

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

MICHAEL VERSACE : CIVIL ACTION
: :
v. : :
: :
JO ANNE B. BARNHART : No. 01-3909

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 14, 2002

Michael Versace ("Versace" or "Plaintiff"), filing this action pursuant to 42 U.S.C. § 405(g), appealed the final decision of the Commissioner of Social Security ("the Commissioner"), who had denied his claims for Disability and Insurance Benefits ("DIB") under Title II of the Social Security Act. Versace and the Commissioner both moved for summary judgment; these motions were referred to Chief Magistrate Judge James R. Melinson ("Judge Melinson") for a Report and Recommendation ("R&R"). Judge Melinson recommended granting the plaintiff's motion and remanding to the Commissioner for further proceedings. After consideration of the pleadings and briefs, including the plaintiff's objection to the R&R, the report will be approved, but the recommendation to grant the plaintiff's motion for summary judgment will not be adopted. The court will remand this case to the Commissioner to: (1) consider evidence of nonexertional limitations; and (2) explain why Versace's testimony was discredited.

I. **Background**¹

On September 19, 1995, Versace filed an application for DIB. Versace claimed he had been disabled since May 8, 1993, by a

¹Facts taken from Judge Melinson's R&R.

herniated disc and chronic hepatitis C. Plaintiff's date of last insurance for entitlement to DIB was December 31, 1993. His claim was denied initially and on reconsideration. Versace filed a timely request for a hearing before an Administrative Law Judge ("ALJ"). On September 19, 1997, the ALJ conducted a hearing at which he received testimony from Versace, who was represented by counsel. The ALJ denied Versace's claims for benefits on December 15, 1997. Versace filed a timely request for review by the Appeals Council. On June 30, 1999, the Appeals Council remanded the matter for the ALJ to give full consideration to the treating neurologist's report and to reconsider Versace's testimony.

On September 8, 1999, the ALJ held a second administrative hearing. The ALJ received testimony from Versace, who was represented by new counsel, and again denied Versace's claims for benefits. Versace filed a timely request for review which was denied by the Appeals Council on June 15, 2001, so that the ALJ's decision became the final decision of the Commissioner.

Having exhausted administrative remedies, Versace filed a complaint with this court for review of the Commissioner's final decision denying benefits. Versace claims that the ALJ: (1) failed to consider the actual demands of his past relevant work in finding that he retained the ability to return to it; (2) failed to find that he was limited to sedentary work; (3) improperly rejected the 1995 and 1997 opinions of his treating physician ("Dr. Winer"); (4) failed to contact Dr. Winer to obtain clarification of his reports; and (5) failed to find his testimony credible.

Judge Melinson in his R&R found that: (1) Versace's first contention that the ALJ erred in finding that he could not return to his past work was an inaccurate statement of the ALJ's decision; (2) substantial evidence supported the ALJ's decision

not to assign controlling weight to Dr. Winer's 1995 and 1997 opinions; (3) it was not error for the ALJ to find that Versace was not limited to sedentary work; (4) the ALJ erred in failing to discuss objective evidence of nonexertional limitations found by Versace's treating doctors and therapists; and (5) since the ALJ failed to discuss evidence of nonexertional limitations, the court could not determine whether the ALJ gave appropriate weight to Versace's alleged limitations. Judge Melinson recommended that the plaintiff's motion be granted and the case remanded to the Commissioner to clarify whether the ALJ properly considered evidence of Versace's nonexertional limitations and restrictions, in sitting, standing, various postural movements, and Versace's subjective complaints.

Plaintiff, objecting to the R&R, contends that: (1) Judge Melinson incorrectly found that the ALJ's rejection of Dr. Winer's opinion was supported by substantial evidence; (2) the ALJ's improper rejection of Dr. Winer's opinion requires that the Commissioner's decision be reversed with instructions to calculate and award benefits.

II. Discussion

A. Standard of Review

Under the medical-vocational regulations promulgated by the Commissioner, a five-step sequential evaluation is used to evaluate disability claims.² To satisfy this burden, the

² The five steps are:

1. If claimant is working in a substantial and gainful activity, a finding on not disabled is directed. If not, proceed to Step 2.
2. If claimant does not have any impairment or combination of impairments which significantly limit the claimant's physical or mental ability to do basic work activities, a finding of not disabled is directed. If there is a severe impairment, proceed to Step 3.
3. If the impairment meets or equals criteria for a listed impairment(s) in Appendix 1 of Subpart P of Part 404 of 20 C.F.R., a finding of disabled is directed. If not, proceed to Step 5.

claimant must show an inability to return to his former work. If the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs existing in the economy. See Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

Judicial review of the Commissioner's final decision is limited, and this court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. See Fargnoli v. Halter, 247 F.3d 34, 38 (3d Cir. 2001). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support decision. Id at 38.

Despite the deference to administrative decisions implied by this standard, the court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). The court reviews de novo the parts of the Magistrate Judge's Report and Recommendation to which Versace objects. 28 U.S.C. § 636(b)(1)(C)(2001).

B. Versace's Objections

Versace first argues that substantial evidence did not support the ALJ's rejection of Dr. Winer's report because objective medical evidence supports the report. A treating physician's medical opinion is to be given controlling weight

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4. If claimant retains the residual functional capacity to perform past relevant work, a finding of not disabled is directed. If not, proceed to Step 4.
 5. The Commissioner will then consider the claimant's residual functional capacity, age, education, and past work experience in conjunction with the criteria listed in Appendix 2 to determine if the claimant is or is not disabled.

20 C.F.R. §§ 404.1520(b)-(f)

when it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence" in the claimant's case record." 20 C.F.R. § 404.1527(d)(2). The "ALJ may reject a treating physician's opinion on the basis of contradictory medical evidence, and may afford a medical opinion more or less weight depending upon the degree to which supporting explanations are provided and whether the treating doctor is a specialist." Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988); 20 C.F.R. § 404.1527(d). However, the ALJ must reject a "treating physician's opinion only on the basis of contradictory medical evidence" as opposed to his or her own credibility judgments, speculation or lay opinion. Plummer v. Apfel, 186 F.3d at 429.

According to Versace, Dr. Winer's 1995 assessment was supported by a 1992 EMG report. The ALJ did not discuss this report in his opinion. However, the ALJ is not required to discuss every medical record; he need only explain his evaluation of the relevant medical evidence. See Weier v. Heckler, 734 F.2d 955, 963 (3d Cir. 1984). Judge Melinson correctly found that although the ALJ did not discuss the 1992 EMG report, the omission does not constitute reversible error because the rest of the evidence, including a 1992 nerve conduction study, supports the ALJ's conclusion.

Versace also argues that the ALJ erred in finding Dr. Winer's report inconsistent with the record because the ALJ mistakenly attributed Versace's physical therapist's report to Dr. Winer. (Tr. 128-135). The ALJ's error does not constitute reversible error because, as with the omission of the EMG report, the remaining evidence also supports the ALJ's conclusion.

The ALJ specifically rejected, as inconsistent with the record, Dr. Winer's 1997 conclusion that Versace was only capable of four hours of work each day since 1989. The ALJ reason's were

that: (1) Dr. Winer found no neurological deficits during the relevant time period; (2) in January 31, 1990, a physical therapist stated that Versace was walking up to two miles a day; (3) in January, 1991, a Healthmark physician found Versace capable of lifting up to twenty pounds; (4) in July, 1991, Dr. Winer noted that Versace was exercising and walking a mile per day despite his low back pain; (5) Dr. Rucker and other Healthmark physicians reported from 1990 through 1993, that Versace was able to return to light duty work. R&R at 13. Contradictory medical evidence supported the ALJ's decision to reject Dr. Winer's opinion.

The ALJ did not err in finding that Versace was not limited to sedentary work. The record supports a finding that Versace was able to lift up to twenty pounds and walk one to two miles, which is consistent with the requirements of light work under the regulations. See 20 C.F.R. § 404.1567(b).

However, the ALJ failed to discuss findings by Versace's treating doctors and therapists, of various environmental restrictions and nonexertional physical limitations, significantly impairing Versace's ability to perform the full range of light work.

In October, 1989, Versace's physicians and therapists recommended that, due to his liver impairment, Versace should avoid exposure to pesticides, solvents, and chemicals. An inability to work with chemicals, solvents, or pesticides is considered a nonexertional restriction limiting the ability to perform certain jobs. See § 404.1571(d); Social Security Ruling ("SSR") 83-14. From the date of Versace's accident, Versace's physicians also found that Versace had other nonexertional physical limitations. Versace's physical therapists performed a functional capacity assessment which determined Versace was limited to only occasional performance of the following

movements: bending, stooping, squatting, crawling, crouching, kneeling, reaching, and balancing.

The ALJ may accept or reject parts of the evidence, but he must give a reason for discounting the evidence he rejects. See Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994). Since the ALJ did not discuss evidence of nonexertional physical and environmental limitations, the court cannot determine whether the ALJ properly discounted: (1) probative evidence of nonexertional limitations; and (2) Versace's testimony.

If the ALJ credits evidence of nonexertional limitations, he must consider whether Versace's alleged limitations are supported by this evidence. The ALJ must not solely rely upon the Grids to determine whether Versace is disabled. See 20 C.F.R., Pt. 404, Subpt. P, App. 2 § 200.00(e)(2) (stating that where a claimant's characteristics do not fit neatly into the Grids, the Grids must be relied upon only as a framework in considering whether the claimant's functional capacity is diminished by the nonexertional limitations). The ALJ should obtain testimony from a vocational expert to determine whether Versace is capable of performing other jobs which allow for nonexertional limitations.³

Since the ALJ failed to discuss objective evidence of Versace's nonexertional limitations, this court cannot determine whether the ALJ properly considered evidence of nonexertional limitations, and if the ALJ gave appropriate weight to Versace's testimony. The matter will be remanded to the Commissioner for further consideration.

³ Any hypothetical questions posed to the vocational expert must accurately portray Versace's physical impairments. See Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir.). If the question posed is unsupported by the record, it will be deficient. Id.

III. **Conclusion**

Versace's objection, that substantial evidence did not support the ALJ's rejection of Dr. Winer's opinion, will be overruled. There is no basis for reversing the Commissioner's decision with instructions to calculate and award benefits. The Report of the Magistrate Judge will be approved, but the Recommendation to grant the Plaintiff's Motion for Summary Judgment will be denied, the action will be remanded to the Commissioner for further proceedings consistent with this Memorandum.

An appropriate order follows.

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ORDER

AND NOW, this 14th day of August, 2002, upon careful consideration of the Magistrate Judge's Report and Recommendation and Plaintiff's Objections thereto, and upon independent review of the Cross Motions for Summary Judgment filed by the parties,

It is **ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation of Magistrate Judge Melinson (#12) are **OVERRULED**.
2. The Report of Chief Magistrate Judge Melinson (#11) is **APPROVED**, but the Recommendation is not **ADOPTED**.
3. Plaintiff's Motion for Summary Judgment (#7) is **DENIED**.
4. Defendant's Motion for Summary Judgment (#8) is **DENIED**.
5. The decision of the Commissioner denying disability and insurance benefits to Plaintiff is **REVERSED** and the action is **REMANDED** to the Commissioner for further proceedings consistent with this memorandum.

Norma L. Shapiro, S.J.

