

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

JUAN DIAZ : CIVIL ACTION  
 :  
 v. :  
 :  
 KENNETH S. APFEL, Commissioner of :  
 SSA : No. 98-1676

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

November 3, 1999

Juan Diaz challenges the denial of Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). Cross-motions for summary judgment were referred to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation. The Report recommends plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted. Diaz filed objections to the Report. After a de novo consideration of the objections, the Report and Recommendation is approved.

PROCEDURAL HISTORY

The following procedural history is adapted in part from the Report and Recommendation: Applications by Diaz for SSI and DIB, filed April 18, 1995, alleged disability from December 8, 1994. (R. 69-77.) These applications were denied initially and upon reconsideration. (R. 78-80, 96-98.) Diaz requested review of these decisions before an Administrative Law Judge ("ALJ"). (R.

99-100.) Diaz, represented by counsel, testified at an ALJ hearing with the aid of a Spanish-English interpreter. (R. 38-68.) A vocational expert and Diaz's girlfriend, Maria Pagan, also testified. Id.

On April 25, 1997, the ALJ denied Diaz's SSI and DIB applications. (R. 12-20.) The ALJ made the following findings:

1. The claimant has met the disability insured status requirements of the act at all times relevant herein.
2. The claimant performed work activity subsequent to his alleged onset date, but it was of short duration and, as such, constitutes an unsuccessful work attempt. Thus, the claimant has not engaged in substantial gainful activity at any time relevant to this decision.
3. The medical evidence establishes that the claimant has limitations from diabetes, hypertension, and is status post left rotator cuff repair and arthroscopic repair of Bankhart's lesion, but he does not have an impairment or combination of impairments listed in, or medically equal to one listed in, the Listing of Impairments (20 C.F.R. Part 404, Subpart P, Appendix 1).
4. When viewed in light of the medical and other evidence of record, the testimony of the claimant is not fully credible.
5. The claimant retains the residual functional capacity to perform light work activity at unskilled low stress jobs, which can be performed despite an inability to communicate in English, and which require a low level of concentration, low noise, normal use of hands, does not expose an individual to heights, moving machinery, and extreme heat, cold, or dampness, and allows an individual to attend psychotherapy once a week in the morning (20 C.F.R. §§ 404.1545, 416.945).
6. The claimant is unable to perform his past relevant work.
7. The claimant is 48 years of age, which is defined

as a "younger person" (20 C.F.R. §§ 404.1563, 416.963).

8. The claimant has a marginal education through completion of the 6th grade (20 C.F.R. §§ 404.1564, 411.964).

9. The issue of transferability of work skills is not relevant to this decision due to the claimant's age (20 C.F.R. §§ 404.1568, 416.968).

10. Based on an exertional capacity for light work activity and the claimant's age, education, past work experience, and inability to communicate in English, section 404.1569 of Regulations No. 4, section 416.969 of Regulations No. 16, and Rule 202.16, table No. 2, Appendix 2, Subpart P, Regulations No. 4, direct a conclusion of "not disabled."

11. Although the claimant's additional nonexertional limitations preclude him from performing the full range of light work activity, using the above-cited rule as a framework for decision making, there are a significant number of jobs in the local and national economies which he can perform, examples of which were enumerated by the vocational expert.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. §§ 404.1520(f), 416.920(f)).

(R. 18-19.)

On June 10, 1997, Diaz filed a request for review of the ALJ's decision. (R. 7-8.) The Appeals Council determined on January 28, 1998, that there was no basis for granting the request. (R.4.) The ALJ's decision therefore became final pursuant to 20 C.F.R. §§ 404.981, 416.1481. Having exhausted his administrative remedies, Davis filed this complaint for judicial

review of the Commissioner's decision denying benefits.

In his motion for summary judgment, Diaz argued that the ALJ failed to develop fully a record of: 1) his mental impairment for a period over twelve months; and 2) his illiteracy. (Pl.'s Mem. Supp. Summ. J. at 1.) In response, the Commissioner argues that the ALJ's decision is supported by substantial evidence. (Def.'s Mem. Supp. Summ. J. at 8-16.) His objection to the Report and Recommendation argues that the ALJ and the Magistrate Judge overlooked the evidence of his mental impairment and illiteracy. (Pl.'s Objections to Magistrate Judge Rueter's Report and Recommendation at 2.)

#### **FACTUAL HISTORY**

Diaz was born on June 28, 1948; he is defined as a "younger person" under 20 C.F.R. §§ 404.1563, 416.963. (R. 13.) He has a sixth grade education, and has performed past relevant work as a packer and assembler. Id. The vocational expert testified that this work ranged in exertion level from heavy to very heavy and was unskilled. Id. The ALJ found that Diaz had not engaged in any substantial gainful activity at any time relevant to his claim. Id.

Diaz claimed that he suffers from hypertension, diabetes, anxiety, gout, liver problems, and pancreatitis, (R. 13), but neither his motion for summary judgment nor his objection to the Magistrate Judge's Report argue for reversal of the

Commissioner's decision because of any incorrect findings regarding his physical disability. Diaz testified that he goes to the Mental Health Center weekly and also goes to the Reading Hospital Mental Clinic. Id. His daily activities include watching television, going for walks, and visiting friends. Id.

Diaz's girlfriend, Maria Pagan, testified that Diaz is nervous, grouchy, and forgetful, has received mental health counselling, and was hospitalized for a suicide attempt. (R. 13-14.) She also testified that Diaz has difficulty following the theme of a conversation. (R. 53).

#### **DISCUSSION**

To establish a disability under the Act, an applicant must show that there is some "medically determinable basis for an impairment that prevents engaging in any substantial gainful activity for a statutory twelve-month period." Stunkard v. Secretary of Health & Human Servs., 841 F.2d 57, 59 (3d Cir. 1988); Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987). An applicant can establish a disability by: 1) producing medical evidence showing he is disabled per se by meeting or equaling the impairments listed in the regulations, see Stunkard, 841 F.2d at 59; or 2) demonstrating an impairment severe enough to prevent the applicant from engaging in "any kind of substantial gainful work which exists in the national economy." Heckler v. Campbell, 461 U.S. 458, 461 (1983); see Cerar v. Secretary of Health &

Human Servs., No. 93-6973, 1995 WL 44551, at \*2 (E.D. Pa. Feb. 1, 1995) (Shapiro, J.).

The ALJ decided this case under the five-step sequential evaluation of disability claims. See generally Heckler, 461 U.S. at 467-68; Santise v. Schweiker, 676 F.2d 925, 934-35 (3d Cir. 1982), cert. dismissed, 461 U.S. 911 (1983). The five-step process is similar for both DIB and SSI.<sup>1</sup> The burden of

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<sup>1</sup> The five steps are:

1. "If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience." 20 C.F.R. § 404.1520(b); see also 20 C.F.R. § 416.920(b).

2. "If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment." 20 C.F.R. § 404.1520(c); see also 20 C.F.R. § 416.920(c).

3. "If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience." 20 C.F.R. § 404.1520(d); see also 20 C.F.R. § 416.920(d).

4. "If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled." 20 C.F.R. § 404.1520(e); see also 20 C.F.R. § 416.920(e).

5. "If you cannot do any work you have done in the past

establishing the first four steps with sufficient medical evidence is on the applicant. See 42 U.S.C. § 423(d)(5). If the applicant's burden is met, the burden shifts to the Commissioner to show that the applicant has the ability to perform specific jobs existing in the national economy. See Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

### **I. Standard of Review**

This court reviews de novo those portions of the Report to which an objection is made, 28 U.S.C. § 636(b)(1)(B), to determine whether there is substantial evidence of record to support the Commissioner's decision. See 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.

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because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled." 20 C.F.R. § 404.1520(f)(1); see also 20 C.F.R. § 416.920(f)(1).

denied, 402 U.S. 976 (1971). The court cannot 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).

## **II. Mental Impairment**

Diaz first argues that the ALJ overlooked evidence of his continuing mental impairment, for example, his weekly hour and a half visits to the Mental Health Center, (R. 46), an inability to concentrate, "ugly dreams," dizziness, (R. 47, 49), and Maria Pagan's testimony that he is grouchy, unable to maintain a conversation, has difficulty following instructions, screams in his sleep, is forgetful, has a temper, and is often sad. (R. 53-55.) Ms. Pagan also testified that he attempted to commit suicide because he was hearing voices. (R. 56).

The ALJ found that there was no continuous 12 month period of mental illness sufficiently substantial to prevent Diaz from working. (R. 16.) The ALJ also found that Diaz's physical impairments prevented him from performing his past relevant work, but there were other jobs in the economy that Diaz could perform. (R. 19.)

There is substantial evidence in the record to support these findings. Diaz received emergency treatment for anxiety in December, 1994 (R. 174). A second hospitalization in January, 1995, appears to have been caused by Diaz's failure to take prescribed medication. (R.186.) Following an August, 1995

hospital stay, Diaz was discharged with diagnoses of "major depression with psychosis" and "panic disorder," but his condition improved when he was placed on a drug treatment regimen. (R. 210.) There is also evidence of suicide attempts 20-25 years prior to this most recent hospitalization (R. 214.). There is no record of any hospitalization for psychiatric problems since August, 1995. A medical report dated August, 1996, diagnosed him with "major depression" and "personality disorder," but also stated that Diaz "is competent, responsible, future oriented, did not look inexpressibly depressed," and found him fairly stable on medication. (R. 324.) The same report also found Diaz not suicidal. Id.

Diaz has suffered sporadic anxiety and depression, controllable by medication. These psychiatric difficulties did not preclude his engaging in substantial gainful activity.

The evidence supports the ALJ opinion that Diaz's testimony was not fully credible (R. 15-16): it does not establish the continuous impairment to which he testified. The vocational expert also testified that, even with with all Diaz's physical and mental impairments, there are thousands of jobs in the regional and national economy that he could perform. (R. 64-65.) The ALJ considered the factors listed in Social Security Ruling 85-16, including medical evaluations and reports about home life from third party sources. See SSR 85-16, 1985 WL 56855, \*2.

SSR 85-15 allows a finding of disability based on "a substantial loss of ability" to meet the "basic mental demands of competitive, remunerative, unskilled work includ[ing] the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting." SSR 85-15, 1985 WL 56857, \*4. Because the record supports the conclusion that Diaz's psychiatric difficulties were sporadic and that he functioned well while on medication, a finding of disability under the SSR 85-15 criteria is not required.

### **III. Illiteracy**

Diaz argues that his illiteracy is further evidence he is disabled. The ALJ conducted an analysis of Diaz's residual functional capacity, age, education, and past work experience (R. 13.). Illiteracy, if it exists, is a relevant factor, contrary to the Magistrate Judge's finding, (Report and Recommendation at 11), because the ALJ was unable to come to a decision based on work activity or medical facts alone. (R.13.)

However, the vocational expert did consider Diaz's inability to read and write in English when he testified that there were jobs in the economy Diaz could perform. (R. 63-65.) The vocational expert defined some of these jobs as in "the light category." (R. 65.) A younger individual, illiterate or unable

to communicate in English, with a capacity for light work and unskilled previous work experience is not disabled under 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 202.16. See Tavoletti v. Sullivan, 732 F. Supp 578, 571 (W.D. Pa. 1989). The testimony of the vocational expert and the other evidence of record support the application of Rule 202.16 by the ALJ. Diaz's illiteracy, while a relevant factor, does not preclude the finding that he is not disabled.

#### **CONCLUSION**

After careful consideration of the plaintiff's objections to the Magistrate Judge's Report and Recommendation, the objections are overruled. The decision of the ALJ is supported by substantial evidence on the record. The Report and Recommendation will be approved, plaintiff's motion for summary judgment will be denied, and the Commissioner's motion for summary judgment will be granted.

An appropriate Order follows.

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KENNETH S. APFEL, Commissioner of :  
SSA : No. 98-1676

**ORDER**

AND NOW, this 3rd day of November, 1999, upon consideration of the cross-motions for summary judgment, the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter and plaintiff's objections thereto, 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 is **DENIED**.
3. Defendant's motion for summary judgment is **GRANTED**.
4. Judgment is **ENTERED** in favor of Defendant, Commissioner of SSA, and against Plaintiff, Juan Diaz.

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S.J.