

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

STANLEY WISE, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
JO ANNE B. BARNHART,¹ :
Commissioner of the Social Security :
Administration, :
Defendant : NO. 01-4949

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

May 5, 2003

This action was filed under 42 U.S.C. §§ 405(g) and 1383(c), for review of the final decision of the defendant Commissioner of Social Security ("Commissioner") denying Stanley Wise's claim for disability insurance benefits ("DIB") and supplemental security income ("SSI") under Titles II and XVI of the Social Security Act ("Act"). Before the court are cross-motions for summary judgment. After de novo consideration of the Report and Recommendation ("R & R") of Magistrate Judge Carol Sandra Moore Wells, to whom the motions were referred, and plaintiff's objections thereto, this action will be remanded for reconsideration of the credibility of Wise's complaints of pain and revaluation of whether Wise is capable of employment.

¹Jo Anne B. Barnhart became the Commissioner of Social Security, effective November 14, 2001; thus, she is substituted as defendant under Fed. R. Civ. P. 25(d)(1).

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND²

A. Procedural History

On February 26, 1999, plaintiff applied for DIB and SSI benefits; he claimed that, beginning in February, 1999, he was disabled because of back pain, diabetes, hypertension and poor vision. His applications were denied initially and on reconsideration. He requested a hearing before an Administrative Law Judge ("ALJ") at which he was represented by counsel. A Vocational Expert ("VE"), Terrance Walsh, also testified before the ALJ.

On September 12, 2000, the ALJ found that plaintiff was not disabled under the Act. (R. 10-20). Having employed the five-step sequential evaluation process provided in the Social Security Regulations, the ALJ concluded that plaintiff was unable to perform his prior heavy work, but had the residual functional capacity³ to perform sedentary work, available at significant levels in the national economy. Plaintiff's request for review was denied by the Appeals Council on July 30, 2001; the ALJ's unfavorable decision became the final decision of the Commissioner. (R. 3-4). Seeking a reversal of the ALJ's decision, or alternatively, remand, plaintiff filed this action

²Adopted in part from the comprehensive overview of the facts contained in Judge Wells' R&R.

³Residual functional capacity refers to what one can do in a work setting notwithstanding limitations. See 20 C.F.R. §§ 404.1545(a), 416.945(a).

for judicial review. Cross-motions for summary judgment were referred to Magistrate Judge Wells, who recommended that defendant's motion for summary judgment be granted; plaintiff has filed objections to the R&R.

B. Factual Background and Medical History

Plaintiff was born on December 2, 1955,⁴ and has a twelfth-grade education. He testified that, prior to 1987, he was employed as a warehouse worker for Bests; from 1987 until 1992, Wise served as a warehouse worker for Avery Foods where he loaded trucks, stacked boxes and operated a forklift. Often, he lifted between 50 and 100 pounds, and at times, lifted as many as 500 items in two hours. Since 1992, plaintiff has not maintained steady employment.

Plaintiff stated that, while lifting a box in 1989, he "heard a pop, [then] felt the pop in [his] back and [his] ribs, and [thereafter] couldn't move." (R. 44). He was taken by ambulance to a hospital, where he was treated and released. He never had surgery, though plaintiff said he wears a back brace prescribed by Dr. Patterson and carries a cane prescribed by Dr. Berkowitz. Plaintiff refuses to take "narcotics" for his pain; but takes Motrin and Tylenol. (R. 46).

In addition to alleged disabling back problems, plaintiff was diagnosed with diabetes mellitus and hypertension in 1997.

⁴Under Social Security Regulations, he is considered a "younger person" because he is less than 50 years old. 20 C.F.R. § 416.1563(c).

He testified he experiences pain in his legs, back and both sides of his hips. He has fluctuating sugar levels causing poor circulation. Both the diabetes and hypertension are managed with medication. Plaintiff takes 40 units of insulin twice daily which, he admitted, basically control his blood sugar. Plaintiff also stated that his hypertension and blood pressure are "pretty much normal" when he takes his medication.

In May, 1999, plaintiff had an eye examination at the Philadelphia Vision Center. Treatment notes indicate a history of diabetes mellitus, with plaintiff's condition as "stable," and that Wise was prescribed new lenses. (R. 181). At the hearing, plaintiff demonstrated that he "can not read up close," but "can see far sight pretty good." (R. 42). Though he wears glasses, he did not wear them during the hearing because he claimed the lenses had come out.

Persistent infection resulted in the amputation of the first and second toes on plaintiff's left foot in September, 1999. (R. 159-60).

On a typical day, plaintiff testified that he experiences pain from morning until night and that he spends most of his time sitting in bed or on the couch. He said that his girlfriend helps him bathe, dress and cook but that he has no difficulty "handling things." (R. 50). He is able to walk half a block, stand for about ten minutes, sit just a little longer (so long as

able to shift positions), and lift up to ten pounds. Plaintiff also said he is able to take public transportation, and has a history of marijuana and cocaine use, though he denies smoking cigarettes. Regarding pain, plaintiff stated, "I can't lay one way. I lay. I fall asleep. I doze off. I wake up. You know, I twist, I turn. I can't lay in one place. I get up. I try to move around. It hurts when I stand up. It hurts when I sit down. I, I just hurt all the time," (R. 48).

From August, 1999, through January, 2000, plaintiff saw Dr. David Pashman, an orthopedist, for back pain. Dr. Pashman noted that plaintiff had a "hyporeflexic ankle and knee jerk" and straight-leg tests in the sitting and supine positions caused pain at seventy-five degrees, but opined that he "was able to walk well on heels and toes." (R. 176). He also administered a Patrick's Test to determine the existence of arthritis which was "equivocally positive" on the right side. (Id.). An August, 1999, x-ray showed advanced discogenic disease at the L3-4 disc space (R. 177) and a November, 1999 MRI revealed "significant disc space narrowing" caused by degenerative disc disease. (R. 172). Dr. Pashman prescribed a "back support," Tylenol with codeine, and Relafen, used to treat osteoarthritis and rheumatoid arthritis.

C. Medical Assessments

On April 23, 1999, Dr. Ralph Smith, Jr., M.D., evaluated

plaintiff on behalf of the Commissioner.⁵ He diagnosed diabetes mellitus, hypertension and "chronic low back disease (r/o disc herniation, by history)." (R.129-30). Regarding flexibility and use of extremities, Dr. Smith concluded that plaintiff had "full range of motion and good strength throughout." (R. 130).

Less than one month later, on May 13, 1999, Dr. Gerald A. Gryczko, M.D., completed a residual functional capacity ("RFC") assessment on behalf of the agency.⁶ The RFC concluded that plaintiff could frequently lift 25 pounds, occasionally lift up to 50 pounds, stand/walk for about six hours, sit for about six hours and push or pull without limitation. (R. 132). Thus, plaintiff had the capacity to engage in "medium work," which "involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 416.1567(c). "If someone can do medium work, we determine that he or she can also do sedentary and light work." Id.

Finally, Dr. John D. Chiampi, Ph.D., completed a Psychiatric Review technique form on May 14, 1999. He found that plaintiff was not sufficiently depressed to meet any listing under Section 12.00. He concluded plaintiff's condition caused minimal limitations on daily life, social functioning and concentration.

⁵Dr. Smith's examination took place before plaintiff underwent the amputation of his two toes in September, 1999.

⁶Like Dr. Smith's exam, this exam also took place before the amputation.

(R. 144, 144, 145).

D. Vocational Testimony

VE Terrance Walsh testified before the ALJ regarding the existence of jobs in the national and local economies that a person of plaintiff's age, education and physical limitations could perform. Walsh characterized plaintiff's warehouse work as "unskilled labor" that was "heavy and very heavy" in nature. (R. 54). In response to questioning by the ALJ, Walsh testified that a sedentary person, experiencing no additional limitations, could work as: a transit clerk (1,500 jobs locally and 13,750 jobs nationally); a security clerk (1,200 jobs locally and 158,700 jobs nationally); or, an information clerk (2,800 jobs locally and 123,900 jobs nationally). (Id.). Walsh then stated that a sedentary person who "could climb stairs only occasionally; who has balance problems; who need[s] to carry a cane or a walker; whose bending is restricted; who would have a slight limitation in handling; who required glasses; and who may require fifteen minute" breaks, (R. 57), could perform the three aforementioned jobs so long as the fifteen-minute breaks were arranged. Should such a person be required to stay home for a half day, three times per week, the VE said, no jobs would be available.

II. STANDARD OF REVIEW

The court's review of the Commissioner's decision is limited to determining whether the Commissioner applied the correct legal

standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact. See Schaudeck v. Commissioner of Social Sec. Admin., 181 F.3d 429, 431 (3d Cir. 1999).

The Court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. Substantial evidence does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court cannot conduct de novo review of the Commissioner's decision or re-weigh the evidence of record.

Allen v. Barnhart, 2003 U.S. Dist. LEXIS 4489, at *11 (E.D. Pa. Feb 11, 2003) (Padova, J.) (internal citations omitted). The court will review de novo those portions of the Magistrate Judge's R&R to which plaintiff has filed objections. See 28 U.S.C. § 636(b)(1). The court may accept, reject or modify, in whole or in part, the findings and recommendations made.

III. DISCUSSION

Under the Social Security Act, a person is "disabled" for the purpose of SSI eligibility if she or he 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 twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §§ 404.1505(a) and 416.905(a). The applicant carries the initial burden of proving disability.

Id. at 423(d)(5). When he establishes an inability to perform prior work, the burden shifts to the Commissioner to show that the claimant can perform other substantial gainful work existing in the national economy. See Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999).

The regulations under the Act establish a five-step sequential evaluation process that the Commissioner, through the ALJ, must employ when reviewing an application for disability benefits. See 20 C.F.R. § 416.920. The ALJ must consider, in sequence, whether a claimant: (1) is working and the work is considered substantial gainful activity within the meaning of the Act; (2) has a severe impairment or combination of impairments which significantly limits the ability (physical or mental) to do basic work activities; (3) has an impairment(s) which meets or equals an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1; (4) is prevented by the impairment(s) from doing past relevant work; and (5) is prevented by the impairment(s) from doing any other work which exists in the national economy. 20 C.F.R. § 416.920; see also Olsen v. Schweiker, 703 F.2d 751, 753 (3d Cir. 1983). If a definitive disability determination can be reached at any stage of the evaluation, further inquiry is unnecessary. 20 C.F.R. § 416.920(a).

In making the determination that plaintiff retained the residual functional capacity to perform sedentary work, the ALJ

had to consider and evaluate plaintiff's subjective complaints of pain. Plaintiff testified he experiences pain from morning until night and that he spends most of his time sitting in bed or on the couch. He said that his girlfriend helps him bathe, dress and cook but that he has no difficulty "handling things." (R. 50). He is able to walk half a block, stand for about ten minutes, sit a little longer without shifting his position, and lift up to ten pounds. Plaintiff also said he is able to take public transportation. Though plaintiff refuses to take "narcotics" for the pain he experiences, preferring Motrin or Tylenol, he said he had smoked marijuana and used cocaine.

Plaintiff argues Judge Wells incorrectly concluded that the ALJ's determination was supported by substantial evidence because the ALJ ignored competent medical evidence when he discredited plaintiff's testimony concerning the level of pain he was experiencing and decided plaintiff's pain was not a disabling factor. In addition, the ALJ's determination regarding pain as a disabling factor was not supported by substantial evidence, so the plaintiff contends the ALJ's RFC assessment, based in part on the effects of pain on the plaintiff, was also not supported by the evidence.

"An ALJ must give serious consideration to a plaintiff's subjective complaints of pain, even where those complaints are not supported by objective evidence. While there must be

objective evidence of some condition that could reasonably produce pain, there need not be objective evidence of the pain itself." Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993) (internal citations omitted). When plaintiff has a condition which could reasonably produce the pain alleged, but the pain that the claimant complains of exceeds the level and intensity that is supported by objective medical evidence, the ALJ must to consider the following factors: (1) the individual's daily activities; (2) the location, duration, frequency, and intensity of the individual's pain or other symptoms; (3) factors that precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness and side effects of any medication taken by the individual; (5) treatment, other than medication that the individual receives or has received for relief of pain or other symptoms; and (6) any measure other than treatment that the individual uses or has used to relieve pain or other symptoms. 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii).

The ALJ found plaintiff's subjective allegations of pain not entirely credible. Noting that allegations of pain must be accorded serious consideration where the symptoms are reasonably consistent with objective medical evidence, the ALJ stated:

I note that [Wise] has degenerative arthritis in the lumbar spine, and impairment that reasonably could be expected to cause pain. However, the evidence does not substantiate pain at the level of intensity to preclude work. He does not take an inordinate amount of pain medication; he takes a mild analgesic, appropriate for

a mild pain condition. There is no documentation of muscle spasm or weakness, findings that are generally indicative of severe pain. The record was held open post-hearing in order to allow the claimant's representative an opportunity to submit additional evidence pertaining to the claimant's impairments and nothing [relevant] was forthcoming.

(R. 17). Judge Wells found the ALJ's determination was supported by substantial evidence:

Objective medical evidence did not document clinical findings generally indicative of severe pain such as muscle spasms or muscle weakness. Also, neither Dr. Smith's nor Dr. Pashman's reports support Plaintiff's subjective testimony regarding the severity of his back pain. Dr. Smith found no obvious difficulty walking or using his arms or legs, only slightly reduced spinal range of motion, full range of motion and good strength in all extremities. Dr. Pashman found the Plaintiff could walk well on both his heels and toes and a straight-leg raise test was positive at seventy-five degrees which is not indicative of nerve root pressure.

(R&R at 12).

Plaintiff argues that, because the ALJ's decision was not supported by objective medical evidence, Judge Wells' R&R upholding the ALJ's decision is not supported by substantial evidence. He claims the ALJ ignored notes contained in his medical records documenting 21 visits to medical providers between July 16, 1997 and January, 2000, including two emergency care visits. He also claims the records show that on at least one occasion, the pain was caused by a muscle spasm, considered by the ALJ as an indicator of "severe pain." (Objections 4). Plaintiff adds that his aversion to prescription pain medication

stems from his past struggle with cocaine use, for which he had entered rehabilitation. Finally, plaintiff argues that the ALJ failed to consider plaintiff's documented, credible complaints of pain and functional limitations in completing the RFC assessment, and Judge Wells incorrectly upheld that assessment.

A review of plaintiff's medical records shows that between July, 1997, and January, 2000, plaintiff did visit medical providers more than twenty times, though some of these visits were for "regular check-ups." (R. 111, 112). Notes from a July 22, 1998, examination of plaintiff state that he complained of back pain associated with a muscle spasm, but a diagnosis consistent with the complaints is absent from the medical notes. (R. 108).

As to plaintiff's complaints of pain, "Where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence." Witmer v. Barnhart, 2002 WL 485663 at *3 (E.D. Pa. March 28, 2002); Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981); Green v. Schweiker, 749 F.2d 1066, 1068 (3d Cir. 1984).

In Smith, 637 F.2d at 971, the ALJ relied heavily on the fact that the claimant went shopping and hunting, and had full use of his hands, arms, and legs in concluding that the claimant did not have a statutory disability. The ALJ's conclusion was found "too speculative to be sustainable." Id. "[S]tatutory

disability does not mean that a claimant must be a quadriplegic or an amputee.... Disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity." Id. A social security claimant "must have the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world," Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir. 1989) and "need not prove [he] is bedridden or completely helpless to be found disabled." Id.

Here, plaintiff testified that his girlfriend helps him bathe, dress and cook; "most of [his] time is spent sitting in the bed in [his] room" or on the couch. (R. 47). Plaintiff also stated, "I can't lay one way. I lay. I fall asleep. I doze off. I wake up. You know, I twist, I turn. I can't lay in one place. I get up. I try to move around. It hurts when I stand up. It hurts when I sit down. I, I just hurt all the time," (R. 48). The ALJ did not support her opinion with any contrary medical evidence except to opine that "the evidence does not substantiate pain at the level of intensity to preclude work." (R. 17). "[A]n ALJ is not free to set [her] own expertise against that of a physician" Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985).

Regarding functional capacity, there were three medical assessments completed on behalf of the agency relied upon by the

ALJ in making a determination regarding plaintiff's disability status: 1) Dr. Ralph Smith, M.D.; 2) Dr. Gerald A. Gryczko, M.D.; and, 3) Dr. John D. Chiampi, Ph. D. , who conducted a Psychiatric Review Technique. All three of these reports were made before two of plaintiff's toes were amputated in September, 1999. Judge Wells also considered the reports of Dr. Pashman, who continued to see plaintiff through January, 2000. In affirming the ALJ's determination, she noted "Dr. Pashman found that plaintiff could walk well on both his heels and toes ..." (R&R at 12); however, Dr. Pashman reached that conclusion in August, 1999, before the amputation, (R. 176). Without a medical report of how the RFC is affected by the loss of two toes, not all the findings of the ALJ are supported by substantial evidence.

This case is remanded to the Commissioner to reconsider Wise's complaints of pain and reevaluate whether Wise is capable of employment.

An appropriate order follows.

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 JO ANNE B. BARNHART, :
 Commissioner of the Social Security :
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AMENDED ORDER

AND NOW, this 5th day of May, 2003, on consideration of the cross-motions for summary judgment (Papers #6 and #8), de novo review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells (Paper #10), the objections thereto (Paper #11), and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Paper #10) is **NOT APPROVED**
2. Plaintiff's Motion for Summary Judgment (Paper #6) is **GRANTED**;
3. Defendant's Motion for Summary Judgment (Paper #8) is **DENIED**; and,
4. This case is **REMANDED** to the Commissioner of Social Security **FORTHWITH** in accordance with the fourth sentence of 42 U.S.C. § 405(g) to reconsider plaintiff's complaints of pain and reevaluate whether he is capable of employment.

S.J.