

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

RONALD HAILEY	:	CIVIL ACTION
	:	
v.	:	
	:	
JO ANNE BARNHART	:	NO. 03-4869

MEMORANDUM

Baylson, J.

January 31, 2005

Ronald Hailey appeals the decision of the Administrative Law Judge (“ALJ”) that he is not disabled and therefore does not qualify for Disability Insurance Benefits. This Court finds that substantial evidence supports the ALJ’s findings and holding in this case and, therefore, Mr. Hailey is not disabled for the purposed § 216(I) of the Social Security Act.

I. Statement of the Case

The Plaintiff contends that he was disabled beginning January 7, 2001 to September 24, 2002, the date of decision of the ALJ.¹ The ALJ’s decision became the decision of the Commissioner as of June 27, 2003, whereupon this Civil Action was filed. Both Plaintiff and Defendant have moved for summary judgment. Plaintiff has filed a supplemental brief containing additional medical records which Plaintiff contends the ALJ should have, but did not, consider and thus Plaintiff alternatively requests a remand for consideration of this evidence. Defendant opposes remand.

The Court held oral argument on January 27, 2005.

¹ Counsel are in agreement that as of the day after the ALJ’s decision on this matter, Plaintiff was found disabled for other reasons.

II. Discussion

A. Should This Case Be Remanded?

The threshold issue that must be decided here is whether the allegedly “new” evidence submitted by the claimant in his supplemental brief warrants a remand or supports Plaintiff’s contention that the ALJ’s decision was not supported by substantial evidence. In the Third Circuit, a district court has the authority to remand a case to the Commissioner of Social Security if the claimant can show the following: 1) the evidence is new; 2) the evidence is material; and 3) there was good cause justifying why the evidence was not presented to the ALJ. Matthews v. Apfel, 239 F.3d 589, 594 (3d Cir. 2001) (interpreting “Sentence Six” of 42 U.S.C. § 405). If all three of the requirements are met, the case should be remanded to the Commissioner.

The “new” evidence in this case is medical reports from the Wound Care Center of Mercy Rehab Associates. The notes contained in these reports, taken between November 29, 2001 and February 5, 2002, are attached to the Plaintiff’s supplemental brief and were reviewed in detail at the oral argument. The notes were made by various medical professionals who observed Plaintiff and reached certain conclusions. It is significant that the discharge summary, contained in a letter dated February 5, 2002, states that Plaintiff’s “wound healed completely and he was discharged from the Comprehensive Wound Healing Center on January 18, 2002.” There is nothing in these notes that supports finding Plaintiff so disabled that he cannot perform sedentary work.

The Court concludes that the matter should not be remanded. Initially, it is important to note that the Plaintiff was represented by counsel at the hearing before the ALJ and counsel has candidly admitted that it was counsel’s error that resulted in the Wound Center’s records not

being presented to the ALJ. Although the Court concludes that Plaintiff has not met the test for a remand under Third Circuit precedent, the Court also concludes, based on the extensive discussion at the oral argument on January 27, 2005, that even if the notes had been considered by the ALJ, their contents would not have made any difference in the ultimate result.

A remand for “new evidence” must meet the standard set forth in Matthews and previously explained in Szubak v. Sec. of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984). The evidence must be new in the sense that it is not merely cumulative of the evidence available at the time of the ALJ’s review. 745 F.2d at 833. The evidence must be material to the point that there is a reasonable possibility of changing the outcome. Id. And lastly, there must be a showing of good cause that the claimant did not present the evidence at the time of the ALJ’s review. Id.

The Supreme Court suggested in Sullivan v. Finkelstein that “newness” under Sentence Six means that the evidence was either not in existence or was not available. 496 U.S. 617, 626 n6 (1990). It is clear from the record that the evidence from the Wound Care Center existed at the time of the ALJ’s review, as the records were made well in advance of the review and decision dates. Furthermore, counsel for Plaintiff conceded at oral argument that the records were available to him at the time of the hearing before the ALJ.

At the oral argument, Plaintiff cited several cases, including Reefer v. Barnhart, 326 F.3d 376 (3d Cir. 2003), for the proposition that the ALJ has the obligation to seek a claimant’s medical records, particularly once their existence has been brought to the attention of the ALJ. See R. 50. However, the Reefer case and the others cited by the Plaintiff have different factual circumstances and also, in those cases, the plaintiff was proceeding pro se. Thus, the Court

concludes that the standard for remand under Matthews has not been met, and that even if it had, the Court concludes that the consideration of the records would not change the result in this case.

B. Is the ALJ's Decision Supported by the Evidence and Law?

The ALJ, in determining that the claimant was not disabled, followed the five-step test laid out in Chapter III of Title 20 of the Code of Federal Regulations. 20 CFR § 404.1520(a)(4), § 416.920, R. 20. This five-step test for disability is as follows:

- 1) If the claimant is performing substantial, gainful work, the claimant is not disabled. 20 CFR § 404.1520(a)(4)(i).
- 2) If the medical severity of the impairment is such that the claimant does not have a determinable and severe physical or mental impairment that meets the duration requirement, the claimant is not disabled. 20 CFR § 404.1520(a)(4)(ii).
- 3) If the impairment does not last for the durational period, generally one year, then the claimant is not disabled. 20 CFR § 404.1520(a)(4)(iii).
- 4) If the claimant can still perform his past relevant work, regardless of the findings above, the claimant is not disabled. 20 CFR § 404.1520(a)(4)(iv).
- 5) If the claimant, after an examination of his residual functional capacity, can make an adjustment to other job types of which there are sufficient numbers in the national and local economy, the claimant is not disabled. 20 CFR § 404.1520(a)(4)(v).

The ALJ found that Mr. Hailey was not disabled for two connected reasons. First, although Mr. Hailey was not engaged in substantial work activity, his determinable ailments were not severe enough to warrant finding him to be disabled. R. 21. In examining the medical records of Mr. Hailey's cardiovascular disease status, post coronary artery bypass graft and diabetes mellitus, the ALJ determined these health problems to be severe, but not severe enough "to meet or medically equal one of the impairments" that are listed in Appendix 1, Subpart P, of Regulation No. 4 of 20 CFR § 404. R. 21. In addition, the ALJ found that neither Mr. Hailey's

chronic heart failure nor his cardiac enlargement significantly impaired his physical activity.

R. 21. The ALJ did find, however, that Mr. Hailey was unable to continue in his past relevant work because it required too much of him physically. R. 21.

Second, the ALJ found that, although Mr. Hailey could no longer perform his past relevant work, he would be able to perform jobs at the “sedentary” level regardless of his impairments. R. 23. Therefore, under 20 CFR § 404.1520(a)(4)(v), supra, as long as the Commissioner could show that there were a sufficient number of jobs at the sedentary level on both the local and national scale, Mr. Hailey would not be disabled for the purposes of Social Security Disability benefits. R. 24. Relying on testimony from the vocational expert (“VE”) assigned to Mr. Hailey, the ALJ determined that the Commissioner had met this burden by showing sufficient employment opportunities for the sedentary jobs of “information clerk” and “identification clerk.” R. 24.

The standard of review for an ALJ decision is “substantial evidence” that “a reasonable mind might accept as adequate to support a conclusion.” Monsour Medical Center v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). The claimant argues that the ALJ’s decision is not supported by substantial evidence because the ALJ failed to adequately consider Mr. Hailey’s leg and heart problems. However, it is the job of the ALJ to determine the weight to be given to the different factors and come to a conclusion. Miller v. Commissioner of Social Sec., 172 F.3d 303, 304 (3d Cir. 1999).

The ALJ concluded that the Plaintiff was disabled from January 2001 through November 2001, but that the surgery which took place on October 9, 2001 resulted in Plaintiff regaining sufficient strength and ability so that he retained the Residual Function Capacity (“RFC”) to

perform sedentary work. The ALJ's review of the medical evidence is accurate. Because the period of time for which the ALJ found Plaintiff to have been disabled was less than one year, this finding does not provide any relief to the Plaintiff. However, as of November 2001, the ALJ also found that although Plaintiff would be unable to return to his prior work, he could perform the full range of sedentary work. The ALJ then applied the regulations, including the grid rules, and concluded that Plaintiff was not disabled.

The parties presented extensive oral argument on this issue. Plaintiff asserts that under certain regulations, including prefatory comments, the regulations do not allow a transfer of skills from prior semi-skilled status to a less skilled status. The Court finds that the Commissioner has the more persuasive argument.

The VE and the ALJ found that Plaintiff possessed transferable work skills. The VE also found that Plaintiff's communication and evaluation skills were transferable to sedentary exertional work, such as an information or identification clerk, and provided additional testimony on this point. R. 52-55, R. 24. The evidence also supports the finding that the Plaintiff is closely approaching advanced age and is a high school graduate. The Court rejects Plaintiff's argument that the only skills transferrable are for skilled sedentary work, as this is not logical and not supported by the regulatory framework. The Court distinguishes Judge Padova's decision in Aronson v. Apfel, 1999 WL 167685 (E.D. Pa.), in part because the regulations on which Judge Padova relied have been superceded. There is substantial evidence to support the ALJ's conclusion that the Plaintiff has the residual functional capacity to perform the full range of sedentary work.

The ALJ concluded that the appropriate grid sections are 201.22 and 201.15, which

provide a decision of not disabled. 20 C.F.R. pt. 404, subpt. P, app. 2, Table No. 1, Rules 201.22, 201.15.

The ALJ's interpretation and application of the regulations is reasonable.

The Court has reviewed the general medical evidence presented, including the notes by Dr. Elcock (found at R. 290) and the report of Dr. Ginsberg—particularly his conclusions on February 10, 2002 that “the legs were observed and no evidence of edema, ulcerations, or varicosities were noted.” R. 284). The Court also reviewed the report of Dr. Berger. R. 300. Except for some reports of pain, all other observations were negative. There is evidence in the record that Plaintiff had some pain at various times but the Court does not find that these subjective pain reports are sufficient to render the decision of the ALJ as unsupported or improper in law.

A question was raised as to whether there was substantial evidence to find that the claimant's impairments were severe for more than a year. In Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985), serious doubts are voiced about the validity of the severity requirement. In Baeder the severity requirement was challenged on the grounds that it would only take into account the medical, and not the vocational, impairment of the claimant. Id. at 553. The court there held that a determination by the ALJ based solely on the medical evidence of severity is not enough to determine that a claimant is disabled, and that any denial of benefits made without the consideration of vocational factors would face reversal. Id. at 553 n5. The vocational factors that must be taken into account include age, education, and past work experience. The hypotheticals to the VE were appropriate. In this case, the ALJ's finding that Plaintiff's impairments were not severe is supported by consideration of Mr. Hailey's vocational abilities, including his age, his

education and the skills that he would be able to transfer from his past employment as a security guard and stock clerk. R. 21. The medical records and the consideration of Plaintiff's vocational ability support this conclusion. Therefore, the evidence in the record at the time of the ALJ's decision, in terms of the severity of Mr. Hailey's impairment, substantially supports that decision.

In order to determine that the Plaintiff was able to perform sedentary work, the ALJ considered the testimony of the Plaintiff and the VE, as well as Plaintiff's medical records. R. 24. The ALJ determined that Mr. Hailey could perform either of the jobs referenced by the VE. R. 24. The ALJ also found that the Plaintiff lacked credibility in describing his impairment. R. 22. "Although the ALJ may weigh the credibility of the evidence, he must give some indication of the evidence which he rejects and his reason(s) for discounting such evidence." Burnett v. Comm. of Social Sec., 220 F.3d 112, 121 (3d Cir. 2000). In this case, Mr. Hailey's descriptions of his ailments are not confirmed by the medical records. It was therefore reasonable for the ALJ to find Mr. Hailey's credibility lacking, and to give greater weight to the medical records in making his decision.

This Court finds that the Plaintiff does not qualify for a remand under "Sentence Six" of 42 U.S.C. § 405 and that substantial evidence supports the ALJ's decision in this matter.

An appropriate Order follows.

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ORDER

AND NOW, this 31st day of January, 2005, upon consideration of Plaintiff's and Defendant's Motions for Summary Judgment, it is hereby ORDERED that Plaintiff's Motion is DENIED, that Defendant's Motion for Summary Judgment is GRANTED, and that Final Judgment is entered in favor of the Defendant, Commissioner of Social Security, and against Plaintiff, Ronald Hailey. The Clerk shall mark this case closed.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.