

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

ROGER OUIMET,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
KENNETH S. APFEL,	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
	:	
Defendant	:	NO. 97-6197

M E M O R A N D U M

Padova, J.

September 17, 1998

Plaintiff, Roger Ouimet, brought this action under 42 U.S.C.A. § 405(g) (West 1991 and Supp. 1998), seeking judicial review of the final decision of the Commissioner of Social Security, Defendant Kenneth S. Apfel ("Commissioner") denying Plaintiff's claim for disability insurance benefits ("DIB") and supplemental security income benefits ("SSI") pursuant to Title II and Title XVI of the Social Security Act, 42 U.S.C.A. §§ 401-433, 1381-1383(c) (West 1991 and Supp. 1998), respectively. The parties filed cross-motions for summary judgment. Pursuant to Local Rule 72.1(d)(1)(C), the Court referred the case to Magistrate Judge Arnold C. Rapoport for a Report and Recommendation ("Report"). Plaintiff filed timely objections to the Report. Because the Court finds that the decision of the Commissioner is supported by substantial evidence, the Report will be adopted, the Commissioner's motion for Summary Judgment will be granted, and Plaintiff's motion for Summary Judgment will be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was born February 13, 1947, and was 49 years old at the time of the hearing before the Administrative Law Judge ("ALJ"). He has an eighth grade education. Plaintiff received a course certification from welding school in 1962 (Record ("R.") at 26), and worked in construction from 1966 to 1988 as an iron worker (R. at 26, 27, 92.) In 1982, Plaintiff suffered left shoulder and neck injuries in an on-the-job accident. As a result he underwent shoulder surgery in November, 1982, and a cervical spine procedure in January, 1983. (R. at 140, 143-145.) Plaintiff returned to work in 1985, but was laid off in 1988. Plaintiff explains that he was laid off because of continued absences from work due to recurrent neck pain. (R. at 85A, 88.) Plaintiff has not worked since January 1, 1989.¹

Plaintiff applied for DIB and SSI on April 20, 1994. His applications were denied both initially and upon reconsideration. (R. at 11.) Plaintiff then requested a hearing before an ALJ. (R. at 81.) A hearing was held before ALJ Harriet A. Simon on August 8, 1996. Plaintiff testified at the hearing and was represented by his counsel Harvey Miller, Esq. (R. at 22-54.) George Starosta, a vocational expert ("VE"), also testified. (R.

¹ Plaintiff worked briefly from June 5, 1991, until June 10, 1991, assembling chicken coops. (R. at 29, 85A, 232.)

at 50-53.) Twenty-eight exhibits were entered into evidence at the hearing and one additional exhibit was admitted subsequently. (R. at 1, 55-239, 240-267.) On October 26, 1996, the ALJ issued a report finding Plaintiff "not disabled" under the act and thus ineligible for DIB and SSI. (R. at 8-21.) Plaintiff filed a timely request to the Appeals Council for review of the ALJ's decision. (R. at 6-7.)

In considering Plaintiff's request for review, the Appeals Council made additional evidence part of the record.² (R. at 5.) The Appeals Council denied Plaintiff's request for review on August 7, 1997, and found that the additional evidence did not provide a basis for changing the ALJ's decision. (R. at 3-4.) The ALJ's findings then became the final decision of the Commissioner. See Jesurum v. Secretary of the United States Dep't. of Health & Human Servs., 48 F.3d 114, 116 (3d Cir. 1995).

On October 7, 1997, Plaintiff filed this action. Both parties filed motions for Summary Judgment. Magistrate Judge Arnold C. Rapoport filed his Report on July 15, 1998.

In his Report, the Magistrate finds that, based upon a review of the record as a whole, the Commissioner's decision is supported by "substantial evidence." Thus, the Report recommends

² The new evidence consisted of a Health Sustaining Medication Assessment Form filled out by Gerald Miller, M.D., asserting that Plaintiff is totally disabled. (R. at 268-269.)

that Plaintiff's Motion for Summary Judgment be denied and Defendant's Motion for Summary Judgment be granted.

Plaintiff's objections to the Report are twofold. First, Plaintiff argues that the standard of review applied by the Magistrate Judge was too narrow. Second, Plaintiff argues that the Commissioner evaluated his subjective complaints of pain improperly. The Court will address each of Plaintiff's objections below.

II. LEGAL STANDARD

The role of the Court in reviewing the Commissioner's decision to deny disability benefits is to determine whether that decision is supported by "substantial evidence." 42 U.S.C.A. § 405(g). "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) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). It consists of more than a mere scintilla of evidence but may be less than a preponderance. Id. The Court may not undertake a de novo review of the Commissioner's decision. Monsour Medical Center v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (holding that the Court must defer to agency inferences from facts if they are supported by substantial

evidence, "even [where] this court acting de novo might have reached a different conclusion") (citation omitted)). "[T]he evidence must be sufficient to support the conclusion of a reasonable person after considering the evidentiary record as a whole, not just the evidence that is consistent with the agency's findings." Id. at 1190.

III. DISCUSSION

A. The Process

Title II of the Social Security Act provides for the payment of disability insurance benefits to those who have contributed to the program and who suffer from a physical or mental disability. 42 U.S.C.A. § 423(a)(1)(D). Title XVI of the Act establishes that a person is eligible for SSI benefits if his or her income and financial resources are below a certain level, and if he or she is "disabled." The statutory definition of "disability" under both Titles is as follows:³

(1) The term "disability" means--

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected

³ The regulations implementing the Title XVI standard, 42 U.S.C.A. § 1382c(a)(3), and those implementing the identical Title II standard, 42 U.S.C.A. § 423(d) are the same in all relevant respects. Williams, 970 F.2d at 1181 n.1.

to last for a continuous period of not less than 12 months

. . .

(2) For purposes of paragraph (1)(A)--

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

. . .

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C.A. § 423(d). The Secretary of Health and Human Services has established a five step sequential evaluation process for determining whether a person is disabled. Williams v. Sullivan, 970 F.2d 1178, 1180 (3d Cir. 1992) (citing 20 C.F.R. § 404.1520 (1991)). In Sullivan v. Zebley, 493 U.S. 521 (1990), the Supreme Court of the United States explained how this sequential evaluation process operates:

The first two steps involve threshold determinations that the claimant is not presently working, and has an impairment which is of the required duration and which significantly limits his ability to work. In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. If the claimant cannot qualify under the

listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits.

Id. at 525.

The claimant bears the initial burden of proving disability. See Podedworny v. Harris, 745 F.2d 210, 217 (3d Cir. 1984). The claimant satisfies this initial burden by showing that he cannot return to his customary occupation. See id. The burden then shifts to the Commissioner to prove that the claimant can still engage in substantial gainful activity. See id. The Commissioner satisfies this burden by showing that, given the claimant's age, education, work experience and residual functional capacity, he can perform jobs that exist in the national and regional economies. See id.

In this case, the ALJ passed through the first four steps of 20 C.F.R. § 404.1520, concluding that: (1) the claimant has not engaged in substantial activity since January 1, 1989; (2) the medical evidence establishes that the claimant has severe impairments consisting of degenerative joint disease of the cervical spine, degenerative joint disease of the left shoulder with bursitis and a myofascial component, and a mildly dilated left ventricle with reduced systolic function, extensive anterior, apical, lateral and distal inferior akinesis; (3) the

claimant does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4; and, (4) the claimant is unable to perform his past relevant work. (R. at 19-20.)

The Commissioner's decision of "not disabled" therefore turned on step five of the analysis. At step five, it is determined "on the basis of the claimant's age, education, work experience and residual functional capacity, whether the applicant can perform any other gainful and substantial work within the economy." Santise v. Schweiker, 676 F.2d 925, 927 (3d Cir. 1982). From the medical evidence, the ALJ concluded that Plaintiff had the residual functional capacity to perform light work reduced by nonexertional limitations involving the preclusion of overhead reaching, hyperextension of the neck and repetitive rotation of the neck. (R. at 8.)

B. The Medical Evidence

In order to determine whether the Commissioner's decision is supported by substantial evidence, it is necessary to begin with a review of the medical evidence of record. It is essential for this Court to consider the "evidentiary record as a whole, not

just the evidence that is consistent with the agency's findings."⁴ Monsour Medical Center, 806 F.2d at 1190.

Plaintiff's medical problems began in 1982 when he suffered left shoulder and neck injuries in an on-the-job accident. As a result he underwent left rotator cuff surgery in November 1982, followed by surgical decompression for left cervical radiculopathy in January, 1983. (R. at 140, 143-145.)

Despite his surgeries, Plaintiff continued to experience left shoulder and neck pain. The medical records show that Plaintiff continued to undergo examinations by Daniel C. Good, M.D., who performed Plaintiff's initial neck surgery. In January 1984, Dr. Good notes that since his surgeries, Plaintiff "really did not get better" and is "still having a lot of shoulder pain." (R. at 138.) Plaintiff returned to work in 1985, but was laid off in 1988; his explanation is that he was laid off because of continued absences from work due to recurrent neck pain. (R. at 85A, 88.)

Following his layoff, Plaintiff was treated at the Veterans Affairs Medical Center in Lebanon, Pennsylvania for a variety of maladies including the removal of a sebaceous cyst, gout, high blood pressure and high cholesterol. (R. at 148-202.) He also

⁴ The Court has reviewed thoroughly the entire administrative record. The medical history as provided herein, with some minor changes, are adopted from the Report and Recommendation of the Magistrate Judge.

complained of frequent ear drainage as well as occipital headaches. (R. at 190.) In April 1991, after admitting to drinking at least fifteen 16-ounce beers each day (R. at 178), Plaintiff was warned that his alcohol consumption and cigarette smoking would complicate his problems with obesity, high cholesterol, and high blood pressure. (R. at 179.)

A radiology report dated April 5, 1991, indicated that Plaintiff had a cardiac enlargement and a mild atherosclerosis of the aorta, but no acute infiltrates or congestive heart failure. (R. at 176.) Other treatment at the V.A. Center included eye examinations and an updated prescription for glasses. (R. at 160-164.)

In October to November 1993, Plaintiff was successfully treated for gout in his left knee at the Susquehanna Family Health Center. (R. at 117.) A November 17, 1993, report by Nelson R. Lehman, M.D., indicates that while Plaintiff's gout was completely gone, he was complaining about frontal headaches he had had for several weeks. (R. at 117.) On November 24, 1993, Plaintiff was examined by Gerald E. Miller, M.D. at the Susquehanna Center for complaints of pain in his left posterior neck area, which seemed to move into the left trapezoid and left temporal areas. Dr. Miller determined Plaintiff's pain was due to muscle spasm and his prior cervical spine surgery at the C-4 level, but that there was no symptomology to suggest a radicular

problem at that time. (R. at 118.) Dr. Miller prescribed Naprosyn, Flexeril and Tylox for Plaintiff's severe pain and insomnia. (R. at 118.)

On December 6, 1993, Plaintiff called Dr. Miller, complaining of continuous neck pain and headaches. Dr. Miller prescribed Tylox for Plaintiff's severe headaches and referred Plaintiff to James P. Argires, M.D. of Lancaster Neurological Associates. (R. at 118.) Plaintiff was seen by Dr. Argires on December 20, 1993. (R. at 132.) Dr. Argires examination revealed "significant paraspinal spasm with marked restriction in cervical movement." (R. at 133.) He diagnosed Plaintiff with cervical spondylosis with radiculopathy and ordered an MRI. (R. at 133-34.) Plaintiff's MRI showed central disc herniation at C4-5 with central cord impingement and bilateral spurs with foraminal narrowing at C4-5. (R. at 135.) Because of the MRI findings, Dr. Argires recommended an anterior cervical discectomy. (R. at 131.)

Dr. Argires performed the discectomy on January 26, 1994. (R. at 129.) In a letter dated March 9, 1994, documenting a February 4, 1994, follow up visit, Dr. Argires noted that Plaintiff's overall progress was quite good, but that he still had mild discomfort across the mid cervical region. (R. at 128.) Plaintiff returned to Dr. Argires on May 2, 1994, and was still experiencing some discomfort in his neck. Dr. Argires told

Plaintiff that he had nothing else to offer him other than to suggest that Plaintiff increase his activities. (R. at 127.) On June 21, 1994, Plaintiff returned to Dr. Argires' office manifesting "considerable headache patterns of a suboccipital nature associated with some arm pain." (R. at 203.) Dr. Argires ordered another cervical spine MRI for Plaintiff. (R. at 206.) The June 22, 1994, MRI revealed that Plaintiff still had cord compression at C4-5 and bilateral spurring at that level, as well as some disc herniation. (R. at 206.) Dr. Argires recommended a posterior cervical laminectomy and decompression. (R. at 207.) The procedure was scheduled for July 22, 1994. (R. at 206.)

Although the actual hospital reports of the July 22, 1994, surgery are absent from the record, it is evident from other evidence contained therein that Plaintiff underwent the procedure. (R. at 14, 46, 216.) Following the posterior laminectomy, Plaintiff still suffered from "considerable" pain and "limited mobility" in his left shoulder. Plaintiff was examined by Timothy P. Tymon, M.D. of Lancaster Orthopedic Group, Inc. on October 21, 1994, for these problems. Dr. Tymon diagnosed Plaintiff with chronic impingement of the left shoulder and performed a left shoulder arthroscopic acromioplasty and debridement on November 22, 1994. (R. at 209, 211.) In a follow-up visit to Dr. Tymon on December 2, 1994, Plaintiff

continued to have pain in his shoulder. Dr. Tymon prescribed Vicodin and Restoril and some physical therapy. (R. at 209.)

When Plaintiff returned to Dr. Tymon on March 3, 1995, he was still having significant pain in his left shoulder. Although an x-ray revealed that the arthroscopic acromioplasty had "well decompressed" Plaintiff's acromion, Dr. Tymon recommended a distal clavicle excision in an attempt to alleviate Plaintiff's ongoing pain. (R. at 220.) Dr. Tymon performed the surgery on March 30, 1995. (R. at 222.) At an April 7, 1995, follow-up visit Plaintiff reported some post-operative pain. Dr. Tymon prescribed Vicodin and Flexeril. (R. at 220.) When Plaintiff saw Dr. Tymon again on June 1, 1995, he complained of pain "when he abducts his shoulder in forward flexion." (R. at 219.)

On March 12, 1996, Plaintiff began treatment at the Milton S. Hershey Medical Center's Pain Medicine and Palliative Care Center where he was seen by Thomas M. Root, M.D. (R. at 242-243.) Plaintiff complained of worsening headaches and left neck and shoulder pain. Plaintiff described the headaches as dull, throbbing and constant. Dr. Root found evidence of left greater occipital nerve tenderness and a decreased range of motion secondary to pain in Plaintiff's neck specifically with extension. He also found a decreased range of motion specifically with abduction, probably secondary to pain, in Plaintiff's left shoulder and a trigger point along the left

trapezius muscle that radiated pain into Plaintiff's shoulder and neck. (R. at 242.) Dr. Root diagnosed Plaintiff with myofascial pain syndrome. In addition to the medication Plaintiff was taking at the time, Dr. Root prescribed capsaicin cream and recommended that Plaintiff substitute Doxepin for Elavil in the hopes of improving his sleep. (R. at 243.)

Plaintiff returned to Hershey Medical Center on April 24, 1996, where he was examined by Susan J. McGarrity, M.D. (R. at 244.) Plaintiff's condition had not changed since his March visit and he rated his pain as six on a ten point scale. Dr. McGarrity diagnosed Plaintiff as having cervicogenic disease with left rotator cuff injury, stiff shoulder syndrome and myofascial pain. (R. at 244.) She recommended the trial of a transcutaneous electrical nerve stimulator, but Plaintiff declined because his health insurance would not cover the treatment. (R. at 244.)

Plaintiff received a suprascapular nerve block injection with steroids at the Hershey Medical Center on May 8, 1996. This gave him only temporary relief. Examination by Michael A. Weaver, M.D. on June 20, 1996, revealed that Plaintiff had a marked tenderness throughout his left neck and shoulder, tenderness upon palpation of the left greater occipital nerve, and tenderness upon palpation of the paraspinal musculature over the lower cervical and upper thoracic region and additional

tenderness within the left trapezius muscle. Plaintiff was given two nerve block injections, one in his neck in the area of tenderness over the greater occipital nerve and one in the area of maximal tenderness in his lower cervical spine. Plaintiff reported a decrease in his pain when he left the clinic. (R. at 245.)

During Plaintiff's June 20, 1996, visit Dr. Weaver diagnosed him with bursitis, degenerative joint disease in his left shoulder, capsulitis in his left shoulder, a component of myofascial pain, and left greater occipital nerve neuralgia. (R. at 245.) Dr. Weaver increased Plaintiff's Elavil dosage and indicated consideration of neuropathic pain medications in the future would be appropriate. (R. at 246.)

On July 19, 1996, Plaintiff returned to the Hershey Medical Center to see Dr. Root. Plaintiff reported improvement in his headache pattern since the greater occipital nerve block was administered. However, his neck pain and shoulder pain had continued. Upon examination, Dr. Root found tenderness along Plaintiff's cervical paraspinous muscles and left trapezius muscle and a decreased range of motion in his left shoulder secondary to pain and stiffness. Dr. Root's diagnosis of Plaintiff's neck pain included a probable large myofascial component to his pain because of his significant paracervical muscle spasm. There was also a possibility of cervical facet

joint disease. As to Plaintiff's shoulder pain, Dr. Root again attributed it primarily to myofascial pain. He also recognized a possible component of neuropathic pain and scheduled Plaintiff for a bone scan for possible cervical facet disease. (R. at 247.) The bone scan ruled out facet disease, but showed degenerative disease of the cervical spine at the C5 and C7 levels and in the posterior spinous process at the mid-cervical level. (R. at 249.)

As part of a Health Sustaining Medication Assessment form Dr. Miller filled out for Plaintiff on July 25, 1996, Dr. Miller labeled the Plaintiff "permanently disabled" due to the following: "myofascial pain syndrome, cervical spondylosis and radiculopathy C4-5, chronic headaches, failed rotator cuff surgery, failed neck surgery (x3), hypercholesterolinia, hypertension, and gout." (R. at 269.)

At the hearing on August 8, 1966 Plaintiff confirmed he had had three cervical spine surgeries and five left shoulder surgeries. (R. at 30,33.) He claimed to be in constant pain from headaches because of the problems with his neck and left shoulder. (R. at 37.) Plaintiff indicated the pain starts in his left temple and moves down through his left neck and shoulder, sometimes down as far as his left wrist. (R. at 36-7.) Plaintiff admitted he received no medical treatment for his neck and shoulder pain between 1991 and 1994. (R. at 47.) He

reported he has problems both standing and sitting for extended periods of time. (R. at 43-4.) He alleged that just walking is "pretty tough to do." (R at 44.) His activities included watching television, reading, visiting a friend, going to Little League baseball games, collecting baseball cards, and attending monthly meetings of the American Legion, where he is a Vice-Commander. (R. at 44,45,104-5.)

Plaintiff told the ALJ that he no longer drinks alcohol because of all the medications he takes for his health problems and that his disability claim is in no way related to his previous alcohol abuse documented in 1991. (R. at 46.) In filing his disability report on April 24, 1994, Plaintiff stated "I'm able to handle personal care without assistance since I'm right-handed [and] most of my problems are on the left side." (R. at 98.) But at the hearing, the Plaintiff told the ALJ he was left-handed. (R. at 46.)

At the hearing, the VE classified Plaintiff's previous work as heavy to very heavy and semi-skilled, with the skills from those jobs being non-transferable to light or sedentary work activity. (R. at 50-1.) The ALJ asked the VE to consider whether a person in Plaintiff's condition, having a maximum residual capacity for light work and a nonexertional limitation precluding constant work involving hyperextension or frequent rotation of the neck, could find an unskilled, light job he could

perform.⁵ The VE indicated such a person could find an unskilled light position as a cashier or ticket taker and could also perform bench assembly type work or packaging work, such as folding, collating, sealing or labeling. (R. at 51.) The VE stated there are a "significant" number of these jobs available locally, regionally and nationally. (R. at 51-2.) The VE further stated that if such an individual had a residual functional capacity for sedentary work only, the individual could perform most of the same jobs he listed when discussing light work, such as assembly, packaging and cashier jobs.⁶ (R. at 52.)

⁵ The Social Security regulations discussing exertion requirements define light work as follows:

(b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567(b) (1997).

⁶ The Social Security regulations discussing exertion requirements define sedentary work as follows:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small

The VE was asked whether there were any jobs Plaintiff could perform if all his claims of pain, headaches, and physical limitations were taken as credible. (R. at 52.) The VE opined:

"No, there would not be because if you would consider the pain factors to be moderately severe, by definition meaning it affects the person's ability to function in a competitive labor market, and if the pain factor interferes with his sleep he certainly would not be able to endure a 6 to 8 hour work day which is necessary to be considered as competitive work, so therefore I would say that he would not be able to perform his previous work nor any jobs that I have just listed in the unskilled category."

(R. at 52-3.)

C. The Commissioner's Findings

Plaintiff applied for DIB and SSI. The last date on which Plaintiff met the insured status requirements for entitlement of disability benefits under the Social Security Act, and therefore the last date that Plaintiff was eligible for DIB, was March 31, 1991. See 42 U.S.C.A. § 423(a)(1)(A). There is no medical evidence in the record as to Plaintiff's disability prior to 1993. Because Plaintiff cannot establish disability prior to his

tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a) (1997).

last date insured, his claim for DIB must be denied. His claim for SSI remains and is analyzed below.

(i) Plaintiff's First Objection

Plaintiff asserts that the Magistrate Judge's standard of review was too narrow. Instead of limiting his review of the Commissioner's decision to whether the decision was supported by substantial evidence, Plaintiff argues that the Magistrate should have also reviewed whether the Commissioner applied the law correctly. Plaintiff asserts that the Commissioner misapplied the law by failing to properly evaluate all of the medical evidence. In support of this argument, Plaintiff points to mischaracterizations or misstatements of the medical evidence in the Commissioner's decision. This Court's scope of review on matters of law is plenary. See Podedworny, 745 F.2d at 221 n. 8. For the reasons discussed below, the Court finds that the Commissioner's decision is supported by substantial evidence, and that the aspects of the Commissioner's decision about which Plaintiff complains do not rise to legal error.

In support of his argument, Plaintiff cites Third Circuit case law which directs that an ALJ is duty-bound to analyze all the evidence in the record and should tailor her opinion so that a reviewing court can determine whether probative evidence was properly credited or simply ignored. Cotter v. Harris, 642 F.2d

700, 705 (3d Cir.), reh'g denied, 650 F.2d 481 (3d Cir. 1981).

The "administrative decision should be accompanied by a clear and satisfactory explication of the basis on which it rests." Cotter, 642 F.2d at 704. The Third Circuit further explains:

This court has recognized that there is a particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record. We have emphasized our concern in a long line of cases. Thus in Kennedy v. Richardson, we vacated and remanded the decision of the ALJ because it failed to afford an explanation why the ALJ rejected medical evidence that supported the claimant which was inconsistent with other medical evidence and the ALJ's findings. In Hargenrader v. Califano, we reversed and remanded the decision of the hearing examiner because he had failed to address significant items of evidence which were in direct conflict with his findings. In Schaaf v. Matthews, we held it was error for an ALJ to reject uncontradicted medical evidence without a clear statement of the reasons for doing so.

Id. at 706 (citations omitted). The record at bar does not raise similar concerns. Although the ALJ's opinion in this case could have been more thorough in its explanation of the weight accorded to individual pieces of evidence, the Court finds it sufficient to satisfy the substantial evidence test. See Baerga v. Richardson, 500 F.2d 309 (3d Cir. 1974).

Plaintiff's argument that the Commissioner's failure to consider his cervical spine surgery on July 22, 1994 was legal error is without merit. First, the Court notes that Plaintiff failed to submit the hospital or follow-up records of the July 1994 surgery. Second, the Court agrees with the Commissioner

that, even though the ALJ may not have specifically mentioned Plaintiff's July 1994 surgery in her opinion, the record shows that she was aware of it in posing her hypotheticals to the VE. Prior to formulating her hypotheticals, she specifically mentions Plaintiff's having had two surgeries in 1994 when questioning him about his surgical history. (R. at 46.) Furthermore, the medical history in the record subsequent to the July 1994 surgery, which the ALJ explicitly considers, indicates that the posterior laminectomy was performed, (R. at 14, 216), and, moreover, none of this evidence shows that as a result of the posterior laminectomy, or Plaintiff's subsequent shoulder surgeries, Plaintiff was left wholly incapable of performing any type of work activity. Therefore, whether or not the July 1994 surgery was specifically addressed by the ALJ in her opinion is irrelevant, as she did consider the surgery at the hearing and, in addition, the evidence subsequent to this surgery fails to substantiate Plaintiff's claim of total disability.

As the Commissioner notes, the evidentiary record is devoid of any opinion from Plaintiff's treating physicians that Plaintiff's physical impairments are such that he is unable to do even light or sedentary work.⁷ Under the Social Security Act,

⁷ Dr. Miller's assessment finding Plaintiff "totally disabled" was not before the ALJ, and therefore, "[this evidence] cannot be used to argue that the ALJ's decision was not supported by 'substantial evidence.'" Jones v. Sullivan, 954 F.2d 125 (3d Cir. 1991).

the burden is on the plaintiff to demonstrate by signs and medical findings, "an impairment of such severity as to [render him] unable to engage in any kind of 'substantial gainful work which exists in the national economy.'" Kanqas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987). Had there been evidence, such as reports by Plaintiff's examining physicians stating that as a result of Plaintiff's multiple surgeries he is incapable of performing any kind of work, and that evidence had not been addressed by the ALJ, then Plaintiff's arguments might have been more on point with the Cotter line of case law. See Cotter, 642 F.2d at 704-708; Smith v. Califano, 637 F.2d 968 (3d Cir. 1980). Here, the only evidence supporting Plaintiff's total, as opposed to partial, disability is Plaintiff's own testimony regarding the extent of his functional limitations and his allegedly severe and continuous pain. While such evidence is entitled to serious consideration by the ALJ, Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993) "[a]n individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability." 42 U.S.C.A. §423(d)(5)(A). Moreover, as discussed below, the ALJ did seriously consider this evidence and did not find Plaintiff completely credible with regard to this testimony.⁸

⁸ Plaintiff argues that the Commissioner did not explain why she "disregarded" Plaintiff's headache complaints which were diagnosed as left greater occipital neuralgia. "Neuralgia is a sudden recurrence or intensification of pain and other symptoms extending along the course of one or more nerves." Pl.'s Motion

The Court has reviewed Plaintiff's other arguments with regard to the Commissioner's treatment of the medical evidence and has found that while it may not be completely accurate in its characterization of some of the medical history, its inaccuracies do not constitute legal error.

(ii) Plaintiff's Complaints of Pain

Plaintiff's second objection is that the Commissioner improperly evaluated his subjective complaints of pain. Under the regulations, the ALJ evaluates symptoms, such as neck and shoulder pain, on the basis of medical signs and findings that could reasonably be expected to produce the symptoms alleged. 20 C.F.R. §§ 404.1529, 416.929 (1997). Subjective complaints must be substantiated by medical evidence and the Plaintiff "must show that he has a condition which reasonably could be expected to produce the alleged symptoms that are the cause of his inability to work." Williams, 970 F.2d at 1186 (citing 20 C.F.R. § 404.1529 (1991)). When the medical evidence establishes the

for Summary Judgment, at 5 n. 12, citing Dorland's Medical Dictionary Illustrated, 1126, 1233 (27th ed. 1988). By this definition, neuralgia is a clinical term for describing a specific type of pain rather than a medical impairment which could reasonably be expected to produce pain (20 C.F.R. § 404.1529(a)). Although the ALJ does not specifically discuss Plaintiff's headaches or neuralgia, as discussed below, she implicitly accepts Plaintiff's overall complaints of pain.

existence of a medically determinable impairment that could reasonably be expected to produce a claimant's alleged symptoms, the regulations then require the ALJ to evaluate their intensity and persistence and their effect on the claimant's ability to work in light of the entire record. 20 C.F.R. §§ 404.1529(c), 416.929(c) (1997). At that point, the ALJ must assess the credibility of the claimant's subjective symptoms. In doing so, the ALJ considers the available objective medical evidence, a claimant's own statements about his or her symptoms, statements and other information provided by treating or examining physicians or other persons about the symptoms and how they affect the individual, and any other relevant evidence in the record. 20 C.F.R. §§ 404.1529(c)(2) & (3), 416.929(c)(2) & (3) (1997).

Here, the ALJ accepted Plaintiff's subjective complaints to the extent that she found Plaintiff unable to perform his past relevant work. Although her decision does not expressly credit Plaintiff's complaints, she implicitly accepts them in finding Plaintiff able to perform only light or sedentary work with certain nonexertional limitations. (R. at 18.) See Simmonds v. Heckler, 807 F.2d 54, 58 (3d Cir. 1986).⁹

⁹ In Simmonds the Court explains that the ALJ's crediting the claimant's complaints to the extent that she was limited to sedentary work amounted to "a complete acceptance of [the]

In her decision the ALJ questions Plaintiff's credibility regarding the severity of his impairments and the extent of his functional limitations. Given the lack of medical evidence, from Plaintiff's treating physicians or otherwise, specifically assessing the totality of Plaintiff's functional limitations, the majority of testimony in this regard is Plaintiff's own. "The fact-finder has a duty to review all the evidence of record to decide whether or not the claimant's testimony is credible." Williams, 970 F.2d at 1187, citing Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). On this record, the ALJ notes that while Plaintiff alleges severe back and neck pain, he does not wear a brace for his back or a cervical collar for his neck. (R. at 17.) She further explains that the medical records indicate that while Plaintiff has a decreased range of motion in his shoulders, he has no neurological deficits. Id. In reviewing the record, the ALJ finds little objective support for Plaintiff's assertions regarding the extent of his functional limitations. Hence, while she does not doubt that Plaintiff has some pain, she does question his credibility regarding such functional limitations and their resultant affect on his ability to perform any type of work activity.¹⁰

complaints as precluding any work above a sedentary level." Id.

¹⁰ In making her determination of Plaintiff's credibility, the ALJ gives significant weight to the report of a Social Security

An ALJ has discretion to reject a claimant's subjective complaints where she affirmatively addresses the issue in her decision, specifies her reasons for rejecting the claim, and where her conclusion is supported by the record. Capoferri v. Harris, 501 F.Supp. 32, 37 (E.D. Pa. 1980), aff'd 649 F.2d 858 (3d Cir. 1981), citing Baerga, 500 F.2d 309. Although her explanations are terse, the ALJ confronts Plaintiff's subjective complaints, such as his complaints of pain, accepts Plaintiff's testimony to a substantial degree in finding that he is capable of performing only light or sedentary work, and, because she questioned his credibility with regard to the extent of these complaints, ultimately rejects Plaintiff's claim of complete disability.

As the Magistrate Judge concludes, it is not enough for Plaintiff to demonstrate the existence of an impairment. It

Administration physician dated May 31, 1994, which found that Plaintiff had "no significant limitations of function." (R. at 17, 72-74.) In his Motion for Summary Judgment Plaintiff argues that "[i]t was error for the Commissioner to accord 'significant weight' to an evaluation that failed to consider the majority of the treatment Mr. Aimered required." However, the weight she accorded the report was with regard to Plaintiff's credibility only. The ALJ did not accept the report as conclusory with regard to Plaintiff's functional capacity, as Plaintiff suggests. Rather, she expressly rejected its determinations as understating his functional limitations. She gave the report significant weight only in that the report's conclusions "were in complete contradiction with Plaintiff's claimed disabling conditions." (R. at 17.) At the time of the report, Plaintiff was claiming total disability due to his shoulder and neck injuries. While the report understates Plaintiff's functional capacity, it throws doubt on Plaintiff's claims of total disability.

must be established that the impairment results in functional limitations so severe that they preclude him from engaging in any substantial gainful activity. Dupkunis v. Celebreze, 323 F.2d 380 (3d Cir. 1963); Gardner v. Richardson, 383 F.Supp. 1 (E.D.Pa. 1974). Although the medical evidence establishes that Plaintiff has a painful neck, back and shoulder condition, it does not demonstrate that the condition renders Plaintiff totally disabled from all types of gainful employment. Because substantial evidence supports the Commissioner's determination of "not disabled", the Magistrate's Report and Recommendation will be adopted, the Commissioner's Motion for Summary Judgment will be granted, and Plaintiff's Motion for Summary Judgment will be denied.

An appropriate order follows.