

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS S. BUSH : CIVIL ACTION  
 :  
v. :  
 :  
KENNETH S. APFEL, :  
Commissioner of the Social Security :  
Administration : NO. 99-2209

**MEMORANDUM AND ORDER**

BECHTLE, J. MARCH , 2000

Presently before the court are plaintiff Thomas S. Bush's ("Plaintiff") Objections to the Magistrate Judge's Report and Recommendation. For the reasons set forth below, the court will approve and adopt the Report and Recommendation.

**I. BACKGROUND**

This is a judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying Plaintiff's claim for disability insurance benefits ("DIB") under Title II of the Social Security Act (the "Act").

Plaintiff was born on July 8, 1943. (R. 72.) Plaintiff received a high school education and was employed by the City of Philadelphia as a truck driver and heavy equipment operator. (R. 143.) Following a 1992 work related injury to his back, Plaintiff was assigned to the job of night watchman. (R. 143.) Plaintiff held the position of night watchman for two and one-

half years. (R. 54.) Plaintiff began receiving disability retirement benefits from the City in February 1995. (R. 37-38 & 81-83.) Plaintiff filed an application for DIB on March 31, 1995, alleging a disability that began February 17, 1995 due to lower back problems, arthritis and high blood pressure. (R. 81-83 & 131-38.) This application was denied initially and upon reconsideration. (R. 85-87 & 99-101.) On October 1, 1997, an Administrative Law Judge ("ALJ") held a hearing on Plaintiff's claim. On March 9, 1998, the ALJ denied Plaintiff's DIB application. The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on February 17, 1995, the date the claimant stated he became unable to work, and continues to meet them through December 31, 2000.
2. The claimant has not engaged in substantial gainful activity since February 17, 1995.
3. The medical evidence establishes that the claimant has severe status-post adhesive capsulitis of the right shoulder with a right rotator cuff tear with associated decreased range of motion of the right upper extremity; diverticulosis of the colon, hypertension, and degenerative joint disease and degenerative disc disease with associated strain of the lumbosacral spine with accompanying pain, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, subpart P Regulations No. 4.
4. I find the claimant's testimony generally credible except regarding the extent to which his impairments affect his functional abilities.
5. The claimant has the residual functional capacity to perform work related activities except for work involving lifting weights in excess of 20 pounds, engaging in more than a good deal of standing and

walking, engaging in tasks which would not allow him to alternate positions once hourly, and engaging in tasks requiring fine manual dexterity. Furthermore, the claimant could not engage in activities requiring overhead reaching. (20 C.F.R. 404.1545).

6. The claimant's past relevant work as a night watchman did not require the performance of work related activities precluded by the above limitations. (20 C.F.R. 404.1565).
7. The claimant's impairments do not prevent the claimant from performing his past relevant work.
8. The claimant was not under a "disability" as defined in the Social Security Act at any time through the date of the decision (20 C.F.R. 404.1520(e)).

(R. 17-18.) In his October 29, 1999 Report and Recommendation, the Magistrate Judge found that substantial evidence existed to support the ALJ's findings and recommended that the court grant the Commissioner's motion for summary judgment. On November 13, 1999, Plaintiff filed Objections to the Magistrate Judge's Report and Recommendation.

## **II. LEGAL STANDARD**

Judicial review of administrative decisions is limited. The court may not re-weigh the evidence. The court determines only whether the Commissioner's decision is supported by substantial evidence. Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kangas v. Bowen, 823 F.2d

775, 777 (3d Cir. 1987). Findings of fact made by an ALJ must be accepted as conclusive, provided that they are supported by substantial evidence. 42 U.S.C. § 405(g). In reviewing a decision of the ALJ, the court "need[s] from the ALJ not only an expression of the evidence s/he considered which supports the result, but also some indication of the evidence which was rejected." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981) (remanding case back to Secretary of Health and Human Services where ALJ failed to explain implicit rejection of expert medical testimony that was probative and supportive of disability claimant's position). The Third Circuit has recognized that "there is a particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record." Id. at 706. The court reviews de novo the portions of the Magistrate Judge's Report and Recommendation to which objections are filed. 28 U.S.C. § 636(b)(1)(C).

### **III. DISCUSSION**

To receive disability insurance benefits, a claimant must show that he or she is unable to:

engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . . [The impairment must be so severe that the claimant] is not only unable to do his previous work but

cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. §§ 423(d)(1)(A) & (d)(2)(A).

An ALJ considering a claim for disability insurance benefits undertakes the five-step sequential evaluation of disability claims set forth in 20 C.F.R. § 404.1520. Under Step One, if the claimant is working and the work constitutes substantial gainful activity, the ALJ must find that the claimant is not disabled regardless of medical condition, age, education or work experience. 20 C.F.R. § 404.1520(b). Under Step Two, the ALJ determines whether the claimant has a severe impairment which significantly limits his or her physical or mental ability to do basic work activity. 20 C.F.R. § 404.1520(c). Under Step Three, the ALJ must determine whether the claimant's impairment meets or equals the criteria for a listed impairment as set forth in 20 C.F.R. pt. 404, subpt. 4, Appendix 1. 20 C.F.R. § 404.1520(d). Under Step Four, if the ALJ finds that the claimant retains the residual functional capacity to perform past relevant work, the claimant will not be found to be disabled. 20 C.F.R. § 404.1520(e). Under Step Five, other factors, including the claimant's residual functional capacity, age, education and past work experience must be considered to determine if the claimant can perform other work in the national economy. 20 C.F.R. § 404.1520(f).

In his Objections to the Magistrate Judge's Report and Recommendation, Plaintiff asserts three errors. First, Plaintiff contends that the ALJ failed to make adequate findings regarding the requirements of Plaintiff's past work as a night watchman. Second, Plaintiff argues that the ALJ's determination of Plaintiff's residual functional capacity ("RFC") is inconsistent with the ALJ's determination that Plaintiff is able to perform his past work as a night watchman. Third, Plaintiff asserts that the ALJ failed to consider the implications of Plaintiff's disability retirement.

The first two objections center on Plaintiff's assertion that because the ALJ determined that Plaintiff needs to change positions hourly, Plaintiff cannot perform his past work as a night watchman. To support this assertion, Plaintiff first contends that the ALJ failed to make specific findings regarding the demands of Plaintiff's past work as a night watchman. Plaintiff then argues that substantial evidence does not support the conclusion that Plaintiff's previous job could be performed by someone who needs to change positions every hour. Thus, Plaintiff argues that the ALJ's determination of Plaintiff's RFC is inconsistent with the ALJ's determination that Plaintiff is able to perform his past work.

Plaintiff contends that the ALJ erred by failing to make specific findings regarding the demands of Plaintiff's past work as a night watchman. Plaintiff argues that the ALJ failed to

comply with Social Security Ruling 82-62 which states:

In finding that an individual has the capacity to perform a past relevant job, the determination must contain among the findings the following specific findings of fact:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Social Security Ruling 82-62, Titles II and XVI: A Disability Claimant's Capacity to Do Past Relevant Work, In General, 1982 WL 31386 (S.S.A. 1982) ("SSR 82-62"). Plaintiff asserts that the ALJ failed to comply with the second requirement.

In his decision, the ALJ concluded that given Plaintiff's RFC, he was able to perform his past work as a night watchman. In rendering this decision, the ALJ found that Plaintiff's work as a night watchman was "sedentary as he performed it and as it is generally performed in the national and regional economies, and would allow [Plaintiff] to alternate positions hourly. Additionally, [the position] did not require fine manual dexterity nor overhead reaching." (R. 17.)<sup>1</sup>

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<sup>1</sup> Social Security regulations define sedentary work as: [involving] 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). Further, "'[o]ccasionally' means occurring from very little up to  
(continued...)

During the administrative hearing, Plaintiff testified that his job as a night watchman consisted of sitting, answering phones, and watching people. (R. 52-53.) Likewise, the record reflects that Plaintiff informed his treatment provider, Dr. Perez-Schwartz, who examined Plaintiff on March 3, 1994, that his job as a night watchman consisted mostly of answering the telephone. (R. 165-66.)

A Vocational Expert ("VE") also testified that Plaintiff's past work as a night watchman would be classified as sedentary and unskilled. (R. 59-61.) The ALJ posed the following hypothetical question to the VE:

Assume an individual approaching advanced age, high school education, work history as described. Without regarding any testimony, I'm going to ask for light jobs, or must be able to alternate between sitting and standing as needed, and a 10 pound weight limitation on lifting and carrying. No over head reaching . . . no bending, pushing, pulling, level surfaces. Fine manual dexterity is not required.

(R. 59-60.) The VE responded that such an individual could

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<sup>1</sup>(...continued)

one-third of the time" and "periods of standing or walking should generally total no more than about two hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday" for the sedentary level of work. Social Security Ruling (S.S.R. 83-10), 1983 WL 31251, at \*4 (S.S.A. 1983); 20 C.F.R. § 404.1567(a). In this case, the ALJ found that Plaintiff has the "residual functional capacity to perform work related activities except for work involving lifting weights in excess of 20 pounds, engaging in more than a good deal of standing and walking, engaging in tasks which would not allow him to alternate positions once hourly, and engaging in tasks requiring fine manual dexterity. Furthermore, the claimant could not engage in activities requiring overhead reaching." (R. 17-18.)

perform work in a number of different positions that exist in significant numbers in the economy. (R. 60.) The ALJ then asked the VE to add additional limiting factors, based on Plaintiff's testimony that he was unable to sit or stand for more than five minutes, and could walk two blocks within five minutes.<sup>2</sup> The VE opined that such an individual could still work as a night watchman, an unarmed position. (R. 62.) Thus, the court concludes that the ALJ made adequate findings regarding the requirements of Plaintiff's past work as a night watchman.<sup>3</sup>

Plaintiff next asserts that the ALJ's determination that Plaintiff needs to change positions hourly is inconsistent with the ALJ's conclusion that Plaintiff can perform his past work as a night watchman. Plaintiff contends that no evidence supports

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<sup>2</sup> The ALJ concluded, however, that Plaintiff's testimony was "generally credible except regarding the extent to which his impairments affect his functional abilities." (R. 17-18.)

<sup>3</sup> "The burden is on the claimant to show that [his] impairment renders [him] unable to perform [his past relevant] work." Henrie v. United States Dep't of Health & Human Servs., 13 F.3d 359, 360 (10th Cir. 1993). Here, unlike Henrie, 13 F.3d at 361, the ALJ had information about the demands of plaintiff's past job, as well as information about his physical capabilities. After review of the record, the court is satisfied that the ALJ fully developed the record with respect to the demands of plaintiff's past relevant work through questioning of the plaintiff and through the vocational expert's testimony. See Webster v. Chater, 96 F.3d 1454 (10th Cir. 1996) (slip. op. at \*\*2, available at 1996 WL 494315) (finding ALJ fully developed record where claimant and vocational expert testified about claimant's past work). Further, the court "emphasize[s] that it is not the ALJ's duty to be the claimant's advocate. Rather, the duty is one of inquiry and factual development. The claimant continues to bear the ultimate burden of proving that he is disabled under the regulations." Henrie, 13 F.3d at 361.

the ALJ's determination that Plaintiff's night watchman job permitted him to change positions hourly. Plaintiff does not deny that substantial evidence supports the ALJ's assessment of Plaintiff's RFC. Nor does Plaintiff deny that he is capable of performing a sedentary job with a sit/stand option.

In support of his assertion that his past job as a night watchman did not allow him to change positions hourly, Plaintiff points to Social Security Ruling 83-12. The ruling states that:

There are some jobs in the national economy--typically professional and managerial ones--in which a person can sit or stand with a degree of choice. If an individual has such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work process which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In case of unusual limitation of ability to sit or stand, a VS [vocational specialist] should be consulted to clarify the implications for the occupational base.

SSR 83-12, 1983 WL 31253, at \*4 (SSA).

However, as the Magistrate Judge observed, this ruling does not preclude the ALJ from finding that a claimant is capable of performing sedentary work with a sit-stand option. See Rose v. Chater, No. CIV.A.94-4421, 1995 WL 365404, at \*3 (E.D. Pa. June 15, 1995) (stating "we do not think the ruling is intended . . . to mandate a finding that no work exists in the national economy for an unskilled worker who requires a sedentary job with a sit-stand option. In fact, such an interpretation is directly

contradicted by the . . . [sentence] which states: 'In cases of unusual limitation of ability to sit or stand, a VS (vocational specialist) should be consulted to clarify the implications for the occupational base.'"); Ellis v. Shalala, No. CIV.A.90-6620, 1994 WL 372079, at \*7 (E.D. Pa. July 11, 1994) (stating that "the Ruling clearly does not mandate a determination that a claimant who requires a sit-stand option is unable to perform any sedentary work").

As stated above, the ALJ determined that Plaintiff's "past work as a night watchman was sedentary as he performed it and as it is generally performed in the national and local economies, and would allow him to alternate positions hourly." (R. 17.)<sup>4</sup>

During the administrative hearing, Plaintiff stated that he stood up and walked around during the course of his shift. (R. 52.) In a disability report dated March 31, 1995, Plaintiff indicated that in performing his job as a night watchman, he "walked around and checked the area." (R. 135.)<sup>5</sup> Further, the

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<sup>4</sup> The court notes that Plaintiff proffered no evidence that he was unable to change positions in his job as a night watchman.

<sup>5</sup> The court notes that Plaintiff's representations as to the requirements of his job as a night watchman vacillate dramatically and are diametrically opposed. In documents dated November 30, 1994 and March 31, 1995, Plaintiff alleged that his job required seven hours of walking and one hour of sitting during a typical day. (R. 144.) However, on April 14, 1995, Plaintiff asserted that his job required "8 or more" hours of walking, "8 or more" hours of sitting, and "8 or more" hours of standing during a typical day. (R. 151.) At the administrative

(continued...)

VE testified that an individual who needed to alternate between sitting and standing would not only be able to perform Plaintiff's former job as a night watchman, but would also be able to perform work in a number of different positions that exist in significant numbers in the economy. (R. 59-60 & 62.) The court finds that substantial evidence exists to support the ALJ's finding that Plaintiff's past work as a night watchman would allow Plaintiff to alternate positions hourly.

Third, Plaintiff asserts that the ALJ failed to consider the implications of the determination of Plaintiff's disability made by the City of Philadelphia. Initially, the court notes that the City of Philadelphia's determination is not binding on the Commissioner. 20 C.F.R. §§ 404.1504 & 404.1527(e).<sup>6</sup> The ALJ must, however, evaluate the underlying medical findings made pursuant to such a disability determination. Coria v. Heckler, 750 F.2d 245, 248 (3d Cir. 1984).

Plaintiff does not contest the fact that the ALJ's determination of Plaintiff's RFC is supported by substantial

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<sup>5</sup>(...continued)  
hearing, Plaintiff testified that his job as a night watchman consisted of sitting eight hours per day. (R. 52-53.)

<sup>6</sup> Under 20 C.F.R. § 404.1504, "A decision by any nongovernmental agency or any other governmental agency about whether you are disabled or blind is based on its rules and is not our decision about whether you are disabled or blind. We must make a disability or blindness determination based on social security law. Therefore, a determination made by another agency that you are disabled or blind is not binding on us." 20 C.F.R. § 404.1504.

evidence. Plaintiff merely contends that the ALJ failed to consider the implications of the City's determination that Plaintiff was entitled to disability retirement. The record shows that Plaintiff's argument is without merit.

During the administrative hearing, the ALJ questioned the plaintiff about his disability determination. (R. 38, 52 & 54.)<sup>7</sup> The ALJ evaluated the underlying medical findings made by treatment providers and consultative examiners and concluded that Plaintiff's condition did not preclude him from performing his duties as a night watchman. (R. 14-17.)<sup>8</sup> Further, the City of Philadelphia's disability determination was based in part on the

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<sup>7</sup> The ALJ asked Plaintiff what the basis for his disability retirement from the City was, and the Plaintiff responded that his disability retirement was based on "arthritis and high blood pressure." (R. 38.) The Plaintiff stated that he did not monitor his blood pressure. (R. 38.) Plaintiff's attorney stated that there was no recent blood pressure reading, and that the latest was taken in April 1997. (R. 54.) Plaintiff stated that he took blood pressure medication. (R. 55.) Plaintiff told the ALJ that his arthritis affected his arm, legs, back and neck. (R. 38.) Plaintiff stated that he took Motrin or Tylenol to control pain. (R. 54.)

<sup>8</sup> For example, progress notes from the Medical College of Pennsylvania indicated that Plaintiff could stand four to five hours, sit six to eight hours, and walk two to three hours. (R. 173.) An MRI and x-ray of Plaintiff's back were essentially normal. (R. 161-62 & 191.) Dr. Casey, an orthopaedic surgeon, recommended that Plaintiff perform a more sedentary job. (R. 159.) Dr. Ritner released Plaintiff to sedentary duty. (R. 160.) Dr. Klinghoffer concluded that Plaintiff was precluded from performing heavy work which required frequent bending and lifting in excess of thirty pounds. (R. 172.) Likewise, Dr. Nosheny, the consultive examiner, opined that Plaintiff could perform sedentary to light work with a sit-stand option. (R. 261.) Finally, several physicians opined that Plaintiff was a symptom magnifier and not motivated to return to his prior employment. (R. 167, 171 & 178.)

findings of Dr. Michael Annabi, and, although Dr. Annabi stated that Plaintiff should be considered for disability, he subsequently reported that Plaintiff did not have any limitations on his ability to perform work related activities. (R. 194-96.) Additionally, the City's disability form indicated that Plaintiff's condition "[did] not totally and permanently disable [him] from performing any work whatsoever with or without the service of the City." (R. 196.) The court finds that the ALJ properly evaluated the underlying medical findings made pursuant to the City's disability determination.

### **III. CONCLUSION**

Based upon the foregoing reasons, the Magistrate Judge's Report and Recommendation shall be approved and adopted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS S. BUSH : CIVIL ACTION  
 :  
v. :  
 :  
KENNETH S. APFEL, :  
Commissioner of the :  
Social Security Administration : NO. 99-2209

ORDER

AND NOW, TO WIT, this            day of March, 2000,  
upon consideration of plaintiff Thomas S. Bush's and defendant  
Kenneth S. Apfel, Commissioner of the Social Security  
Administration's cross-motions for summary judgment, and after  
careful review of the Report and Recommendation of United States  
Magistrate Judge Thomas J. Rueter and the Objections thereto, IT  
IS ORDERED that:

1. the Report and Recommendation is APPROVED and ADOPTED;
  2. plaintiff Thomas S. Bush's motion for summary  
judgment is DENIED; and
  3. defendant Kenneth S. Apfel, Commissioner of the  
Social Security Administration's motion for summary  
judgment is GRANTED. Judgment is entered in favor of  
defendant Kenneth S. Apfel, Commissioner of the Social  
Security Administration and against plaintiff Thomas S.  
Bush.
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LOUIS C. BECHTLE, J.