

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

JOSEPH MCCULLEN, : CIVIL ACTION
Plaintiff :
v. :
KENNETH S. APFEL, :
Commissioner of Social Security :
Defendant : NO. 99-4424

Memorandum and Order

Norma L. Shapiro, S.J.

January 5, 2001

Claimant, Joseph McCullen, seeks judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying his claim for disability insurance benefits under sections 216(I) and 223 of the Social Security Act. The parties filed cross motions for summary judgment.

Claimant, born July 28, 1934, was 60 years old when he stopped working in 1994. He had worked as a steamfitter since 1959; a steamfitter or pipefitter is classified as heavy skilled employment (Tr. 27). He claimed disability as of November 1, 1994 because of tricep tendinitis of the right elbow and bilateral knee pain.

After initial and reconsideration denials, the claimant filed a request for hearing that was held on December 18, 1997, and attended by claimant, his attorney and a vocational expert. The Administrative Law Judge found:

" 1. The claimant met the disability insured status requirements of the Act as of November 1, 1994. He remained fully insured up through December 31, 1998.

2. The claimant has not engaged in substantial gainful activity since November 1, 1994.

3. The medical evidence establishes that the claimant has triceps tendinitis of the right elbow, left knee pain and low back 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. Pursuant to SSR-96-3p, the claimant's impairment(s) is "non-severe" as it does not functionally limit his ability to do basic work

activities (20 CFR 404.1520, 416.920, or 416.924).

4. I find the claimant to be credible to the extent that the medical evidence substantiates the allegations of impairment.

5. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520 (f))." (Tr. 19).

Although the ALJ found the claimant to be credible to the extent that the medical evidence substantiates the allegation of impairment and the medical evidence establishes the claimant "has triceps tendinitis of the right elbow, left knee pain and low back pain," the Administrative Law Judge found claimant does not have a listed impairment or combination of impairments. The ALJ also found claimant's impairment is "non-severe" because it does not functionally limit his ability to do basic work activities "such as concentrating on tasks, or in working on a sustained basis."

The problem is there is no evidence whatsoever to support the finding that claimant is able to do basic work; the testimony of the Vocational Expert is to the contrary.

There is no finding whether claimant is able to perform his past relevant work as required by SSR 86-5; See SSR 85-28. His past relevant work is consistently classified as heavy, skilled employment but the ALJ found him able to do "basic work activities" that would permit light or medium work at the most. If plaintiff is unable to perform past relevant work, it reflects on whether his impairment is non-severe, 20 CFR § 404.1562.¹

1. §404.1562 If you have done only arduous unskilled physical labor.

If you have only a marginal education and work experience of 35 years or more during which you did arduous unskilled physical labor, and you are not working and are no longer able to do this kind of work because of a severe impairment(s), we will consider you unable to do lighter work, and therefore, disabled. However, if you are working or have worked despite your impairment(s) (except where the work is sporadic or is not medically advisable), we will review all the facts in your case, and we may find that you are not disabled. In addition, we will consider that you are not disabled if the evidence shows that you have training or past work experience which enables you to do

Claimant's situation is remarkably similar to example "B."

The failure of the Administrative Law Judge to consider and make a finding on whether plaintiff can perform the duties of his past relevant work requires remand to the Commissioner for reconsideration under the five-step evaluation process, even if plaintiff's impairments do not meet the listing under Appendix 1 of the Regulations, 20 CFR § 404.1520.

Claimant's motion for summary judgment will be denied and defendant's motion for summary judgment will be denied. The claimant's objection to the Report and Recommendation of the Magistrate Judge is sustained; accordingly, the Report and Recommendation of the Magistrate Judge will not be approved and the matter will be remanded to the Commissioner to complete the five-step sequential evaluation process required under the regulations.

An appropriate Order follows.

substantial gainful activity in another occupation with your impairment, either on a full-time or a reasonably regular part-time basis.

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ORDER

AND NOW, this 5th day of January 2001, upon consideration of the pleadings and the record herein, and after review of the Report and Recommendation of United States Magistrate Judge Sandra Moore Wells, it is hereby **ORDERED** that:

2. The Report and Recommendation is **NOT APPROVED**. The case is **REMANDED** to the Commissioner of Social Security for action commensurate with the foregoing opinion.

3. Plaintiff's Motion for Summary Judgment is **DENIED**.

4. Defendant's Motion for Summary Judgment is **DENIED**.

S.J.