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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
DAVENPORT DIVISION

JUDGE THOMPSON,	*	
	*	3-99-CV-90103
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Plaintiff, Judge Thompson, filed a Complaint in this Court on June 4, 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). For the reasons set out herein, the decision of the Commissioner is reversed.

BACKGROUND

Plaintiff filed his application for benefits on August 7, 1995. Tr. at 141-47. After the application was denied initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law Judge. A hearing was held before Administrative Law Judge J. Michael Johnson (ALJ) on July 16, 1997. Tr. at 54-77. A supplemental hearing was held December 5, 1997. Tr. at 373-93. The ALJ issued a Notice of Decision – Unfavorable February 26, 1998. Tr. at 11-36. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on May 21, 1999. Tr. at 6-8. Plaintiff filed his Complaint in this Court on June

Copies to Counsel: 8-28-00
By:

Pleading # 11

4, 1999.

MEDICAL EVIDENCE

A Discharge Summary, dated November 3, 1993, from the Iowa Department of Corrections Medical and Classification Center Tr. at (189-200), states that Plaintiff began serving a ten year prison term for sexual abuse in the third degree April 1, 1988, with an expiration date of August 11, 1995. Plaintiff had been sent to the Center for pre-release evaluation and treatment.

> The Reformatory referral indicated the patient was sent to this facility for pre-release evaluation and treatment. Concern was also expressed in regard to his history of assaultiveness, as well as his being quite defensive about his offense and "other things", as well as his denial of such. In particular, he denied his sexual abuse and drinking problem.

Tr. at 189. At the time of admission, Plaintiff was wearing a back brace and complaining of back pain. Tr. at 189-90. Regarding the back pain, Curtis C. Fredrickson, M.D., staff psychiatrist, wrote:

> During the earlier part of Mr. Thompson's hospital stay this writer tried to work with him to get rid of his back brace, but when he started talking about contacting his attorney I had decided to go ahead and continue with and ordered him a new one. In the long run I think the back brace may actually make his muscles weaker. I do not think he actually has anything wrong with his back other than muscle tension and pain. He probably hopes to get back on disability or to get disability for back pain in the future. Studies done at University of Iowa Hospital and Clinics showed no nerve root impingement and only a little narrowing between two vertebra.

Dr. Fredrickson also noted that Plaintiff had been referred to the University of Iowa for examination of his heart because of complaints of chest pain. Examination of Plaintiff's coronary arteries was normal. Tr. at 193. Final diagnoses were:

Axis I: Alcohol abuse by history

Probable somatoform pain disorder
Axis II: Personality disorder NOS with antisocial, passive-aggressive and dependant traits
Borderline intellectual functioning
Rule out developmental learning disorder NOS
Axis III: Essentially healthy adult male with low back pain but related to his somatization disorder
Hyperlipidemia. This may be the only true physical problem he has.

Tr. at 193. (Diagnostic codes omitted.)

Plaintiff was seen at the multidisciplinary lung cancer clinic of the University of Iowa on January 17, 1994. Plaintiff underwent a CT scan in order for the doctors to determine if there was any change in a left lower lobe mass and anterior mediastinal mass which required surgical diagnosis. Tr. at 202. The CT scan revealed a small hamartoma in the anteromedial segment of the left lower lobe measuring 1.8 cm (unchanged since 1992 (Tr. at 205)), and a simple cyst in the left kidney and lateral segment of the left lobe of the liver. Tr. at 204. On April 21, 1994, Thomas J. Gross, M.D. wrote: Given the internal density changes consistent with fat, the hamartoma needs no further follow-up." Tr. at 205. On May 25, 1994, Plaintiff underwent an excisional biopsy of a left foot mass/ganglion cyst. Tr. at 210.

On January 24, 1995, Plaintiff was seen at the University of Iowa complaining of left chest pain with radiation. The pain was described as continuous, sharp and worsened with any left arm movement. The pain was felt to be due to the 1982 chest trauma. Tr. at 213. When he was seen at the University on January 31, 1995, for lower extremity claudication, John D. Corson, M.D. wrote: "There was adequate circulation to both lower extremities. We recommended that he quit smoking." Tr. at 217.

On June 2, 1995, Plaintiff was seen at the University for back and left shoulder pain.

Plaintiff complained "of continued lower back pain that radiates into his buttock, goes down to his legs and foot and all his toes on both feet. The arch in the front of his foot is also numb. When he pulls off his shoes his feet tingle. Both legs feel weak when he walks. No position makes it better for him. It is worse while standing still or walking long distances." Plaintiff said the shoulder pain often awakened him at night. The shoulder pain was felt to be due to an impingement. Plaintiff was given exercises for his shoulder, and was told to continue activity for his back. Tr. at 219. When seen at the vascular surgery clinic of the University on August 10, 1995, it was noted that Plaintiff was able to walk approximately one-half mile before pain developed in his legs. Tr. at 222.

After he was released from prison, Plaintiff was seen at Community Health Care, Inc, in Davenport, Iowa in order to obtain refills of medication previously prescribed. Tr. at 227-30.

Plaintiff was seen by Timothy J. Murphy, Ph.D. for a psychological evaluation on October 30, 1995. Tr. at 231-34. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), Plaintiff scored a verbal IQ of 63, a performance IQ of 55, and a full scale IQ of 55. All of these scores were in the mild mental retardation range. Tr. at 233. Dr. Murphy wrote that Plaintiff "appeared to make a conscious effort at dissimulation. His antisocial history is consistent with such an effort to 'fake bad' for purposes of secondary gain (i.e., obtain disability benefits)." Dr. Murphy opined that Plaintiff's cognitive functioning was somewhat higher than the IQ scores would indicate. "At a minimum, he should be able to understand, remember, and carry out short, simple instructions." Tr. at 234.

Plaintiff underwent an abdominal aortogram at the University of Iowa. Tr. at 248-50. This study showed an irregularity of the abdominal aorta consistent with atherosclerotic disease.

Tr. at 249. On February 28, 1996, Plaintiff underwent an angiogram and angioplasty of his left common iliac artery. Tr. at 245-47.

When Plaintiff was seen at Community Health Care on August 27, 1996, for recheck of his blood pressure, he denied drinking, but it was noted that he smelled of alcohol. Tr. at 252.

Plaintiff was seen for a psychiatric examination by D.V. Domingo, M.D. on October 1, 1996. Tr. at 255-57. Dr. Domingo wrote:

> The father was shot to death and the mother died of a heart attack. The father was an alcoholic. He has six brothers and four sisters. One sister and two brothers drink alcohol a lot and two sisters and three brothers are dead of a heart attack. As for schooling he doesn't know whether he finished the eighth grade or what. His grades were good in some subjects, they were bad in other subjects. He probably can't tell me much about his schooling. He can't read or write except to write his name only. Work history is spotty. He has worked in a foundry for two and one-half years in St. Paul, Minnesota and they fired him after he hurt his back. He used to work for a steel company melting iron for one year but it went out of business. He worked for an aluminum company for two and one-half years, was fired because he was in a car accident. He also worked spray painting and has done odd jobs and yard work.
>
> He was married once, divorced his wife when he caught her with another man. They had two children. He has three other children by another woman. He lives with a friend at this time and his friend is helping him. He gets food stamps.

Tr. at 256. After a mental status examination, in which it was noted that there was no odor of alcohol, Dr. Domingo's mental diagnoses were alcoholism in remission and mild mental retardation. *Id.* With regard to work related activities, Dr. Domingo opined: "... I would consider him very limited in his functioning. Because of his low I.Q. he might be able to [do] menial jobs under conditions of a very, very supportive employer. His ability to compete in the work place is very poor." Tr. at 257.

Plaintiff was seen for a comprehensive internal examination by S. Sachdev, M.D. on November 5, 1996. Tr. at 258-60. Plaintiff was described as a 42 year old man with complaints of low back pain, being hard of hearing in the right ear, bronchitis, dental problems, high blood pressure, arthritis and headaches and neck pains. Tr. at 258. Plaintiff told Dr. Sachdev that he smoked a half pack of cigarettes per day, and that he drank three cans of beer per day on a regular basis. Tr. at 259. After his physical examination, Dr. Sachdev opined that Plaintiff would be unable to do tasks involving walking more than a block at a time but that he has no problem sitting for prolonged periods. Tr. at 260.

Plaintiff was seen for another psychological evaluation by Juan A. Aquino, Ph.D., on April 15, 1997. Dr. Aquino reported that Plaintiff was nine years old when his father was killed. Plaintiff told Dr. Aquino that at one time he drank one-fifth of hard liquor per day and would often experience shakes upon withdrawal. At the time of the examination, Plaintiff said that he was drinking "a few beers" on weekends at home. On the WAIS-R, Plaintiff obtained a verbal IQ of 62, a performance IQ of 68, and a full scale IQ of 62. Dr. Aquino expressed concerns regarding the validity of Plaintiff's scores, stating that people with very low functioning score higher than Plaintiff did on several aspects of the test. Tr. at 266. Two administrations of the Ray 15 Item Test for the Detection of Malingering were consistent with a malingering type effort on Plaintiff's part. Dr. Aquino wrote that he suspected that Plaintiff was able to function at a higher level than his testing would indicate and that Plaintiff probably functions somewhere in the borderline range of intelligence. Tr. at 268.

Plaintiff was seen for a psychiatric examination by Cynthia E. Hoover, M.D. on April 30, 1997. Tr. at 272-76. After a review of Plaintiff's history, a clinical interview and mental status

examination, Dr. Hoover wrote:

> Judge Thompson is a 44-year-old divorced man who is not currently suffering from a significant psychiatric disorder. He has a history of bereavement over Mother's death and Dysthymia, low-grade depression felt secondary to his chronic pain. The client does not seem to have Somatization Disorder with his physical symptoms. His complaints have valid reasons documented in his medical records. Cognitively, the client has scored in the mild mental retardation range on IQ testing. He seemed to be functioning higher than that. However, he does have an eighth grade education and is illiterate. The illiteracy seems to be the major psychological/psychiatric factor that would prevent this gentleman from understanding complex instructions. Psychiatrically, the client seemed capable of understanding simple instructions. He did not seem to be exaggerating physical symptoms. There is some question whether he was faking things on the memory tests, as these responses were "off" much worse than his detailed job history. Socially, the client interacted appropriately and seemed capable of behaving fine with coworkers and the public.

Tr. at 275.

A hearing test, August 15, 1997 (Tr. at 312-14), showed "very mild bilateral flat sensori neural defecit." Tr. at 314. An eye test on August 28, 1997 (Tr. at 315-18), showed that Plaintiff has "very mild" cataracts. Tr. at 315. William J. Benevento, M.D. recommended over-the-counter reading glasses. Tr. at 316.

ADMINISTRATIVE HEARING

Plaintiff appeared and testified at an administrative hearing on July 16, 1997. Tr. at 54-77. When asked how much he can lift, Plaintiff responded: "Around about 10 pounds now." Tr. at 72. At the conclusion of the hearing, the ALJ announced that he would order the consultative eye and ear examination which were discussed in the paragraph above. Tr. at 75. The hearing reconvened December 5, 1997. Tr. at 373-93. Plaintiff testified that a month before the hearing,

he had gone to Mercy Hospital, and was given a sling in which to carry one of his arms[1]. Tr. at 376.

The ALJ called Roger F. Marquardt to testify as a vocational expert. Tr. at 380. The ALJ asked the following hypothetical question:

> Mr. Marquardt, as we were referring to the hypothetical, assume that we're talking about a male who, by regulatory definition, is a younger individual with a limited educational background, past relevant work as per Exhibit No. 38 (*see* Tr. at 311) and with the following impairments, and here we're talking about psychiatric/psychological difficulties variously identified to include dysthymia as well as multiple musculo-skeletal complaints to include the low back and (INAUDIBLE) peripheral vascular disease. Additionally, chronic obstructive pulmonary disease, ocular complaints with objective findings to include cataracts, bilateral hearing loss noted by general testing. Now, as a result of this combination of impairments, the medication or treatment prescribed, the claimant would have the physical and mental capacity to perform work-related activities except for the following. In that, a maximum lift would not exceed 10 pounds, a repeated maximum lift would also not exceed 10 pounds. Standing and walking during the course of an eight-hour day would not exceed a total of two hours. Environmental restrictions would include no exposure to extremes of heat, humidity, cold, dust or fumes beyond that which would be found in a commercial office. The pace of the work should be regular with provision for no fast paced work. The work itself should be simple, routine, repetitive (INAUDIBLE). Now based on these – this hypothetical, would the claimant be capable of past relevant work, either as he performed it or as it's generally performed in the national economy?

Tr. at 387-88. In response, the vocational expert testified that Plaintiff would be unable to do his past relevant work, would have no transferable skills, but that some sedentary unskilled work would be possible. Examples of the sedentary work were bench assembly work, hand mounter,

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1. Plaintiff was seen at Genesis Medical Center in Davenport, Iowa on October 31, 1997. Plaintiff complained of left shoulder pain that had been present for three weeks. A left shoulder x-ray was negative. Plaintiff was placed in a sling, given Darvocet, and ice for the pain. He was told to see Dr. Green the following Monday. Tr. at 336.

and taper in the electronic industry. Tr. at 388. On cross examination, the vocational expert testified that he had taken into account Plaintiff's limited education and his inability to read or write when identifying the unskilled jobs. Tr. at 389-90. The ALJ asked the vocational expert to consider the need to alternate standing and sitting, essentially at will, and to occasionally be afforded a slow pace. The vocational expert said that these factors would eliminate competitive work. Tr. at 389. The vocational expert also testified that if Plaintiff were seriously limited in his ability to demonstrate reliability[2], competitive work would not be possible. Tr. at 391.

ADMINISTRATIVE DECISION

In his decision, dated February 26, 1998, the ALJ, following the familiar five step sequential evaluation, found that Plaintiff had not engaged in substantial gainful activity since August 7, 1995. The ALJ found that Plaintiff's severe impairments are peripheral vascular disease, status post angioplasty of the common iliac artery, hypertension, complaints of pain in the lower back and legs, chronic obstructive pulmonary disease, dysthymia, possible borderline intellectual functioning, and a history of alcohol abuse. The ALJ found that none of these impairments, alone or in combination, meet or equal a listed impairment. The ALJ found that Plaintiff is unable to do his past relevant work. The ALJ found that Plaintiff has the residual functional capacity to lift 10 pounds occasionally or frequently, that he can stand or walk no more than two hours a day with no climbing, that he should not be exposed to concentrated heat, cold dust or fumes, and that he should do no more than regular paced work. The ALJ found that Plaintiff has a marginal education and is functionally illiterate. The ALJ found that Plaintiff is able to do the

2. Dr. Aquino identified this limitation when he completed a Medical Assessment Of Ability To Do Work-Related Activities (Mental) which was appended to his report. Tr. at 270.

types of work identified by the vocational expert at the hearing. Tr. at 30. The ALJ found that Plaintiff is not disabled nor entitled to the benefits for which he applied. Tr. at 31.

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. Schwei-ker*, 710 F.2d 1334, 1338 (8th Cir. 1983). *See also Cunningham v. Apfel,* — F.3d —, No. 99-2984 slip op. (8th Cir. August 4, 2000) at page 7, citing *Nevland.*

In the case at bar, the ALJ's residual functional capacity finding is supported by the medical evidence in the record including the opinion expressed by Dr. Sachdev after his examination on November 5, 1996. It is also supported by Plaintiff's own testimony that he is able to lift ten pounds. Not one doctor in this record expressed an opinion that Plaintiff would be unable to work or instructed Plaintiff that he should limit his work activity. Furthermore, the Court finds that the mental aspects of the ALJ's residual functional capacity finding are supported by the opinions of the psychologists and psychiatrists who examined Plaintiff. It is the holding of this Court that the Commissioner met his burden of proving that Plaintiff has a residual functional capacity for sedentary unskilled work activity.

In addition to proving that Plaintiff has a residual functional capacity, the Commissioner must also prove that jobs exist in significant numbers that Plaintiff is able to do. In *McCoy v. Schweiker*, 683 F.2d at 1148, the court wrote: "If 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." In the case at bar, Plaintiff is physically and mentally limited to sedentary unskilled work. Plaintiff, at the time of the ALJ's decision, was 45 years old. Plaintiff is also functionally illiterate. The introduction to the Guidelines at 20 C.F.R. Appendix 2 to Subpart P § 200.00 (h) states:

> The term *younger individual* is used to denote an individual age 18 through 49. For those within this group who are age 45-49, age is a less positive factor than for those who are age 18-44. Accordingly, for such individuals; (1) who are restricted to sedentary work, (2) who are unskilled **or have no transferable work skills,** (3) who have no relevant past work or who can no longer perform vocationally relevant past work, and (4) who are either illiterate or unable to communicate in the English language, a finding of disabled is warranted....

(Bold emphasis added.) *See Holtz v. Apfel*, 191 F.3d 945, 947 (8th Cir. 1999). In the case at bar, unlike in *Holtz*, there is no question that Plaintiff is illiterate. Therefore, under the Commissioner's interpretation of his regulations, a finding of disability is appropriate.

The ALJ found that alcoholism is a contributing factor material to the determination of disability. Tr. at 31. It is the holding of this Court that this finding is not supported by substantial evidence on the record as a whole. 20 C.F.R. § 404.1535 (a) provides that a determination of whether alcoholism is material to the determination of disability is begun if the Commissioner has "medical evidence of your drug addiction or alcoholism." In the case at bar, there is no medical evidence that Plaintiff is an alcoholic. Dr. Hoover diagnosed "alcohol abuse, most serious in the 1980s." Tr. at 274. Dr. Aquino diagnosed "alcohol dependence in partial remission." Tr. at 267. S. Sachdev, M.D., in a list of 10 diagnoses, listed as number 6 "alcohol use." Tr. at 260. Dr. Domingo diagnosed "alcoholism, in remission." Tr. at 256. There is no evidence in this record that Plaintiff was ever admitted to a hospital for treatment of alcoholism. There is no evidence in this record that after his discharge from the Iowa Department of Corrections, that Plaintiff was arrested or had any legal difficulties due to alcoholism. Thus, the Court can find no medical or other evidence that Plaintiff is an alcoholic. Even assuming, arguendo, that Plaintiff is an alcoholic, the key factor in determining whether drug addiction or alcoholism is material to a determination of disability is whether the claimant would still be found disabled if he or she stopped using alcohol. *Pettit v. Apfel*, 218 F.3d 901, 902 (8th Cir. 2000). If Plaintiff stopped drinking, he would not have a residual functional capacity for more than sedentary work. If he stopped drinking, he would still be illiterate. And, if he stopped drinking, he would still be between 45 and 50 years of age. In other words, whether or not Plaintiff drinks alcohol,

he still meets the criteria for finding of disability as set forth in 20 C.F.R. Appendix 2 to Subpart P § 200.00 (h). Alcoholism, therefore, is not a contributing factor material to the determination of disability. As of his 45th birthday, Plaintiff is entitled to a finding of disability.

The Court has considered the remainder of Plaintiff's arguments and finds them to be without merit. The ALJ found that Plaintiff has borderline intellectual functioning. That finding is supported by all of the psychological evidence in this record. Although Plaintiff consistently scored in the mildly mentally retarded range on IQ tests, all of the psychologists opined that his actual ability to function was in the borderline range. The ALJ did not err by failing to find that Plaintiff meets or equals a listed impairment. Likewise, the ALJ did not err by failing to order additional psychological evaluations, as Plaintiff argued.

CONCLUSION

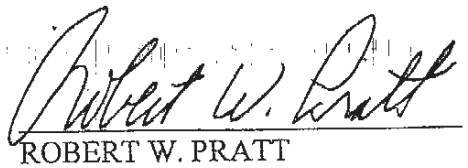
It is the holding of this Court that Commissioner's decision is not supported by substantial evidence on the record as a whole. The Court finds that the evidence in this record is transparently one sided against the Commissioner's decision. *See Bradley v. Bowen*, 660 F.Supp. 276, 279 (W.D. Arkansas 1987). At the time of the administrative hearing, Plaintiff was 45 years old and limited to sedentary unskilled work. The ALJ found that Plaintiff is illiterate. A finding of disability, therefore, is appropriate. The ALJ's 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. A remand to take additional evidence would only delay the receipt of benefits to which Plaintiff is entitled.

Defendant's motion to affirm the Commissioner's final decision 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 28th day of August, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE