plaintiff had injured his right knee when he slipped and hit it on a fuel tank on June 13, 1993. The doctor's diagnosis was a contusion of the right knee with an outside possibility of a torn lateral meniscus. Tr. at 477. An MR study of Plaintiff's right knee dated July 14, 1993, showed moderate joint effusion. There was postoperative changes consistent with a previous medial meniscectomy. Tr. at 478. On July 29, 1993, Dr. Rochelle stated that the MR showed a small grade I tear of the lateral meniscus which was "not clinically significant." Tr. at 477. When Plaintiff's pain did not improve, Dr. Rochelle elected to have Plaintiff undergo arthroscopic surgery. Tr. at 474. Plaintiff's surgery was done on April 15, 1994, at Mercy Hospital in Council Bluffs, Iowa. Tr. at 463-64. On April 19, 1994, Dr. Rochelle wrote that Plaintiff had recovered satisfactorily from the arthroscopy. Dr. Rochelle opined that prognosis for Plaintiff returning to work was "perhaps 60-70% probable with some possibility of not being able to do a lot of physical squatting and bending with his knee as he has done prior to this injury." Tr. at 474.

Plaintiff was admitted to Jennie Edmundson Hospital August 2, 1996, where he underwent "cervical discectomy and removal of osteophyte and herniated disc on the right and anterior interbody fusion of C5-C6." Tr. at 276. After the surgery, Plaintiff's pain subsided and he was discharged on August 4, 1996. Tr. at 273.

Plaintiff saw C. Kent Boese, M.D. on September 18, 1996 because of trouble with his left hip and right ankle. The doctor noted Plaintiff's history with the motor vehicle accident. About a year before the examination, Plaintiff fell down some stairs and injured his right ankle -- see

Tr. at 296 which is a treatment note from Dr. Rochelle indicating that Plaintiff sustained an inversion type of injury to his right foot and ankle on July 8, 1995. Dr. Boese reviewed x-rays:

> AV views of the left hip show narrowing of the lateral aspect of the joint space, some definite early degenerative arthritis there. On the right ankle he has osteophite formation on the anterior talar neck area, and also the posterior talus he has a little degenerative arthritis starting in that ankle also.

The doctor's diagnosis was "early degenerative arthritis of the left hip and right ankle. Dr. Boese concluded his report: "No restrictions pertaining to the left hip or right ankle." Tr. at 285.

On March 3, 1997, Behrouz Rassekh, M.D. wrote to Disability Determination Services that Plaintiff had undergone a cervical diskectomy and fusion of C5-C6 in August, 1996. The doctor wrote that he had last seen Plaintiff on September 26, 1996 at which time Plaintiff had "pain all over." Nevertheless, the doctor opined that as far as the cervical diskectomy and fusion was concerned, Plaintiff "could do an occupation which would not require repeated extension of the neck and working above the shoulders should be avoided. He should not lift over 60 pounds." Tr. at 286.

Plaintiff was seen for a psychiatric evaluation by Eugene C. Oliveto, M.D., a board certified psychiatrist, on March 19, 1997. Tr. at 289-92. Dr. Oliveto recited Plaintiff's history of injuries. Plaintiff complained of right knee and neck problems. Dr. Oliveto wrote:

> He claims Dr. Rassekh will not give him disability or say that he cannot work even though he is restricted in what he can do and he goes through a whole list of physical problems with me including his knees, his inability to bend down, his inability to turn his head, right ankle arthritis, sprains, and he also lets me know that he has two law suits pending for injuries on the job or in falls, and he really makes a strong case for being physically disabled.

Tr. at 289. On mental status examination, Plaintiff was described as:

> [A] 48 year-old white male who looks older than his stated age. He is darkly complected. He has a pony tail. He is balding in the front. He is 5'8" tall and weighs 233 pounds. He is in terrible physical condition. He has a very hoarse smokers voice. He has dirty clothes on, a pot belly, and a strong smell of nicotine and cigarette smoke on his body. His behavior is appropriate and attitude cooperative. Initially, he questioned why he had to see a psychiatrist because he does not believe he has any psychiatric problems.

Tr. at 290. Under the heading of psychiatric diagnosis, Dr. Oliveto wrote that there was no major psychiatric disorder present (Tr. at 291), and stated that there was "no work related disability due to any psychiatric or mental problems." Tr. at 292.

Plaintiff was seen by Dr. Rochelle for an orthopedic examination on April 4, 1997. Tr. at 293-94. After a physical examination, Dr. Rochelle offered the following opinion regarding Plaintiff's residual functional capacity:

> ORTHOPEDIC RESTRICTIONS: Standing and walking of no more than one to two hours per day. Lifting and carrying of no more than 20 pounds occasionally, no frequent lifting at all. Sitting is doubtful on a continuous basis, although he probably could function in an eight-hour capacity with a sitting job, provided that he is allowed to get up and move around periodically. He should do no frequent bending, stooping, squatting, crawling or kneeling, although he could do that activity occasionally.

Tr. at 294.

On May 14, 1997, Plaintiff saw Dr. Boese because of bilateral knee pain. X-rays of the knees showed a decrease in the medial joint space on the right knee with some early osteophyte formation and some patellofemoral arthrosis. The left knee showed some mild degenerative changes. The doctor stated that if Plaintiff continued to have problems, a high tibial osteotomy to re-align the leg might need to be considered. Tr. at 329. On June 11, 1997, after viewing long leg x-rays, Dr. Boese prescribed a quarter inch lateral heel wedge to shift the weight to the lateral

side. Tr. at 327. On July 9, 1997, Dr. Boese opined that Plaintiff could work if he could sit fifty percent of the time and stand or walk fifty percent of the time, and that he should lift no more than 10 pounds. Tr. at 326.

ADMINISTRATIVE HEARING

Plaintiff appeared and testified at a hearing on October 14, 1997. Tr. at 34-94. At the beginning of the hearing, the ALJ asked counsel what impairments were being alleged as severe. Counsel responded: "... cervical disk disease, arthritis right knee and ankle, and left hip, and shoulder." He also told the ALJ that no mental impairments were being alleged. Tr. at 39. Counsel also stated that bilateral carpel tunnel syndrome was alleged as a severe impairment. Tr. at 40. Plaintiff testified that he quit school in the tenth grade and earned a GED while in the Navy. Tr. at 42.

Plaintiff testified that he does not think he can do any type of work. He said that he can sit for a half hour after which he needs to get up and move. He said that he can stand for 45 minutes at a time. Plaintiff said that he is able to walk "maybe a block." When asked how much weight he can lift, he responded: "Probably about 15. I've got a small tool box at home and I can't even hardly pick it up." Tr. at 46. Plaintiff said that he is unable to bend, stoop, crawl or climb ladders because of his knees. Tr. at 47. He said that he is unable to lift over shoulder level because of arthritis in his left shoulder. Tr. at 47-48. Plaintiff said that the carpel tunnel syndrome left him with numbness and cramping in his left hand. Tr. at 48. Plaintiff testified that although his left shoulder was the worst, he was starting to have pain in his right shoulder as well. He said that because of his hips, if he sits too long his left leg goes numb. Tr. at 49. Plaintiff said that he has pain in his ankle because of gout. Tr. at 51. When asked to describe a

typical day, Plaintiff responded.

> Setting around, every now and then watch TV, go in and take a nap, go outside. Stretch my leg, go outside and walk for a little bit. Come back in and watch some more TV.

Plaintiff said that his daughters do all the cooking and cleaning at his house. Tr. at 53.

Plaintiff told the ALJ that he stopped working in 1996 because of the surgery on his neck. He said that he quit his job because of the pain he was having, and thereafter he had the surgery. Tr. at 55-56. Plaintiff told the ALJ that he had not noted improvement since the surgery on his neck. Tr. at 60.

Plaintiff told the ALJ that he had been required to undergo a vocational evaluation by the Iowa "Unemployment Office" in order to be eligible for welfare (see Tr. at 218-70), but that they did not think he should apply for jobs because of his medical condition. Tr. at 63.

After Plaintiff testified, the ALJ called Kathleen R. Lyons, to testify as a vocational expert. Tr. at 68. The ALJ asked the following hypothetical question:

> Now assume that I find the claimant was 47 years old at the age of onset and has a GED, general equivalency diploma, and I'm going to give you some exertional and non-exertional limitations and then ask you if he can perform his past relevant work. And those limitations would by that he could -- well first of all let me draw your attention if I could, to Exhibit 6F. If you have that, page two. And this is from Dr. Rochelle in April. Okay. And I'm going to slightly modify that in so far as the carrying goes because there is a July of '97 medical record that says he can carry up to 10 pounds. So looking at 6F I want to ask you if the claimant is – he's now 49 years old, and has a GED education, and assuming that he can lift and carry 20 pounds occasionally and 10 pounds frequently, that he would need to have a sit, stand option in the job, and that he was restricted to no frequent lifting and – or restricted to, excuse me, was restricted to limited overhead reaching. That he should avoid ladders and stairs and that he should avoid climbing or twisting. Would he be able to perform any of his past relevant work?

In response, the vocational expert testified that Plaintiff would not be able to do any of his past relevant work. Tr. at 76. The vocational expert was asked if Plaintiff possesses any transferable skills to which she responded:

> His transferrable skills would be an ability to operate a vehicle using his eyes, hands, and feet in coordination. A knowledge of the rules of the road and ability to follow them. He would also have a knowledge and understanding of various automobile parts. Those, those skills would transfer to sedentary and light truck driving positions and to sales of automobile parts.

Tr. at 77. Thereafter, the vocational expert identified several jobs in the light and sedentary exertional categories that could be done within the limitations of the ALJ's hypothetical. Tr. at 81-82. The vocational expert did not provide numbers from the Dictionary of Occupational Titles (DOT) or the skill level of the cited jobs. The vocational expert stated, however, that all of the cited jobs were either unskilled or at the low end of the semi-skilled range. Tr. at 84. When the ALJ asked the vocational expert to assume that Plaintiff's testimony were accepted as credible, the vocational expert testified that there would be no work in the national economy that Plaintiff could perform. Tr. at 85-86.

Because counsel asked for time to cross examine the vocational expert, and because there was another claimant waiting for a scheduled hearing, the ALJ adjourned the hearing and continued it on October 28, 1997. Tr. at 95-132. During this hearing, Plaintiff's counsel and the ALJ attempted to clarify the vocational expert's testimony regarding the jobs cited in response to the ALJ's hypothetical. At no time during the vocational expert's testimony was she asked to identify the DOT numbers of Plaintiff's past relevant work or any of the other cited jobs[2].

2. It is extremely helpful to a reviewing court when the vocational expert quotes DOT numbers for any jobs cited.

In her decision of November 28, 1997, the ALJ, following the familiar five step sequential evaluation, found that Plaintiff has not engaged in substantial gainful activity since June 18, 1996. The ALJ found that the medical evidence establishes the following severe impairments: degenerative disc disease; arthritis of the left hip and shoulder; arthritis of the right knee and ankle; and low back pain. 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 as a truck driver but that he has the residual functional capacity to occasionally lift 20 pounds and frequently lift up to 10 pounds, that he would need to alternate sitting and standing throughout the course of a workday, that he would be limited in his ability to perform overhead reaching and that he should not climb or twist. The ALJ found that Plaintiff's residual functional capacity allows him to perform a significant number of sedentary and light occupations which exist in significant numbers. Therefore, the ALJ found that Plaintiff is not disabled, nor entitled to the benefits for which he applied.

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 as a truck driver. 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*, — F.3d — (8th Cir. March 2, 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 stated that she was relying on the opinion of Dr. Rochelle for evidence to support her hypothetical question and residual functional capacity finding. Dr. Rochelle's opinion is found on page 294 of the transcript. The Court agrees with the ALJ that Dr. Rochelle's opinion should be relied upon to determine Plaintiff's residual functional capacity. The ALJ, however, both in the hypothetical and in the finding, neglected to include an important element of the doctor's opinion. The doctor stated: "Standing and walking of no more than one to two hours per day." Light work is defined, by the Commissioner's regulation, found at 20 C.F.R. 404.1567(b):

> 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.

Social Security Ruling 83-10 states that in order to do the frequent lifting involved in light work, "the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday." It is well settled law that the hypothetical must precisely set out the claimant's impairments and limitations. *Cox v. Apfel,* 160 F.3d 1203, 1207 (8th Cir. 1998). Because an essential difference between light and sedentary work, is that light work requires the ability to stand and walk six hours per day, it was error for the ALJ not to make clear to the vocational expert that Plaintiff was limited to standing and walking for only two hours per day. Since the medical opinion relied upon by the ALJ, limits Plaintiff to walking and standing of no more than one to two hours per day, he is limited to sedentary work.

There is another reason that Plaintiff is limited to sedentary work. Light work requires the ability to lift a maximum of 20 pounds and the ability to lift 10 pounds *frequently*. Dr. Rochelle opined that Plaintiff is limited to lifting a maximum of 20 pounds with "no *frequent* lifting at all." The ALJ stated that she modified that limitation because of the opinion expressed by Dr. Boese in July 9, 1997. Dr. Boese's opinion does not support a finding that Plaintiff is able to perform light work. What he actually said was that Plaintiff can not lift or carry more than 10 lbs." He did not say that Plaintiff could do that *frequently*. The ability to lift a maximum of 10 pounds is compatible with sedentary work but not light work. Neither doctor opined that Plaintiff can do any lifting or carrying on a *frequent* basis. Neither doctors' opinion, therefore, supports a finding that Plaintiff can do light work. Plaintiff is not able to do either the

standing and walking or the lifting required of light work activity as defined in the regulations. The evidence in this record is transparently clear that Plaintiff is limited to sedentary work.

The ALJ did not find that Plaintiff has any transferable skills, and the Court finds no evidence in this record to support such a finding. The vocational expert testified that Plaintiff had skills from past relevant work which would transfer to "sedentary and light truck driving positions", as well as to other kinds of work such as an automobile parts salesman. As will be shown below, the vocational expert's testimony that Plaintiff has transferable skills was flawed and the ALJ was correct to reject it.

In the first place, the vocational expert identified Plaintiff's "skills" as the "ability to operate a vehicle using his eyes, hands, and feet in coordination." As Judge Heaney pointed out in *Fines v. Apfel*, 149 F.3d 893, 896 (8th Cir. 1998), eye-hand-foot coordination are more appropriately classified as aptitudes or abilities rather than skills. Likewise, knowing how to follow rules of the road is an aptitude.

In the second place, the vocational expert testified that Plaintiff's knowledge of car parts gave him the skills to work as an automobile parts salesman, but she did not explain how driving a truck gave Plaintiff a knowledge and understanding of various automobile parts to enable him to do that kind of work in a competitive work environment. Simply because Plaintiff knows the difference between a lug nut and a fan belt doesn't mean that he has the skills to work as an automobile parts salesman which, according to the DOT, takes between three and six months to learn. In any event, a salesperson of automobile accessories is defined in the DOT as a light exertional job. *See* DOT code 273.357-030. Since Plaintiff is limited to sedentary work, he could not do that type of work even if he did have the required transferable skills.

Finally, the Court searched the DOT for any truck driving jobs which are classified as sedentary – to no avail. Driving, by it's very nature, because it requires the use of arm and leg controls, is a light exertional activity at a minimum[3]. When there is a conflict between the testimony of a vocational expert and the DOT, the DOT controls. *Smith v. Shalala*, 46 F.3d, 45, 46 (8th Cir. 1995).

Plaintiff, therefore, is limited to unskilled sedentary work. In *McCoy v. Schweiker*, 683 F.2d at 1148, the Court wrote that when a claimant has a combination of exertional and nonexertional limitations, the medical vocational guidelines are first considered to determine whether he is entitled to a finding of disability based on exertional impairments alone. In the case at bar, the medical vocational guidelines, rules 201.12 and 201.14 provide that Plaintiff is entitled to a finding of disability as of his 50th birthday. The existence unskilled sedentary work was established by the vocational expert. Thus, the Commissioner proved up both prongs of his burden for the period of time prior to Plaintiff's 50th birthday.

It is the Judgment of this Court, therefore, that as of September 27, 1998, Plaintiff is entitled to a finding of disability and that he is, as of that date, entitled to disability insurance benefits.

CONCLUSION

It is the holding of this Court that Commissioner's decision, insofar as it holds Plaintiff not disabled after age fifty, is not supported by substantial evidence on the record as a whole.

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3. One exception to this statement would be escort-vehicle driver, DOT code 919.663-022. This job, however, while it is classified as sedentary, is unskilled with an SVP of 2 which requires up to one month to learn. As will be shown below, because Plaintiff is limited to unskilled sedentary work, he is entitled to disability benefits after age 50.

See Bradley v. Bowen, 660 F.Supp. 276, 279 (W.D. Arkansas 1987). The evidence in this record establishes that Plaintiff is unable to return to past relevant work and that, because he is limited to sedentary unskilled work, after he attained the age of fifty he is entitled to a finding of disability as a matter of law. A remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is clearly entitled. Therefore, Plaintiff is entitled to an award of disability benefits.

Defendant's motion to affirm the Commissioner is granted for the period of time prior to Plaintiff's fiftieth birthday. For the period of time from and after Plaintiff's fiftieth birthday, however, the Commissioner's decision is reversed.

This cause is remanded to the Commissioner for computation and payment of benefits as of September 27, 1998.

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 20th day of March, 2000.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE