

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

ROBERT E. COMBS	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 03-5526
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

**MEMORANDUM AND ORDER**

AND NOW, this 16th day of August, 2005, upon consideration of the cross-motions for summary judgment (Doc. Nos. 5, and 8 ) and the reply brief thereto (Doc. No. 10) the Court makes the following findings and conclusions:

A. On May 24, 1995, Robert Combs, (“Combs”) filed for disability insurance benefits (“DIB”) under Title II of the Social Security Act, (“Act”) 42 U.S.C. §§ 401-433. (Tr. 24-26). Throughout the administrative process, including one prior appeal to this Court, three hearings before an administrative law judge (“ALJ”) (Tr. 206-234; 248-296; 339-400), two remands to the Commissioner<sup>1</sup> (Tr. 297; 401), and three unsuccessful requests for review by the Appeals Council (Tr. 184-185; 246B-246C; 301-303; 337-338), Combs’ claim was denied. (Tr. 27-29; 30; 32; 36-38; 39; 193-204; 235-245; 321-336). Pursuant to 42 U.S.C. § 405(g), Combs once again sought review in this Court on October 2, 2003.

B. The ALJ found Combs’ reflex sympathetic dystrophy<sup>2</sup> (“RSD”) of the right upper extremity, to be severe within the meaning of the regulations, but found that it was not severe

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<sup>1</sup> Upon motion by the Commissioner, this Court remanded Combs’ case to the Commissioner on June 24, 1998, because of problems with the hearing tape. (Tr. 297; 298-299). The Court again remanded the case to the Commissioner upon motion by the Commissioner on November 20, 2001, in order for the Commissioner to further evaluate Combs’ RFC and obtain the testimony of a VE to clarify the effect of Combs’ impairment on the occupational base. (Tr. 401; 402-404).

<sup>2</sup> RDS is a chronic pain syndrome often resulting from trauma to a single extremity. SSR 03-2p, 2003 SSR LEXIS 2, at \* 4-5. The most common manifestation includes complaints of intense pain at the situs of the injury. *Id.* For Social Security disability evaluation purposes, RSD can be established where consistent complaints of pain, typically out of proportion to the severity of the injury sustained to the individual, accompany one or more of the following: swelling, autonomic instability, abnormal hair or nail growth, osteoporosis, or involuntary movements of the affected region of the initial injury. *Id.* at \* 11-12.

enough to meet or medically equal any of the listed impairments. (Tr. 327 ¶ 17; 334 Finding Nos. 3, 4)<sup>3</sup>; 20 C.F.R. Part 404 Subpart P, Appendix 1. The ALJ further concluded that Combs was unable perform his past relevant work, but could perform other work existing in the economy, and has the residual functional capacity (“RFC”) to perform a significant range of light work. (Tr. 332 ¶¶ 41, 45; 333 ¶¶ 48, 50; 335 Finding Nos. 11-13).

C. The Court has plenary review of legal issues, but reviews the ALJ’s factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm’r of Soc. Sec., 181 F.3d 429, 431 (3d Cir. 1999) (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.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (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 it 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).

D. Combs raises several arguments that the ALJ’s determination was erroneous. However, 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.

1. Combs argues that the ALJ’s credibility analysis is flawed for several reasons including the ALJ’s failure to consider the testimony of Combs wife. In general, an ALJ is required to address the testimony of non-medical witnesses, including a neighbor or spouse, who testify to bolster the credibility of the claimant. Burnett v. Comm’r of Soc. Sec., 220 F.3d 112, 122 (3d Cir. 2000). Furthermore, pursuant to SSR 03-2p, when the limiting effects of an impairment are not substantiated by objective medical evidence, the ALJ is required to make a finding on the credibility of the individual’s statements based on a consideration of the entire case record. SSR, 03-2p, 2003 SSR LEXIS 2, at \* 18. This includes third-party information, including traditionally non-acceptable medical sources with knowledge of the claimant’s ability to function, which is often critical in deciding an individual’s credibility. Id. at \*18, 21-22.

In the instant case Combs’ wife testified at both the December 6, 1996 (248-296), and March 19, 1999 (206-234), hearings, but not at the June 20, 2002, hearing. (Tr. 339-400). After the second administrative decision, which included a discussion of Combs’ wife’s testimony (Tr. 200 ¶ 19), the case was remanded for *further* consideration of Combs’ RFC and the testimony of a vocational expert. (Tr. 325 ¶ 3; 401). However, even assuming that the ALJ had a duty to discuss Combs’ wife’s testimony in the third decision, the error was harmless

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<sup>3</sup> Paragraphs are numbered chronologically seriatim as they appear throughout the ALJ’s decision.

and there is still substantial evidence to support the ALJ's credibility determination.<sup>4</sup> See Rutherford v. Barnhart, 399 F.3d 546, 553 (3d Cir. 2005) (refusing to remand the case where the ALJ indirectly considered claimant's obesity and direct consideration would not have changed the outcome of the case). For example, the ALJ supported his credibility determination by pointing out the inconsistency between Combs' allegation that he could sit for only one half hour, and apparent ability to sit without difficulty through a two hour hearing. (Tr. 331 ¶ 34). Further confirming that Combs' complaints of pain are not entirely credible, both Dr. John Williams, M.D. and Dr. Robert Mauthe, M.D. opined that Combs was capable of performing light or sedentary work, despite his RSD diagnosis. (Tr. 86-87; 88-93; 113-115; 120-124; 328 ¶¶ 21-22; 329 ¶ 26). Finally, credibility determinations are for the ALJ to make. Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). Because the ALJ considered Combs' subjective complaints of pain in accordance with SSR 96-7p, 1996 WL 374186 (Tr. 328 ¶ 19; see also 326-336), and there is substantial evidence to support the ALJ's decision, I am unable to conclude that incorporating Combs' wife's testimony into the third decision, would have changed the outcome in the case, and the credibility decision is supported by substantial evidence. See Rutherford, 339 F.3d at 553; ( see also supra footnote 4).

2. Combs alleges that the ALJ's decision is rife with inappropriate considerations. In assessing the sufficiency of the ALJ's decision, I note that although the ALJ's statements may not rise to the level of bias, several comments by the ALJ are not prudent. Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid the appearance of bias. Grant v. Shalala, 989 F.2d 1332, 1345 (3d Cir. 1993) (citations omitted). Here, the ALJ's decision contains multiple statements that give the appearance of bias. (Tr. 328 ¶ 20; 330-331 ¶ 37; 331 ¶ 34; 333-334 ¶¶ 51, 52). However, even assuming that the ALJ improperly relied upon such considerations, there is other substantial evidence of record to support the ALJ's credibility analysis, and remand is not necessary.

3. Combs next asserts that the ALJ has made legal errors or has misconstrued facts which resulted in an error in the application of the law. As for legal errors, the adjudicator must not draw inferences about an individual's impairments from a failure to seek regular medical treatment without first considering the explanation for infrequent or irregular medical visits or failure to seek treatment. Newell v. Comm'r Soc. Sec., 347 F.3d 541, 547 (3d Cir. 2003); SSR 96-7p, 1996 WL 374186, at \* 7. Although it may appear that the ALJ has drawn inferences regarding Combs' course of treatment (Tr. 330 ¶ 31-33; 331 ¶ 37; 334 ¶ 52), the ALJ properly considered Combs' well documented explanation<sup>5</sup> and therefore, there is no error in the ALJ's analysis.

Combs also alleges that several factual misconstructions were erroneous,

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<sup>4</sup> As well, the ALJ had before him the prior testimony of Combs' wife and the ALJ had considered and discussed that testimony in a prior adjudication in which the ALJ made credibility decisions adverse to Combs.

<sup>5</sup> The ALJ referenced Dr. Williams' opinion that Combs' condition would not improve, and that he had discouraged medication out of concern for potential addiction. (Tr. 52; 175; 330 ¶ 30; 358; 374). Furthermore, in his second decision (Tr. 200 ¶ 18), the ALJ also considered statements by Combs and his treating physicians that the available treatments aggravated Combs' pain or did nothing to alleviate it. (See also Tr. 48; 91-93; 96; 117; 121; 216; 271-272; 356; 428-30).

such as the ALJ's statement that Combs did not receive nerve blocks, regular physical therapy, or pain management treatment. (Tr. 329 ¶ 29).<sup>6</sup> However, the record demonstrates that Combs did receive a stellate ganglion block (Tr. 90), but there is no evidence in the record of Combs undergoing a local bier block or other recommended testing.<sup>7</sup> (Tr. 327 ¶ 15). The record also contains numerous references to Combs' receipt of physical therapy (Tr. 48; 91-93; 117; 121; 216; 280; 359), but the record contains only three pages of physical therapy documents which reference "improved mobility," that Combs is "trying to use the hand more at home," and that "patient presents with pain in the right upper extremity which is decreasing in nature." (Tr. 428-430). Finally, Combs testified that after trying only a few prescription medications, which he ceased due to side affects, Combs relied upon Aspirin, Ibuprofen and Tylenol for allegedly profound pain. (Tr. 216-217; 241 ¶ 16; 271-272; 356-358). Though, the ALJ does misstate that Combs "has not described any pain associated with mere touching of the arm or pain caused by the sensation of wind blowing across his skin, which are symptoms of [RSD]<sup>8</sup>" and the record does, however, include statements by Combs and Dr. Williams to this effect. (Tr. 329 ¶ 29; 175; 370-371). Despite this misstatement, it is evident that the ALJ considered the available objective evidence of Combs' impairment such as tenderness, swelling, discoloration, temperature changes. (Tr. 326-327 ¶ 13; 327 ¶¶ 14-16; see also 86; 89-93; 95-96; 118; 121; 139; 141; 300). Hence, there is still substantial evidence to support the ALJ's decision, and therefore, I cannot conclude that the ALJ's misstatements are reason enough to remand the case. See Caballero v. Barnhart, No. 02-7402, 2003 U.S. Dist. LEXIS 19485, at \* 20 (E.D. Pa. Sep. 30, 2003) (submitting that a harmless error does not necessitate a remand).

4. Combs argues that the ALJ's RFC determination is not supported by substantial evidence and that Combs is, at the very least, restricted to a limited range of sedentary work. A proper RFC determination involves consideration of all the evidence before the ALJ, including: all the individual's symptoms; the effects of pain and its treatment on an individual's ability to work; opinions from medical sources, particularly if they provide information contrasting the claimant's current medical condition with his condition prior to the onset of the impairment; and third party information. SSR 03-2p, 2003 SSR LEXIS 2, at \* 20-21. Here, the record and the ALJ's decision reflect the above listed factors (Tr. 196-204; 238-244; 324-336), including: Combs' symptoms (see supra paragraph 1); the effect of pain and treatment on his ability to work (Tr. 330 ¶ 33); medical opinions (see supra paragraph 1, recommending sedentary *or* light work); the contrast between Combs' present and prior medical condition (Tr. 373-374); and third party information (see supra paragraph 1). Therefore, the ALJ's RFC determination is

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<sup>6</sup> This statement contradicts the ALJ's earlier statement that Combs had received physical therapy and a ganglion block. (Tr. 326 ¶ 13).

<sup>7</sup> Dr. Mauthe opined that if a three phase bone scan and xrays "turned out to be normal, then the patient has evidence of only a chronic pain syndrome, with no evidence of RSD and may in fact be exaggerating many of his symptoms." (Tr. 122).

<sup>8</sup> Extreme sensitivity to touch or pressure, or abnormal sensations of heat or cold, can also be associated with this disorder. SSR 03-2p, 2003 SSR LEXIS 2, at \* 18. Furthermore, according to Dr. Williams, "[i]n severe cases simply the pressure of clothing or even motion of air across the skin causes pain." (Tr. 175).

supported by substantial evidence and need not be remanded.

5. Combs challenges the ALJ's finding that he can perform a significant number of jobs. Specifically, Combs complains that the ALJ's reliance on the VE's testimony is misplaced because neither the ALJ's hypothetical, nor the VE's response, corresponds to the ALJ's findings. There is no requirement that the ALJ's hypothetical correspond to his findings. Rather, the ALJ must pose a hypothetical to the VE that reflects all of Combs' impairments that are supported by the record; otherwise the question is deficient and the VE's response cannot be considered substantial evidence. Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). In this case the hypothetical about which Combs complains generally covers the impairments that are supported by the record.<sup>9</sup> (Tr. 379). As the hypothetical states, the record reflects an impairment that causes "limitations," but is not "totally immobile," and "could guide things." (Tr. 379). The fact that the hypothetical does not reflect a totally useless arm is also consistent with the ALJ's determination that Combs was not credible to the extent alleged. (Tr. 200 ¶ 19, 330-331 ¶ 33; 331 ¶¶ 34, 37). Furthermore, any requirement that the ALJ's findings correspond to the VE's response, has been met since the ALJ found Combs capable of performing light work, and the VE's selected occupations are light jobs. (See security guard, DOT 372.167-010; packer, DOT 920.687-018, 920.687-014, 920.687-082; usher, DOT 344.677-014; attendant, DOT 342.667.014, 342. 677-010). Therefore, the ALJ's findings are supported by substantial evidence.

6. Combs lastly argues that the specific occupations selected by the VE are not consistent with the ALJ's conclusion that Combs can perform a wide range of light work.<sup>10</sup> First, Combs complains that he is unable to perform the job of security guard. Combs takes issue with the ALJ's admittedly confusing finding that, "claimant has no transferable skills from any past relevant work and/or transferability of skills is not an issue in this case." (Tr. 335 Finding No. 11). Despite this language, the ALJ noted and agreed with the VE's conclusion that Combs is capable of making an adjustment to other work. (Tr. 333 ¶¶ 48-49). Even assuming the ALJ has made a misstatement, transferability, or having skills that can be used in other jobs, is probable amongst jobs in which the same or lesser degree of skill is required. 20 C.F.R. § 404.1568(d)(1)-(2). Thus, transferability from a cook to a security guard is likely since Combs would be transferring from a skilled SVP 7 to a semi-skilled SVP 3 job.<sup>11</sup> SSR 00-4p, SSR LEXIS 8, at \* 8.

Combs also complains that the telemarketer job is also not suitable for him

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<sup>9</sup> I note that the ALJ's next hypothetical reflects each of Combs impairments as Combs described them, to which the VE responded that Combs would be unemployable. (Tr. 382-383).

<sup>10</sup> Combs takes issue with the ALJ's purported reliance on the Medical-Vocational Rules as a framework for deciding Combs ability to work. However, the ALJ's decision reflects that the ALJ made this decision "[b]ased on the testimony of the vocational expert," but was also "was within the framework of Medical Vocational Rule 202.14 and 202.21." (Tr. 333 ¶ 49; see also Tr. 332 ¶¶ 43, 45) (describing the grids as a "framework" and as being viewed "in conjunction" with claimants age, education, and past work experience.).

<sup>11</sup> The VE's discussion of the transferability of skills was briefly, but not thoroughly discussed at the hearing. (Tr. 379).

because, as sedentary job, generally both hands are needed, and that even if he could perform a sedentary job, his occupational base is so eroded from his inability to use his right arm, that he is disabled. SSR 83-12, 1983 SSR LEXIS 32, at \* 11. During the hearing, the VE testified that according to the DOT, telemarketing positions can be either sedentary or light, but agreed that telemarketer positions are generally sedentary. (Tr. 286; 391- 392). For purposes of this case, I view telemarketing as sedentary.<sup>12</sup> Nevertheless, it is clear that spirit of SSR 83-12, 1983 SSR LEXIS 32 was followed as the VE incorporated Combs' right arm limitations, and its effect on Combs' potential occupational base, and was still able to select occupations that Combs was capable of performing. (Tr. 380-383; 386-397).

Finally, the VE suggested several positions in addition to security guard and telemarketer which are listed as examples in the ALJ's decision. (Tr. 335 Finding No. 13; 381). Since telemarketer and security guard were merely examples of the work Combs could perform and because Combs has not challenged the VE's other suggested occupations, including including packer, attendant, and usher, the action need not be remanded on this ground. Rutherford, 399 F.3d at 557-558 (citing Jones, 364 F.3d at 506); (Tr. 381).

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner applied the correct legal standards and that the record contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby

**ORDERED** that:

1. The motion for summary judgment by the claimant is **DENIED**;
2. The motion for summary judgment by the defendant is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST ROBERT E. COMBS**; and
3. The Clerk of Court is hereby directed to mark this case closed.

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LOWELL A. REED, JR., S.J.

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<sup>12</sup> The specific DOT classification for telemarketer is sedentary. DOT 299.357-014; SSR 00-4p, 2004 SSR LEXIS 8, at \* 7; (stating that an ALJ may not rely on classifications of occupations that are inconsistent with the regulatory definitions and that regulatory definitions of exertional levels are controlling.).

