

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

LEO P. FINN, )  
 )  
 Plaintiff, ) Civil Action  
 ) No. 01-CV-5487  
 )  
 vs. )  
 )  
 )  
 JO ANNE B. BARNHART, )  
 Commissioner of Social Security, )  
 )  
 Defendant. )

\* \* \*

APPEARANCES:

RALPH M. RUSSO, ESQUIRE,  
On behalf of Leo P. Finn,

NICHOLAS R. CERULLI, ESQUIRE,  
On behalf of Jo Anne B. Barnhart,  
Commissioner of Social Security,

\* \* \*

OPINION

JAMES KNOLL GARDNER,  
United States District Judge

The within civil action is an appeal of a final decision by the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). It is before the court on federal question jurisdiction. See 28 U.S.C. § 1331.

Plaintiff Leo P. Finn filed his Complaint seeking review of the Secretary's denial of Social Security disability benefits on October 30, 2001. Defendant, Jo Anne B. Barnhart, the Commissioner of Social Security, filed the administrative record on February 4, 2002. Plaintiff filed his Motion for Summary Judgment on May 24, 2002. Defendant filed her Motion for

Summary Judgment on June 17, 2002.

The matter was referred to Magistrate Judge Linda K. Caracappa on June 24, 2002. Magistrate Judge Caracappa filed her Report and Recommendation on January 15, 2003. The matter was referred from the calender of our former colleague United States District Judge Jay C. Waldman to the undersigned on February 25, 2003.

Plaintiff did not file objections to the Report and Recommendation. Pursuant to Rule 72.1(IV)(a) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, objections permitted by 28 U.S.C. § 636(b)(1)(A) to a Magistrate Judge's Report and Recommendation must be filed within ten days in order to be timely.

Plaintiff contends that the Administrative Law Judge erred when he failed to include all of plaintiff's alleged disabilities in the hypothetical questions which the Administrative Law Judge posed to the neutral vocational expert. Because we find that the Administrative Law Judge did err in propounding hypothetical questions to the neutral vocational expert, we remand the within action back to the Commissioner to determine what, if any, jobs in the national economy the plaintiff has the residual functional capacity to perform.

## Facts

Based upon the administrative record filed February 4, 2002, the pertinent facts are as follows. The plaintiff, Leo P. Finn, filed his current application for social security disability benefits on July 31, 1997 requesting benefits from June 14, 1991, the initial date from which the plaintiff claimed an inability to work.<sup>1</sup> Plaintiff complained about depression, back pain, and a history of alcoholism.<sup>2</sup> On December 11, 1997, the Commissioner initially denied Mr. Finn's claim.<sup>3</sup>

The plaintiff appealed that decision. On December 2, 1998 Administrative Law Judge Paul B. Lang held a hearing in the within matter.<sup>4</sup> On January 20, 1999, Administrative Law Judge Lang issued a decision denying plaintiff's claim.<sup>5</sup>

The Administrative Law Judge's decision became the final decision of the Secretary on August 31, 2001 when the Appeals Counsel denied petitioner's request for review.<sup>6</sup> The plaintiff filed the instant action on October 30, 2001 challenging the Secretary's final decision pursuant to 42 U.S.C.

---

<sup>1</sup> Administrative Record ("Record") at 81, 88.

<sup>2</sup> Record at 41, 44, 88.

<sup>3</sup> Record at 69.

<sup>4</sup> Record at 30-66.

<sup>5</sup> Record at 13-26.

<sup>6</sup> Record at 3-4.

§ 405(g).

The Administrative Law Judge announced his opinion in the document labeled "Decision" on page 13 of the record. The Administrative Law Judge's findings are listed below; but the relevant part of his decision for the analysis regarding the hypothetical questions is as follows. The Administrative Law Judge determined that the petitioner

has problems concentrating; he said that he gets along with people, but gets panicky in crowds. ... The Administrative Law Judge finds [the] claimant's statements concerning his impairments and their impact on his ability to work to be fairly consistent with the entire record, although the claimant tends to overstate symptoms. The claimant is found to be credible.<sup>7</sup>

#### Administrative Law Judge 's Findings

Following are the findings made by the Administrative Law Judge.

1. The claimant met the disability insured status requirements of the Act on June 14, 1991, the date the claimant stated he became unable to work, and has acquired sufficient quarters of coverage to remain insured only through September 30, 1996.
2. The claimant has not engaged in substantial gainful activity since June 14, 1991.
3. The medical evidence establishes that the claimant has

---

<sup>7</sup> Record at 18.

depression, a history of alcohol abuse and a back disorder, impairments which are severe but which do not meet or equal the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulation No. 4.

4. The claimant's statements concerning his impairments and their impact on his ability to work are generally credible.

5. The claimant retains the residual functional capacity to perform the exertional demands of light work, or work which requires maximum lifting of twenty pounds and frequent lifting of ten pounds. The claimant can do no climbing or bending, no work at unprotected heights or at unusually low temperatures and no repetitive lifting. The claimant can only occasionally stand and/or walk and must be able to alternate between sitting and standing as needed.

6. The claimant is unable to perform his past relevant work as a laborer and a grounds keeper.

7. The claimant's capacity for the full range of light work is further diminished because the claimant cannot perform jobs with complex instructions or assignments.

8. The claimant is 48 years old, a younger individual.

9. The claimant has a limited education.

10. The claimant has unskilled work experience.

11. Based on an exertional capacity for light work, and the claimant's age, educational background, and work experience,

Sections 404.1569 and 416.969 and Rule 202.17, Table 2, Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion of not disabled.

12. Although the claimant is unable to perform the full range of light work, he is capable of making an adjustment to work which exists in significant numbers in the national economy. Such work includes employment as a check room attendant, an occupation which accounts for approximately 700 jobs in the regional economy and approximately 100,000 jobs in the national economy; a cashier, an occupation which accounts for approximately 10,000 jobs in the regional economy and approximately 420,000 jobs in the national economy; and a sorter/packer, an occupation which accounts for approximately 4,000 jobs in the regional economy and approximately 200,000 jobs in the national economy.

13. The claimant has not been under a disability, as defined by the Social Security Act, at any time through the date of this decision.

14. The claimant's alcoholism is not a contributing factor material to the determination of disability.<sup>8</sup>

---

<sup>8</sup> Record at 20-21.

### Standard

The standard by which the court is to judge an appeal from an Administrative Law Judge's ruling is "whether that decision is supported by 'substantial evidence.'" Hairston ex rel. Rove v. Barnhart, 54 Fed. Appx. 41, 43 (3d Cir. 2002) (citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986), cert. denied, 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 373 (1987)).

"Substantial evidence ... does not mean a large or significant amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept to support a conclusion.'" Pierce v. Underwood, 487 U.S. 552, 564-565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988). In determining whether the Administrative Law Judge's decisions is supported by "substantial evidence," the court "cannot second-guess the Administrative Law Judge's credibility judgments" regarding the claimant. Morales v. Apfel, 225 F.3d 310, 318 (3d Cir. 2000).

The Social Security Administration has enunciated a five-part test to determine whether a claimant is entitled to disability benefits. Step one requires the Commissioner to determine if the claimant is engaged in a substantially gainful activity as defined in 20 C.F.R. § 1520(a). If the claimant is performing a substantially gainful activity in the national

economy, then his claim will be denied. Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999)(citations omitted).

Upon satisfaction of the first step, the Commission must determine whether the claimant is suffering from a severe impairment as defined in 20 C.F.R. § 1520(c). If the claimant fails to make a showing of severe impairment than his claim fails. Plummer, 186 F.3d at 428.

Upon completing step two and pursuant to 20 C.F.R. § 404.1520(d), the Commissioner is to compare claimant's asserted impairments to a list of impairments pre-approved by the Commissioner as being severe enough to preclude a claimant from performing any gainful activity to determine if the claimant's impairments meet or equal the severity of those on the list. If the claimant fails to meet this bar than the claim is denied. Plummer, 186 F.3d at 428.

If the claimant succeeds, then the Commissioner is to proceed to step four, which requires the Administrative Law Judge to consider if the claimant maintains the residual functional capacity to perform his past relevant work. At this stage the burden is on the claimant to establish an inability to return to any occupation found in his work history. Plummer, 186 F.3d at 428 (citing 20 C.F.R. § 1520(d)).

If the claimant establishes such an inability, the burden shifts to the Commissioner to prove that the claimant

retains the residual functional capacity to perform some substantially gainful activity in the national economy. Id. "The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled." Plummer, 186 F.3d at 428 (citing 20 C.F.R. § 404.1523).

#### Hypothetical Questioning

An Administrative Law Judge will often enlist the aid of a neutral vocational expert to meet the government's burden at the fifth step of the analysis. See e.g. Burns v. Barnhart, 312 F.3d 113 (3d Cir. 2002); Podedworney v. Harris, 745 F.2d 210, 218 (3d Cir. 1984). When an Administrative Law Judge propounds hypothetical questions to the vocational expert he must "incorporate [all] Plaintiff's impairment supported by the medical records." Ridenbaugh v. Barnhart, 57 Fed. Appx. 101 (3d Cir. 2003).

In the instant case the Administrative Law Judge found, and the record supports the conclusion, that the petitioner "has problems concentrating; he said that he gets along with people, but gets panicky in crowds."<sup>9</sup> Nevertheless, the Administrative Law Judge did not include plaintiff's fear of crowds in his hypothetical to the vocational expert. The

---

<sup>9</sup> Record at 18.

Administrative Law Judge's (ALJ) and Attorney Russo's colloquies with the vocational expert, in pertinent part, were as follows:

Q.(ALJ) All right. Well, let me give you a hypothetical. Assume a person of the claimant's age, education, and vocational background. Assume such a person can lift 10 pounds frequently and 20 pounds occasionally and assume further limitations of no climbing or bending, occasional standing and walking, no work at unprotected heights, the requirement of a sit stand option, no complex instructions or job assignments, no unusually low temperatures, and no repetitive lifting. Would there be any work available in the regional or national economy such a person could perform and could you give the numbers if so?<sup>10</sup>

...

Q.(Attorney Russo) This, this -- these -- this hypothetical is based on physical qualification, right?

Q. (ALJ) Also mental. No complex instructions or job assignments. And I -- also, too, it's the VE did not make the hypothetical, I did. So you're certainly free to produce your own hypothetical or add to mine.<sup>11</sup>

Because the vocational expert did not consider all of the petitioner's impairments when listing jobs that the petitioner could perform, the vocational expert's answer does not reflect the actual capacity of the petitioner to perform those jobs. The failure of the Administrative Law Judge to include

---

<sup>10</sup> Record at 57-58.

<sup>11</sup> Record at 61. Attorney Russo then went on to propound several hypothetical questions concerning the effect of the petitioner's averred personality disorder and maladaptive behavior on the petitioner's ability to perform the jobs that the vocational expert had set forth.

these factors constitutes error because his determination that there were jobs in the national economy that the petitioner retained the residual functional capacity to perform is not based upon substantial evidence. Burns v. Barnhart, 312 F.3d at 123.

#### Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is granted on the sole issue of the adequacy of the Administrative Law Judge's hypothetical questioning of the vocational expert regarding plaintiff's residual functional capacity. This action is remanded back to the Commissioner to determine what, if any, jobs in the national economy the plaintiff has the residual functional capacity to perform, based upon all of plaintiff's conditions, including his fear of crowds. On all other issues presented, the Report and Recommendation of Magistrate Judge Caracappa is approved and adopted.

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

LEO P. FINN, )  
 )  
 ) Civil Action  
 )  
 Plaintiff, )  
 )  
 )  
 vs. ) No. 01-CV-5487  
 )  
 )  
 JO ANNE B. BARNHART, )  
 )  
 Commissioner of Social Security, )  
 )  
 )  
 Defendant. )

O R D E R

NOW, this 26th day of September, 2003, upon consideration of the Motion for Summary Judgment filed by plaintiff on May 24, 2002; upon consideration of the Motion for Summary Judgment filed by defendant on June 17, 2002; upon consideration of the Report and Recommendation of Magistrate Judge Caracappa filed on January 15, 2003; upon consideration of the briefs of the parties and the administrative record; it appearing that no objections to the Report and Recommendation have been filed; and for the reasons expressed in the

accompanying Opinion,

IT IS ORDERED that the Report and Recommendation is adopted in part and disapproved in part.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by plaintiff is granted in part and denied in part.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by plaintiff is granted on the sole issue of the adequacy of the Administrative Law Judge's hypothetical questioning of the vocational expert regarding plaintiff's residual functional capacity.

IT IS FURTHER ORDERED that, in all other respects, plaintiff's motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by defendant is denied.

IT IS FURTHER ORDERED that the within matter is remanded to the Commissioner for proceedings consistent with the Opinion accompanying this Order.

BY THE COURT:

---

James Knoll Gardner

United States District Judge

