

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

ROBERT W. WILCOX

v.

**KENNETH S. APFEL,
Commissioner of the Social Security
Administration**

CIVIL ACTION

NO. 98-647

MEMORANDUM

Broderick, J.

September , 1999

Plaintiff Robert W. Wilcox ("Wilcox" or "Plaintiff") brings the instant action pursuant to 42 U.S.C. §§ 405 (g) and 1383(c)(3) seeking judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied him disability insurance benefits ("DIB") under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401-433. The parties' filed cross motions for summary judgement which were referred to United States Magistrate Judge Carol Sandra Moore Wells for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Presently before the Court are Plaintiff's objections to the August 31, 1999 report of the Magistrate Judge Wells recommending that summary judgment be granted in favor of the Defendant Secretary and against Plaintiff Wilcox. For the reasons stated below, the Court will approve and adopt Magistrate Wells' report and recommendation, deny Plaintiff's motion for summary judgment, and grant Defendant's motion for summary judgment.

The factual and procedural background of this case is detailed in Magistrate Judge Wells'

report and recommendation and in Plaintiff's motion for summary judgment. The Court will, therefore, merely give a brief summary of the record. Wilcox alleges that he is disabled based on residual problems from a right ankle fracture he suffered on November 30, 1987 in a workplace accident. Wilcox underwent an arthroscopic debridement of his right ankle on February 2, 1989 as a result of his 1987 injury. Wilcox has not worked since his 1987 ankle injury and continues to complain of pain and immobility in that ankle. After his ankle injury, Wilcox gained more than 100 pounds. This weight gain is at least partly attributable to the lack of mobility his ankle injury caused. Wilcox's treating orthopedic surgeon, Dr. Leonard Brody, who has been treating him since December 1998, has diagnosed Wilcox with degenerative arthritis in his right ankle. Dr. Brody believes that ankle fusion surgery is the only available treatment which will resolve the pain Mr. Wilcox experiences in his right ankle. However, Dr. Brody has been unwilling to perform the surgery because of Wilcox's weight. Wilcox also complains of pain in his right knee and right hip which Dr. Brody attributes to the alteration in his gait caused by the ankle injury.

Wilcox filed an application for DIB based on his residual ankle pain and obesity on August 30, 1991 seeking benefits from the date of his injury in 1987. His application was denied initially and on reconsideration. A hearing was held before Administrative Law Judge ("ALJ") Norman B. Lynch on October 14, 1992. At that hearing, Wilcox was represented by counsel and testified before ALJ Lynch, as did a vocational expert ("VE"). ALJ Lynch rendered a decision on February 20, 1993 denying Wilcox benefits because he found that, although Wilcox was unable to return to his previous employment, he retained the residual functional capacity to perform sedentary work and, thus, was not disabled under the Act. The Appeals Council declined Wilcox's request for review. Wilcox then sought judicial review of the final decision of the

Commissioner. Wilcox's complaint was referred to United States Magistrate Judge James R. Melinson for a report and recommendation by the Honorable Robert S. Gawthrop, III. Judge Gawthrop approved and adopted Magistrate Judge Melinson's report and recommendation on May 15, 1995, ordering that Wilcox's claims be remanded to the Commissioner for an additional hearing. Judge Gawthrop directed the Commissioner to allow Wilcox an opportunity to display his injured ankle and to present corroborating testimony from his girlfriend, both of which ALJ Lynch had refused to allow Wilcox to do at the October 14, 1992 hearing. Judge Gawthrop also instructed the Commissioner to consider Dr. Brody's March 6, 1992 letter which stated, in relevant part, that "[a]t the current time Mr. Wilcox is not a candidate for return to work."

ALJ Lynch convened a remand hearing on March 29, 1996. ALJ Lynch viewed Wilcox's injured ankle, compared it to his non-injured left ankle, and then recused himself, at Wilcox's request. A second remand hearing was held before ALJ Diane C. Moskal on July 10, 1996. At that hearing, ALJ Moskal heard testimony from Wilcox and a VE. ALJ Moskal also made a visual examination of Wilcox's right foot in comparison to his left foot. ALJ Moskal did not hear testimony from Debbie Martin, Wilcox's fiancée at the time of the first hearing, because the relationship had ended and Wilcox's attorney did not wish to call Ms. Martin. The ALJ instead heard testimony from Maureen McCloskey, Wilcox's live-in girlfriend since 1994.

On January 21, 1997, ALJ Moskal issued her decision that Wilcox was not disabled during any time between November 30, 1987 and December 31, 1992, his last insured date. The Appeals Council denied Plaintiff's request for review, rendering ALJ Moskal's decision the final decision of the Commissioner. The instant action followed.

The Court conducts a de novo review of the portions of the Magistrate Judge's report and

recommendation to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). This Court's review of the Commissioner's final decision is "limited to determining whether that decision is supported by substantial evidence." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999). See also 42 U.S.C. § 405(g). Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft, 181 F.3d at 360 (quoting Pierce v. Underwood, 487 U.S. 552 (1988)) (internal quotations omitted). This Court "will not set the Commissioner's decision aside if it is supported by substantial evidence, even if we would have decided the factual inquiry differently." Hartranft, 181 F.3d at 360. The Court "cannot conduct a de novo review of the Commissioner's decision or re-weigh the evidence of record." Palmer v. Apfel, 995 F. Supp. 549, 552 (E.D.Pa. 1998) (citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1990 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987)). The Court "is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record." Plummer v. Apfel, No. 98-1825, 1999 WL 571062 at *3 (3d Cir. Aug. 5, 1999).

To be eligible for benefits under the Act a claimant must demonstrate that he is under a "disability," which the Act defines in relevant part as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A). The Social Security Administration's regulations ("the administrative regulations") provide a five step sequential evaluation process for determining whether a claimant suffers from a "disability." See 20 C.F.R. § 404.1520. The United States Supreme Court has aptly summarized the process as follows:

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 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.

Sullivan v. Zebley, 493 U.S. 521, 525 (1990). The claimant bears the burden of proof as to the first four steps but, if the claimant is unable to resume his former occupation, the "burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability." Plummer, 1999 WL 571062 at *4. "The ALJ must show that there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with [his] medical impairments, age, education, past work experience, and residual functional capacity." Id.

Applying the sequential analysis described above, ALJ Moskal made the following findings:

1. The claimant met the disability insured status requirements of the Act on November 30, 1987, the date the claimant stated he became unable to work, and has acquired sufficient quarters of coverage to remain insured only through December 31, 1992.
2. The claimant has not engaged in substantial gainful activity since November 30, 1987.
3. The medical evidence establishes that on the date his insured status expired the claimant had residuals from a right ankle fracture and obesity, impairments which are severe but which do not meet or equal the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.
4. The claimant's statements concerning his impairments and their impact on his ability to work during the relevant period are not entirely credible in light of the degree of medical treatment required (routine, infrequent doctor's visits), medicals used (generally over-the-counter analgesics), and activities of daily living (able to

- leave house for workers comp checks, restaurant meals, etc.).
5. On December 31, 1992, the date his insured status expired, the claimant lacked the residual functional capacity to lift and carry more than ten pounds.
 6. The claimant was unable to perform his past relevant work as a warehousemen and an assistant manager in a food service company.
 7. The claimant has not significant non-exertional limitations which narrowed the range of work he was capable of performing on the date his insured status expired, [except] that he needed to sometimes elevate his right foot and ankle.
 8. On the date his insured status expired, the claimant was 32 years old, a "younger individual."
 9. The claimant has a high school education.
 10. The claimant has semi-skilled work experience.
 11. The vocational expert identified significant numbers of sedentary jobs which claimant could perform within his residual functional capacity.
 12. Based on an exertional capacity for sedentary work, and the claimant's age, educational background, and work experience, Section 404.1569 and Rules 201.27 and 201.29, Table 1, Appendix 2, Subpart P. Regulations No. 4, direct a conclusion of "not disabled."
 13. The claimant was not under a disability, as defined in the Social Security Act, at any time through December 31, 1992, the date his insured status expired.

Record ("R.") at 509-510. Wilcox challenged the ALJ's conclusion that his pain allegations were not sufficiently credible. Wilcox also challenged the ALJ's determination, in reliance on the testimony of the VE, that Wilcox could, despite his physical limitations, perform jobs that were present in the national economy.

Magistrate Judge Wells reviewed the record as well as the arguments raised by Wilcox and the Commissioner in the motions for summary judgment and concluded that the ALJ's findings were supported by substantial evidence in the record. Report and Recommendation ("R&R") at 1. Specifically, Magistrate Wells determined that ALJ Moskal properly considered the medical records and the opinions rendered by Dr. Brody, Wilcox's treating physician. R&R at 13. Magistrate Wells also determined that ALJ Moskal appropriately weighed Wilcox's subjective complaints. R&R at 14. Finally, Magistrate Wells determined that the ALJ's use of

the VE's testimony was appropriate. R&R at 17. Magistrate Wells therefore recommended that the decision of the Commissioner be upheld, Plaintiff's motion for summary judgment be denied, and the Commissioner's motion for summary judgment be granted. R&R at 19.

Wilcox filed the following objections to Magistrate Wells' report and recommendation:

1. The "Factual Background" (Statement of Facts) in the Report and Recommendation completely excludes any references to testimony by the Vocational Expert-Nancy Harder.
2. The Report and Recommendation does not address claimant's contention that the opinions rendered by the Vocational Expert (VE) and relied upon by the Administrative Law Judge were equivocal.
3. The Report and Recommendation does not address claimant's contention that the Administrative Law Judge improperly relied upon "light" duty jobs that were mischaracterized as "sedentary" by the VE.
4. The Report and Recommendation does not address claimant's contention that the VE improperly ignored acknowledged speaking limitations on the part of claimant when identifying jobs requiring communicative duties.
5. The Report and Recommendation fails to address with any ascertainable analysis claimant's contention that the hypothetical(s) propounded by the Administrative Law Judge to the VE lacked necessary references to ambulatory limitations. Report and Recommendation, pp. 5, 18. Contrary to the findings in the Report and Recommendation, the Administrative Law Judge did not discredit claimant's need to ambulate with a cane, inability to ascend/descend stairs, foot spasms painful enough to impair communication, or walking, standing and weight bearing limitations that would affect lifting and carrying. Report and Recommendation, pp. 18.
6. The Report and Recommendation does not address claimant's contention that the Administrative Law Judge failed to elicit from the VE the number of jobs in the economy found to be suitable for claimant.
- 9.[sic] The Report and Recommendation does not anywhere in the Statement of Facts or in its Discussion section recite any actual testimony rendered by the VE.
10. The Report and Recommendation incorrectly states that the claimant failed to satisfy the "severity requirement" (Step 2 of the Sequential Analysis) before the Administrative Law Judge. In fact, the Administrative Law Judge conceded that claimant had "severe limitations" and satisfied the severity requirement. Report and Recommendation, p.13. See R.509, ALJ Finding, No. 3. See also Defendant's Brief at 9. The ALJ's decision is, in fact, a Step 5 - "Other Work" decision.
11. The Report and Recommendation does not address claimant's contention that Administrative Law Judge Moskal's on-the-record description of claimant's

physical deformity was at variance with the description in Judge Moskal's decision. See Report and Recommendation, p.17. The Report and Recommendation does not recite Judge Moskal's on-the-record description of claimant's right foot in any fashion. Instead, the Report and Recommendation summarizes only the description by Judge Lynch, who later recused himself and did not render a post-remand decision. Report and Recommendation, p.6.

12. Plaintiff's [sic] objects to the proposed form of Order denying plaintiff's requested relief.

The Commissioner has not objected to the Report and Recommendation or filed a response to Plaintiff's objections.

Because Wilcox has objected to the majority of the Report and Recommendation, the Court has made a de novo review of the entire record in order to determine whether or not the ALJ's decision was supported by substantial evidence. Initially, the Court finds that ALJ Moskal's finding that Wilcox's statements concerning his impairments are not entirely credible is supported by substantial evidence in the record. It is the responsibility of the ALJ to determine the credibility of witnesses and weigh the evidence presented. Richardson v. Perales, 402 U.S. 389, 401 (1971). Wilcox testified at the initial hearing before ALJ Lynch on October 14, 1992 and at the remand hearing before ALJ Moskal on July 10, 1996. Although Wilcox's testimony in 1996 as to his current condition came almost four years after his last insured date, his testimony is still relevant because Wilcox testified on July 10, 1996 that "back then [October of 1992] I probably did a little bit more, not much more than I do now...." R. at 350. Dr. Brody's treatment records also indicate that Wilcox's condition is a degenerative one. R. at 206. Wilcox testified that he was unable to stand for more than a few minutes or to walk for more than 30 feet without suffering severe pain. R. at 115-116. He also testified that he was unable to perform household chores and that his ankle required him to spend most of his time in bed with his leg elevated. R.

at 103-104, 111-112, 121-124, 363. Wilcox testified that he suffered regular spasms in the foot which rendered him unable to move or speak for periods of time. R. at 355-56. In 1992, Wilcox testified that these spasms occurred two or three times a day. R. at 111. Wilcox testified that he has used a cane or crutches, on the long-standing order of Dr. Brody, since his injury in 1987. R. at 348.

ALJ Moskal determined that Wilcox's testimony that he was in constant, excruciating pain which rendered him unable to take public transportation, perform household chores, walk, or concentrate for periods of time was not credible. Although ALJ Moskal found that Wilcox suffered from a severe impairment and accepted that such impairment would cause serious pain to Wilcox, ALJ Moskal found Wilcox's testimony concerning the extent of his pain was not credible in light of other evidence in the record. An ALJ may discredit a claimant's complaints of pain where there is contradictory evidence in the record and the ALJ explains his basis for doing so. Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). Pain is a disabling factor only when it is so severe that it precludes a person from working so the fact that the claimant cannot work without pain does not necessarily mean that he is disabled. See, e.g., Cancel v. Harris, 512 F. Supp. 69 (E.D.Pa. 1981). In assessing complaints of pain, an ALJ considers such factors as the daily activities of the claimant, the frequency and duration of the pain, and the type of treatment, including medication, the claimant receives to alleviate the pain. Soc. Sec. Ruling 96-7p, 20 CFR § 404.1529. An ALJ is entitled to draw an inference adverse to the claimant from the fact that the claimant has not sought medical assistance to relieve the professed pain. See Mason v. Shalala, 994 F.2d 1058, 1068 (3d Cir. 1993).

In determining that Wilcox's subjective claims of pain were not entirely credible, ALJ

Moskal relied on several pieces of evidence. ALJ Moskal noted that Wilcox testified that his only pain medication was Tylenol or Advil three or four times a week. R. at 505. Wilcox was not undergoing any other treatments or procedures to relieve his pain. R. at 505. ALJ Moskal also noted that Dr. Brody's records demonstrate that Wilcox was examined only three times in 1991 and only twice in the years 1992, 1993, 1994 and 1995. R. at 503. ALJ Moskal examined Wilcox's foot and compared it to the other foot. While she was doing so, Wilcox experienced a spasm in his big toe. R. at 504. ALJ Moskal found Wilcox's "tears and protestations of pain" during her visual examination of his foot were unsupported by any information contained in any of his medical records. R. at 504. Finally, ALJ Moskal noted that Wilcox's testimony and his reports that he could not use public transportation at all and was unable to walk more than a few feet were contradicted by evidence in the record. R. at 505. For example, Maureen McCloskey, Wilcox's live-in girlfriend, testified that Wilcox walked two blocks twice a month to get his workers compensation check and went out to dinner, using the bus or cabs, about twice a month. R. at 505.

The ALJ is empowered to evaluate the credibility of witnesses. See Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). Looking at all the evidence in the record, in light of the standard of review employed by this Court, the Court finds that ALJ Moskal's determination that Wilcox's subjective complaints of pain were not entirely credible is supported by substantial evidence. The Court finds that the ALJ has adequately explained her decision to regard the severity of Plaintiff's symptoms as not entirely credible. Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981).

The Court further finds that ALJ Moskal's decision to not rely on Dr. Brody's statement in

March 1992 that Wilcox was not a candidate for return to work was supported by substantial evidence in the record. Although the treating physician's opinions should be accorded great weight, the Commissioner and the ALJ are not bound by the physician's conclusion of disability and may reject it if insufficient clinical data supports it. See Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). "[A]n ALJ may afford a treating physician's opinion more or less weight depending on the extent to which supporting explanations are provided." Plummer v. Apfel, No. 98-1825, 1999 WL 571062 at *5 (3d Cir. Aug. 5, 1999) (citing Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1984)). ALJ Moskal found that Dr. Brody's statements that Wilcox was unable to work were based largely on Wilcox's subjective statements that he could not use public transportation and could not walk even short distances. R. at 505. ALJ Moskal discredited many of those subjective statements and therefore could accord less weight to Dr. Brody's conclusions based on them.

Finally, the Court finds that the ALJ's determination, based on the testimony of the VE, that there were jobs which Wilcox could perform, despite his functional limitations, is supported by substantial evidence. The VE testified that she had reviewed all of the exhibits and was present to hear Wilcox testify. R. at 396. The VE testified, upon questioning of the ALJ, that Wilcox, based on the evidence in the record and the testimony presented, would be able to perform certain jobs which Dr. Brody had approved Wilcox for in 1990. R. at 399-409. The VE also testified, again upon questioning of the ALJ, as to other jobs existing which Wilcox could do, despite his physical limitations. R. at 409-412. In giving her opinion, the VE took into account Wilcox's lifting restrictions, inability to stand or walk extensively, his use of a cane, and his need to keep his leg elevated throughout the day. R. at 399-412, 417-425. Even though

Wilcox was restricted to less than the full range of sedentary work, the VE testified that jobs existed in the national economy which Wilcox could do. *Id.* The VE provided numbers which existed in the national and local economies for several of these jobs and took into account what percentage of these jobs would be affected by Wilcox's need to keep his leg elevated throughout the day. R. at 408, 410-412.

The VE did not consider what Wilcox's attorney described as his inability to communicate or concentrate because of his muscle spasms in forming her opinions. R. at 412-417. However, the ALJ did not find credible the suggestion that Wilcox could not speak or concentrate for large periods of the day due to pain from muscle spasms and the Court finds that such a conclusion was supported by substantial evidence. Therefore, it was not improper for the VE not to have based her testimony on such symptoms. In addition, the ALJ offered Wilcox's attorney the opportunity to question the VE concerning whether or not her testimony would be different if such symptoms were taken into effect and Wilcox's attorney declined to do so. R. at 426-428.

Having made a de novo review of the record, the Court has determined that ALJ Moskal's findings are supported by substantial evidence. The Court will, therefore, deny Plaintiff's motion for summary judgment, grant Defendant's motion for summary judgment, and enter judgment against Plaintiff and in favor of Defendant. Although there may be minor factual errors in the Report and Recommendation filed by Magistrate Judge Wells, the Court finds that its reasoning and conclusions are correct and therefore approves and adopts it.

An appropriate Order follows.

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ORDER

AND NOW, this day of September, 1999; upon consideration of the parties' cross motions for summary judgment and after review of the Magistrate's August 31, 1999 Report and Recommendation and Plaintiff's objections thereto;

IT IS ORDERED that the August 31, 1999 Report and Recommendation of Carol Sandra Moore Wells, United States Magistrate Judge, is **APPROVED and ADOPTED**;

IT IS FURTHER ORDERED that the Commissioner's Motion for Summary Judgment (Doc. No. 12) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff Robert W. Wilcox's Motion for Summary Judgment (Doc. No. 7) is **DENIED**.

RAYMOND J. BRODERICK, J.