

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

CHARLES GAGLIARDI : CIVIL ACTION
 :
 v. :
 :
 KENNETH S. APFEL,¹ :
 Commissioner of Social Security : NO. 97-4933

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 27, 1998

Plaintiff Charles Gagliardi ("Gagliardi") seeks review under 42 U.S.C. § 405(g) of the final decision of the Commissioner of Social Security (the "Commissioner") denying his claims for disability insurance benefits ("DIB") under Title II of the Social Security Act (the "Act"). See 42 U.S.C. § 401, et seq. The parties' cross-motions for summary judgment were referred to United States Magistrate Judge Thomas J. Rueter ("Judge Rueter") for a Report and Recommendation. Judge Rueter recommended that Gagliardi's motion for summary judgment, or in the alternative motion for remand, be denied and the Commissioner's motion for summary judgment be granted.

Gagliardi objected to Judge Rueter's Report and Recommendation that the Commissioner's denial of disability, on the ground that Gagliardi was not disabled on or before December 31, 1984, was based on substantial evidence; he claims the

¹ Kenneth S. Apfel was appointed Commissioner of Social Security on September 29, 1997 and has been substituted automatically for his predecessor, Acting Commissioner of Social Security John J. Callahan. See Fed. R. Civ. P. 25(d)(1).

Commissioner and Judge Rueter erred in not according dispositive weight to the medical opinion of Dr. Farber, who stated in a May 1, 1996 letter that Gagliardi had an initial attack of Multiple Sclerosis in 1972 or 1973. There was no medical evidence in the record dating from 1976 to 1993; this retrospective diagnosis of Dr. Farber was the only evidence, other than plaintiff's testimony, of disability predating December 31, 1984, the claimed date of onset.

The court conducts de novo review of the portions of a magistrate judge's Report and Recommendation on a dispositive motion to which specific objections have been filed. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). In reviewing the decision of the Commissioner, this court must uphold the denial of benefits as long as the Commissioner's determination is supported by substantial evidence. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986). "Substantial evidence is defined as the relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Maduro v. Shalala, No. 94-6932, 1995 WL 542451, at *1 (E.D. Pa. Sept. 9, 1995) (Shapiro, J.); see Richardson, 402 U.S. at 401; Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). Substantial evidence is "more than a scintilla of evidence but may be somewhat less than a preponderance of the evidence." Maduro, 1995 WL 542451, at *1;

see Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir.), cert. denied, 402 U.S. 976 (1971). The court cannot conduct de novo review of the Commissioner's decision or re-weigh the evidence of record. See Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987).

Gagliardi claims that the letter of Dr. Farber should be given controlling weight in determining the onset of his disability. Generally, the Commissioner should give more weight to the opinion of a treating physician than a nontreating physician. See 20 C.F.R. § 416.927(d)(2). In this case, Dr. Farber was Gagliardi's treating physician beginning in 1993, nine years after the alleged onset of Gagliardi's disability. Dr. Farber's opinion regarding the onset of Gagliardi's Multiple Sclerosis is thus a retrospective diagnosis and, as such, is not conclusive, especially when the disability is a progressive disease. See Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991) ("While we agree with claimant that retrospective diagnosis and subjective testimony can be used to diagnose a physical or mental condition, this type of evidence alone cannot justify an award of benefits."); Potter v. Secretary of Health & Hum. Servs., 905 F.2d 1346, 1348-49 (10th Cir. 1990). Beyond the threshold determination that conclusive weight need not be given to a retrospective diagnosis, the weight to accord specific evidence is left to the discretion of the Commissioner; the

reviewing court does not re-weigh the evidence. See Monsour, 806 F.2d at 1190.

Upon review of the record, the court cannot say that the Commissioner's determination was not supported by substantial evidence. See 42 U.S.C. § 405(g); Richardson, 402 U.S. at 390. A "reasonable mind" might find sufficient evidence in the record to conclude that Gagliardi was not disabled on or before December 31, 1984. See Dobrowolsky, 606 F.2d at 406; Maduro, 1995 WL 542451, at *1. There were no contemporaneous medical records of a disability prior to December 31, 1984. The testimony of Gagliardi regarding his abilities and activities in 1984 supports the Commissioner's finding that Gagliardi was not disabled on or before December 31, 1984. Although Gagliardi's sporadic work history ended with three days of construction labor in 1983, he testified that he was able to drive his car, help clean around the house, and lift weights up to thirty pounds throughout 1984. This testimony affords sufficient evidence to support the Commissioner's finding that Gagliardi was not disabled on or before December 31, 1984.

An appropriate Order follows.

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ORDER

AND NOW, this 27th day of August, 1998, upon consideration of the parties' cross-motions for summary judgment, de novo review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED**.
2. Plaintiff's motion for summary judgment, or in the alternative for remand, is **DENIED**.
3. Defendant's motion for summary judgment is **GRANTED**. Judgment is **ENTERED** in favor of defendant.

Norma L. Shapiro, J.

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