

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

CONFESOR RAMOS	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO: 03-845
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	
Defendant.	:	

MEMORANDUM AND ORDER

Presently before this Court are the Parties' Cross-Motions for Summary Judgment (Docs. 7 & 8), Plaintiff's Statement in Opposition to the Administrative Law Judge's Findings (Doc. 14), Defendant's Response (Doc. 15), the Report and Recommendation of M. Faith Angell, United States Magistrate Judge (Doc. 17), Objections to the Report and Recommendation filed by Defendant (Doc. 18), and Plaintiff's Response to Defendant's Objections (Doc. 19). For the reasons set forth below, upon careful and independent consideration of all previously listed documents, this Court finds, as supported by the record, that the Commissioner applied the correct legal standards and that the record as a whole contains substantial evidence to support the Administrative Law Judge's findings of fact and conclusions of law.

BACKGROUND

On November 8, 2000, Confesor Ramos ("Ramos") applied for Social Security Disability Insurance Benefits ("DIB") and Supplemental Security Income disability benefits, alleging an onset date of October 7, 2000. (Tr. 48-50; 252-254). Throughout the administrative process, including a September 13, 2001, hearing before an administrative law judge ("ALJ"), Ramos' claims were denied. (Tr. 20-30; 41-44; 256-259). The Appeals Council affirmed the ALJ's decision on December 23, 2002. (Tr. 6-9). Pursuant to 42 U.S.C. § 405(g), Ramos initiated the

instant action for judicial review.

The ALJ found that the medical evidence established that Ramos has a disorder of the neck, the left shoulder, and the low back; impairments that are severe but that do not meet or equal the criteria of any of the impairments listed in Appendix 1 of the Regulations (20 C.F.R. Appendix 1, Subpart P, Regulation No. 4). (Tr. 29, Finding No. 2). The ALJ further concluded that Ramos could not perform his past relevant work, but was not disabled, and had the Residual Functional Capacity (“RFC”) to perform the exertional requirements of light level work. (Tr. 29, Finding Nos. 4-5 & 9). With the testimony of a Vocational Expert (“VE”), the ALJ further concluded that although Ramos is unable to perform the full range of light work, he is capable of making an adjustment to work performing jobs that exist in significant numbers in the national economy including, an assembler and a kitchen helper. (Tr. 30, Finding No. 10). In addition, the ALJ concluded that Ramos’ statements concerning his impairments and their impact on his ability to work were exaggerated and not fully credible. (Tr. 29, Finding No. 3).

STANDARD OF REVIEW

The role of this Court on judicial review is to determine whether there is substantial evidence in the record to support the Commissioner’s final decision. Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985) (citing 42 U.S.C. § 405(g)). The factual findings of the Commissioner must be accepted as conclusive, provided that they are supported by substantial evidence. Richarson v. Perales, 402 U.S. 389, 390 (1971) (citing 42 U.S.C. 405(g)). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. at 401 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d

403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ's conclusion is supported by substantial evidence, this Court may not set aside the Commissioner's decision even if the Court would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

DISCUSSION

Ramos objects to three (3)¹ Findings made by the ALJ. Plaintiff argues that these specific Findings were contrary to the evidence of record and not supported by substantial evidence. The Court will address each Finding in turn.

A. ALJ's Finding No. 3

Ramos argues that the ALJ's credibility finding is contrary to the evidence of record and not supported by substantial evidence. In Finding No. 3 of the ALJ's decision, the ALJ stated that "[t]he claimant's statements concerning her [sic] impairments and their impact on his ability to work are exaggerated and not fully credible." (Tr. 29). Specifically, the ALJ stated that "[t]he claimant, who, at the hearing, answered many questions without translation, alleged not speaking English. He asserted that the surgeries he had did not help. However, Dr. Antonacci's records show that the claimant's motor strength had improved significantly after the surgery and his level of pain had diminished." (Tr. 26). First, Ramos argues that he never stated that he did not speak English, only that he did not speak "a lot." (Tr. 274). Further, Ramos avers that, from the

¹Plaintiff states a fourth argument in Plaintiff's Statement in Opposition to the ALJ's Findings. However, this Court finds that the fourth listed argument relies on a subsequent ALJ determination, which is unrelated to this case and presents facts that were not before the ALJ in the instant case. Therefore, it will not be considered by this Court.

transcript, it is impossible to tell whether or which questions Plaintiff answered without waiting for translation. It is also impossible to tell whether the Plaintiff answered in English or Spanish. Second, as to the extent of Plaintiff's pain following his surgeries, Ramos contends that the medical record confirms his testimony that he continued to experience pain and difficulties with balance and strength after his surgeries.

An ALJ must give great weight to a claimant's subjective complaints of pain and inability to perform work when the testimony is supported by objective medical evidence. Schaudeck v. Commissioner of SSA, 181 F.3d 429, 433 (3d Cir. 1999); 20 C.F.R. § 404.1529. The ALJ may also reject this testimony if he does not find it to be credible. Schaudeck, 181 F.3d at 433. The Court points out that the ALJ's credibility determinations are entitled to great deference, where as here, the ALJ has adequately explained his reasons for his determination. Brunhammer v. Barnhart, 2004 U.S. Dist. LEXIS 7685, *27 (D. Del. 2004) (citing Wilson v. Apfel, 1999 U.S. Dist. LEXIS 16712, 1999 WL 993723, *3 (E.D. Pa. Oct. 29, 1999); Schonewolf v. Callahan, 972 F. Supp. 277, 286 (D.N.J. 1997) (citations omitted)).

The extensive limitations alleged by Ramos are unsupported by objective findings. The ALJ recognized that Ramos had pain, but nonetheless, found, based on substantial evidence, that the pain Ramos described was exaggerated as compared to his medical evaluations and medical records. Further, the ALJ took into account Plaintiff's pain and physical limitations in finding that he was capable of performing light level work "but with no more than occasional climbing, balancing, bending, kneeling, crouching, and crawling; with no overhead reaching with the left upper extremity; and with no concentrated exposure to extremely cold temperature, wetness, vibration, and hazards (i.e., moving machinery and unprotected heights)." (Tr. 29, Finding No.

4); see also Welch v. Heckler, 808 F. 2d 264, 270 (3d Cir. 1986).

Likewise, there is no evidence to contradict the ALJ's credibility finding with regard to Plaintiff's ability to speak English. As stated by the Plaintiff, it is unclear from the transcript whether Ramos was using the services of the interpreter or answering the ALJ directly. Because the ALJ was able to evaluate the credibility of the Plaintiff first-hand, this Court must give deference to his determination. Therefore, this Court finds no error in the ALJ's credibility determination, as it was based on credible evidence and supported by the record.

B. ALJ's Finding No. 4

Ramos maintains that the ALJ's Finding No. 4, that Plaintiff retained the residual functional capacity to perform the physical requirements of light level work, is contrary to the evidence of record and not supported by substantial evidence. Specifically, Plaintiff states that he would not have been able to *sustain* competitive work at any exertional level on an *ongoing basis* from his alleged disability onset date of October 7, 2000 through at least the date of the ALJ's decision, December 26, 2001.² In support of this proposition, Plaintiff argues that the testimony of the VE was consistent with the concept of the "unsuccessful work attempt" codified at 20 C.F.R. § 416.974(c)(1).³ Further, Ramos claims that the Third Circuit has recognized that

²Plaintiff cites Social Security Ruling 96-8p, which defines a "regular and continuous basis" as "eight hours a day, for 5 days a week, or an equivalent work schedule." See http://www.socialsecurity.gov/OP_Home/rulings/di/01/SSR96-08-di-01.html.

³Work you have done will not show that you are able to do substantial gainful activity if, after working for a period of 6 months or less, you were forced by your impairment to stop working or to reduce the amount of work you do so that your earnings from such work fall below the substantial gainful activity earnings level. 20 C.F.R. 416.974(c)(1). This is considered an "unsuccessful work attempt."

the need for multiple hospitalizations can result in an individual being incapable of sustaining even unskilled sedentary work. See Rocco v. Heckler, 826 F. 2d 1348, 1350-51 (3d Cir. 1987) (citing Kangas v. Bowen, 823 F. 2d 775, 777 (3d Cir. 1987)).

Plaintiff points to the VE's testimony that "if an individual were unable to perform even sedentary work for at least four months a year, that person would be unable to sustain employment." PI's Stat. Opp. ALJ's Findings p. 6. However, upon review of the hearing transcript, it is clear that Plaintiff's proposition is taken out of context. Plaintiff's attorney asked the VE: "Assume an individual, because of medically determinable impairments, must undergo staged surgical procedures, such that in a 12 month period, the individual would be unable to perform even sedentary work for at least four months of the year . . . those four months being spread out over the year. Would that individual be able to sustain employment?" (Tr. 295). That question does not contemplate the Plaintiff's situation. There is no evidence in the record to suggest that the Plaintiff was required to undergo staged surgical procedures. Therefore, this question would have been inappropriate for the ALJ to consider in making his determination. Neither the question nor the answer are supported by the medical evidence or the record.

"We will generally consider work that you are forced to stop after a short time because of your impairment as an unsuccessful work attempt." 20 C.F.R. § 404.1574(a)(1). There must be a significant break in the continuity of your work before we will consider you to have *begun* a work attempt that *later* proved unsuccessful. 20 C.F.R. 416.974(c)(2) (emphasis added). It is not the duty of the court to weigh the evidence of plaintiff's work history, rather, the court must only determine if there is substantial evidence in the record as a whole to uphold the ALJ's determination. Knigh t v. Barnhart, 195 F. Supp. 2d 569, 581 (D. Del. 2002); see, e.g., Greenspan

v. Shalala, 38 F.3d 232, 239-40 (5th Cir. 1994). In this case, Plaintiff's absence of proof that he ever attempted to work, in any capacity, after his alleged onset date, constitutes substantial evidence to support the ALJ's conclusion that Plaintiff cannot and did not establish an unsuccessful work attempt. The plain language of the code states that one must begin a work attempt that later proves unsuccessful. Here, the Plaintiff failed to establish that he ever began. As such, this Court finds no error.

To address the Plaintiff's second argument that his need for multiple hospitalizations resulted in his being incapable of sustaining even unskilled sedentary work, the Court looks to Kangas v. Bowen, 823 F. 2d 775, 777 (3d Cir. 1987). The plaintiff in Kangas was hospitalized eight times in the sixteen month period between August 1984 and December 1985. Kangas, 823 F. 2d at 776. Six of the hospitalizations were for acute exacerbations of his chronic lung disease, usually involving infection. Id. Kangas had frequent lung infections which sometimes required hospitalization every two to three months. Id. Kangas argued that because of his frequent need for hospitalization, he could not engage in any work activity on a sustained basis. The Third Circuit agreed, and held that the ALJ must consider these factors in determining whether Kangas could engage in substantial gainful activity.

The instant case is distinguishable from Kangas. There is no evidence from the record that Plaintiff needed multiple hospitalizations. Nor is there evidence that the Plaintiff suffered from a recurring chronic condition which rendered him unable to sustain any work. In fact, after Plaintiff's first surgery, on January 3, 2001, Dr. Antonacci stated that Plaintiff had significant improvement in his motor strength and no pain down the leg. (Tr. 208). Dr. Antonacci was "quite pleased" with the improvement in his strength. Id. Dr. Antonacci's examinations of

Plaintiff after his first surgery all cite improvement and there is no evidence that the Plaintiff could not have sustained any gainful employment during the time between his first and second surgeries. (Tr. 208-211). Consequently, this Court finds that the ALJ's determination is supported by substantial evidence.

C. ALJ's Finding No. 10

Finally, Plaintiff submits that the ALJ's Finding No. 10, that Plaintiff could perform "other work" as an assembler or kitchen helper is contrary to the evidence of record and not supported by substantial evidence. Plaintiff states that given his medical course from October 7, 2000 through December 26, 2002, he would have been unable to sustain work at any exertional level on a regular and continuous basis and surely would have been unable to do work for at least four months during this period. Thus, Plaintiff argues that he should have been found disabled at Step 5 of the ALJ's analysis.

This Court disagrees. The ALJ found that the claimant lacked the functional capacity to return to his former employment. Thereafter, the ALJ presented the VE with a series of hypothetical facts, which were identical to the claimant's condition as set out in the evidence. Based upon these facts, the VE testified that there were jobs in the national economy, existing in significant numbers, which the Plaintiff could perform. For the reasons stated *supra* and all the evidence of record, this Court finds that the ALJ's determination was consistent with the evidence of record and was supported by substantial evidence.

CONCLUSION

For the foregoing reasons, this Court finds that there is no legal error in the ALJ's decision and that there is substantial evidence in the record to support the conclusions of the ALJ.

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CONFESOR RAMOS :

Plaintiff,:

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v.: CIVIL ACTION NO: 03-845

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JO ANNE B. BARNHART,:

Commissioner of Social Security :

Defendant.:

ORDER

AND NOW, this _____ day of January, 2005, upon careful and independent consideration of the Cross-Motions for Summary Judgment filed by the parties (Docs. 7 & 8), Plaintiff's Statement in Opposition to the Administrative Law Judge's Findings (Doc. 14), Defendant's Response (Doc. 15), the Report and Recommendation of M. Faith Angell, United States Magistrate Judge (Doc. 17), Objections to the Report and Recommendation filed by Defendant (Doc. 18), and Plaintiff's Response to Defendant's Objections (Doc. 19), the record reveals that the Commissioner applied the correct legal standards and that the record as a whole contains substantial evidence to support the Administrative Law Judge's findings of fact and conclusions of law. Therefore, **IT IS HEREBY ORDERED AND DECREED** that:

1. The Report and Recommendation is **DISAPPROVED**;
2. The Motion for Summary Judgment by the Plaintiff is **DENIED**;
3. The Motion for Summary Judgment by the Defendant is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST CONFESOR RAMOS.**
4. The Clerk of Court is hereby directed to mark this case **CLOSED**.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.