

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

GERALD W. HYER	:	
	:	
v.	:	CIV. NO. 05-3682
	:	
MICHAEL J. ASTRUE	:	
Commissioner of Social Security	:	

Diamond, J.

July 11, 2007

MEMORANDUM

Plaintiff Gerald W. Hyer challenges the Social Security Commissioner's denial of Hyer's application for Disability Insurance Benefits. The Parties filed cross-motions for summary judgment which I referred to a Magistrate Judge for a Report and Recommendation. For the reasons that follow, I sustain Plaintiff's objections to the Magistrate's Report and Recommendation, decline to follow the Report and Recommendation, deny the cross-motions for summary judgment, and remand to the Commissioner for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff was born in August 1944; he was forty-nine years and four months old as of his date last insured. (R. 115, 121, 20.) He has a high school education; he attended community college, but did not obtain any degree. (R. 62-63.) He has a history of work as a landscape contractor and building maintenance supervisor. (R. 76-77.)

Plaintiff last worked on February 26, 1988, when he fell and injured his lower back. (R. 65, 68.) In the early 1990s he developed chronic pancreatitis requiring repeated hospitalizations. (R. 206-24, 225-33, 234-44, 245-57, 258-63.) As a result of his pain and gastrointestinal disturbance,

he became severely malnourished: although he is five feet, six inches tall, Plaintiff's weight dropped from 130 pounds to 90 pounds by 1996. (R. 36-38, 48, 56, 777.) Doctors eventually inserted a feeding tube to prevent further weight loss. (R. 48, 56.)

On January 27, 1997, Plaintiff applied for Disability Insurance Benefits under Title II of the Social Security Act, alleging that the pain caused by his chronic pancreatitis rendered him disabled. Plaintiff contended that although the condition may have initially resulted from his heavy alcohol consumption, by the time he made his claim for benefits, it was an independent medical impairment.

Plaintiff alleged a disability onset date of February 12, 1991. He was insured for disability benefits through December 31, 1993. Accordingly, he was obligated to establish that his disability persisted into the period between February 12, 1991, and December 31, 1993.

The Commissioner denied Plaintiff's application on March 27, 1997, and denied reconsideration on July 29, 1997. At Plaintiff's request, an Administrative Law Judge held a hearing on January 20, 1999, during which Plaintiff, Dr. Brad Rothkopf (the Commissioner's medical expert), and Richard Baine (a vocational expert) testified. (R. 26-86.) Dr. Rothkopf explained that although Plaintiff's heavy consumption of alcohol caused his chronic pancreatitis, the condition had so progressed that it was disabling without any consideration of his alcohol use. (R. 33-34, 39, 42.) Dr. Rothkopf was unable to say, based on his review of the record, whether Plaintiff's condition would meet or be medically equal to the "listing of impairments" during the relevant period. (R. 47-48, 51.) On December 6, 1999, the ALJ denied Plaintiff's application.

The Appeals Council denied Plaintiff's request for review on August 24, 2001, and denied reconsideration on September 28, 2001. On November 30, 2001, Plaintiff filed a civil action in this District. (01-CV-6012.) After Plaintiff moved for summary judgment, the Commissioner moved

for remand so that the ALJ could:

discuss all of the medical evidence, and provide a rationale for accepting or rejecting medical source opinion evidence; discuss all of the available evidence in formulating a credibility finding and explain the rationale for the credibility finding; issue subpoenas to obtain any [medical records] which pertain to the time period at issue in this case; and hold a supplemental hearing to cure any inaudible notations in the hearing transcript, and to obtain the testimony of a medical expert to opine on Plaintiff's condition during the relevant time period and to discuss any subpoenaed medical records.

(R. 510.) On November 18, 2002, the Court remanded the matter to the ALJ for further proceedings consistent with the Commissioner's motion. See 42 U.S.C. § 405(g).

The ALJ held a supplemental hearing on September 22, 2003, at which Plaintiff and Gary Young (a vocational expert) testified. (R. 750-70.) On March 18, 2004, the ALJ held a second supplemental hearing at which Plaintiff, Dr. Rothkopf, Dr. Richard Cohen (another medical expert), and Dr. Nancy Harter (a vocational expert) testified. (R. 771-817.) Although Dr. Rothkopf testified that Plaintiff's condition might have met or equaled the "listing of impairments" during the relevant period, he also stated that Plaintiff could probably tolerate sedentary work. (R. 781-82, 791.) On May 28, 2004, the ALJ again denied Plaintiff's application. On May 13, 2005, the Appeals Council affirmed. On July 14, 2005, Plaintiff filed the instant action, seeking review of the Commissioner's decision.

I referred this matter to the Magistrate Judge on February 23, 2006. She heard oral argument on May 18, 2006. On April 9, 2007, the Magistrate Judge issued a Report and Recommendation that I grant the Commissioner's summary judgment motion and deny Plaintiff's motion. Plaintiff has filed objections to the Magistrate's Report and Recommendation.

II. LEGAL STANDARDS

The ALJ's decision must be supported by substantial evidence. Allen v. Bowen, 881 F.2d 37, 39 (3d Cir. 1989). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted). The ALJ's decision must be "accompanied by a clear and satisfactory explication of the basis on which it rests." Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). It is within my discretion to affirm, modify, or reverse a Commissioner's final decision with or without remand. 42 U.S.C. § 405(g); Podedworny v. Harris, 745 F.2d 210, 221 (3d Cir. 1984).

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636(b)(1)(C); see generally Goney, 749 F.2d at 7. The Court may "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)©.

III. DISCUSSION

Under the Social Security Act, a claimant is disabled if he or she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to ... last for a continuous period of not less than twelve (12) months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a). Under the medical-vocational regulations, the Commissioner employs the following five-step sequence to evaluate disability claims:

First, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. If he is not, then the Commissioner considers in the second step whether the claimant has a “severe impairment” that significantly limits his physical or mental ability to perform basic work activities. If the claimant suffers a severe impairment, the third inquiry is whether, based on the medical evidence, the impairment meets the criteria of the impairment listed in the “listing of impairments,” . . . which result in a presumption of disability, or whether the claimant retains the capacity for work. If the impairment does not meet the criteria for a listed impairment, then the Commissioner assesses in the fourth step whether, despite the severe impairment, the claimant has the residual functional capacity to perform his past work. If the claimant cannot perform his past work, then the final step is to determine whether there is other work in the national economy that the claimant can perform.

Sykes v. Apfel, 228 F.3d 259, 262-63 (3d Cir. 2000); see also 20 C.F.R. § 404.1520. Although the claimant must prove the existence of a disability, he or she meets this burden by showing an inability to return to former work. 42 U.S.C. § 423(d)(5). The burden then shifts to the Commissioner to establish that the claimant, given his or her age, education, and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

Here, the ALJ found in relevant part:

2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. From February 12, 1991 through December 31, 1993, the claimant’s pancreatitis was a “severe” impairment....
4. From February 12, 1991 through December 31, 1993, the claimant did not have an impairment which met or medically equaled one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
....
6. The claimant’s residual functional capacity was consistent with the ability to perform the full range of sedentary work.
7. From February 12, 1991 through December 31, 1993, the claimant was unable to perform any of his past relevant work (20 CFR § 404.1565).
....
11. Based on an exertional capacity for sedentary work and the claimant’s age, education, and work experience, a finding of “not disabled” is directed by Medical-Vocational Rule 201.21.

(R. 503-04.) The ALJ thus concluded that Plaintiff was not disabled. (Id.)

The Magistrate Judge recommended that I should deny Plaintiff's application for disability insurance benefits. Having carefully reviewed her Report, I cannot understand the basis for it.

Plaintiff contends that: (1) the Magistrate Judge erred by characterizing Dr. Rothkopf's testimony as "subject to speculation and possibilities," and by overlooking Dr. Rothkopf's testimony that Plaintiff suffered disabling pain during the insured period; (2) in reviewing Dr. Rothkopf's testimony, the ALJ confused the analysis of whether Plaintiff's impairment meets a listed impairment (Step Three) with the analysis of Plaintiff's residual functional capacity to perform any work in the national economy (Step Five); (3) the ALJ incorrectly found that Dr. Rothkopf never opined that Plaintiff's pain level during the relevant period was disabling; and (4) the ALJ and the Magistrate Judge erred in concluding that Plaintiff is not disabled, because Plaintiff's chronic pain rendered him unable to perform sedentary work in a sustained manner.

I conclude that this matter must be remanded to the ALJ for two reasons. First, I am unable to determine whether the ALJ confused his analyses of Steps Three and Five. In his analysis of Plaintiff's residual functional capacity, the ALJ stated:

In fact, in response to the Administrative Law Judge's question as to whether the claimant would be disabled as of February 26, 1991, based on his medical condition without consideration of his alcohol abuse, Dr. Rothkopf responded "No. No. No. That, Your Honor, is not what I thought I was trying to say."

(R. 501 (quoting R. 43).) Plaintiff argues that Dr. Rothkopf was addressing whether Plaintiff's impairment met or equaled the substance abuse criteria in the "listing of impairments," which is properly part of the Step Three analysis. Plaintiff contends that because Steps Three and Five require separate analyses, the ALJ should not have considered Dr. Rothkopf's statement in the Step Five

context. It is unclear from the record whether Plaintiff's contention is correct. Obviously, whether or not Dr. Rothkopf considered Plaintiff disabled within the meaning of Step Five could well determine Plaintiff's eligibility for benefits. Accordingly, I will remand so that the ALJ can provide "a clear and satisfactory explication of the basis" for his decision regarding Step Five. See Cotter, 642 F.2d at 704.

Second, I am unable to determine whether the ALJ erred in concluding that Dr. Rothkopf never opined that Plaintiff's pain level during the relevant period was disabling. Plaintiff offers the following hearing testimony from Dr. Rothkopf:

ALJ:	I guess my question is this. Has his pancreatitis progressed to the point where it would be disabling without any consideration of alcohol use?
Dr. Rothkopf:	Yes. On the basis of the pain, Your Honor.

(R. 42.) It is unclear whether Dr. Rothkopf here addressed Plaintiff's pain level at the time of the hearing or Plaintiff's pain level during the relevant period. Once again, the answer could well determine Plaintiff's eligibility for benefits. Accordingly, I will remand for the ALJ to consider Dr. Rothkopf's testimony on this issue. See Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994) ("The Secretary may properly accept some parts of the medical evidence and reject other parts, but [he] must consider all the evidence and give some reason for discounting the evidence [he] rejects.").

IV. CONCLUSION

I cannot determine whether substantial evidence supports the ALJ's decision. Accordingly, I will remand for further proceedings.

Finally, I note that in her Report and Recommendation (issued almost a year after she heard argument), the Magistrate Judge failed to address most of the issues Plaintiff had raised in his

summary judgment motion, and failed to explain the basis for her decision. Should this matter again come before the Magistrate, she is directed to review all the issues raised, and set out the basis for any recommendation she may make.

An appropriate Order follows.

BY THE COURT.

/s Paul S. Diamond, J.

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GERALD W. HYER	:	
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	:	
MICHAEL J. ASTRUE	:	
Commissioner of Social Security	:	

ORDER

AND NOW, this 11th day of July, 2007, upon consideration of the Parties' cross motions for summary judgment, the Magistrate Judge's Report and Recommendation, and the objections thereto, it is ORDERED that:

- (1) Plaintiff's Objections are **SUSTAINED**;
- (2) The Report and Recommendation is **NOT ADOPTED**;
- (3) Defendant's Motion for Summary Judgment is **DENIED**;
- (4) Plaintiff's Motion for Summary Judgment is **DENIED**; and
- (5) This matter is **REMANDED** to the Commissioner of the Social Security Administration for further proceedings in accordance with the above Memorandum.

The Clerk's Office shall close this case for statistical purposes.

IT IS SO ORDERED.

/s Paul S. Diamond, J.

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