

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

ROBERT KAY,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	No. 04-2269
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J.

November 12, 2004

On August 11, 2004, Plaintiff Robert Kay brought this action pursuant to 42 U.S.C. § 405(g) (2004), seeking judicial review of the Commissioner of Social Security’s (“Commissioner”) final decision denying Plaintiff’s claim for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401-34. On September 30, 2004, a Magistrate Judge recommended that this Court adopt the decision of the Commissioner. On October 15, 2004, Plaintiff objected to this recommendation. For the following reasons, this Court remands Plaintiff’s action to the Administrative Law Judge (“ALJ”).

I. BACKGROUND

As the factual background of this case is set forth in the Magistrate’s Report and Recommendation, it is unnecessary to repeat it in full. Plaintiff was employed as a commercial airline pilot for over thirty-five years. (R. at 42, 132.) In the fall of 2000, while participating in a simulator flight, Plaintiff briefly lost consciousness. (*Id.* at 135.) On January 7, 2001, in an unrelated incident, Plaintiff dropped an object on his right foot which required amputation of his right big toe. (*Id.* at 135.) As a result of that accident, Plaintiff experiences an intermittent painful

cold sensation in his foot for which he takes the drug Neurontin. (*Id.* at 136.) On January 24, 2001, Plaintiff applied to be medically re-certified as an airman by the Federal Aviation Administration (“FAA”). (*Id.* at 117.) This certification is required to be licensed by the FAA as a pilot or co-pilot. (*Id.*) On December 4, 2001, the FAA denied Plaintiff’s application to be medically certified because of his “disqualifying neurological condition (unexplained disturbance of consciousness),” and also because the FAA considers Neurontin to be an “unacceptable medication.” (*Id.* at 114.) Moreover, the FAA stated that so long as Plaintiff takes Neurontin, he will not medically qualify as an airman. (*Id.*) Consequently, Plaintiff applied for disability benefits on October 9, 2001. (*Id.* at 29-31.) On November 14, 2001, Plaintiff’s application was denied by the Commissioner. (*Id.* at 19.) On May 6, 2002, after a hearing, the ALJ upheld this denial. (*Id.* at 10-16.) On March 26, 2004, the Appeals Council refused to review the ALJ’s findings, and the ALJ’s decision thereby became the Commissioner’s final decision. (*Id.* at 4.) Having exhausted his administrative remedies, Plaintiff filed this appeal.

II. STANDARD OF REVIEW

When reviewing a final decision of the Commissioner, this Court’s role is to determine whether the Commissioner’s decision is supported by substantial evidence. 42 U.S.C. § 405(g); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quotation omitted). It is “more than a mere scintilla of evidence but may be less than a preponderance.” *Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988).

III. DISCUSSION

To establish a disability under the Social Security Act, a claimant must demonstrate a medically determinable basis for an impairment that prevents him from engaging in substantial gainful activity for a twelve month period. *Newell v. Comm’r of Soc. Sec.*, 347 F.3d 541, 545 (3d Cir. 2003) (quotations omitted). The Commissioner uses a five step sequential evaluation process to determine whether a claimant is disabled.¹ 20 C.F.R. § 404.1520 (2004); *Williams v. Sullivan*, 970 F.2d 1178, 1180 (3d Cir. 1992). In step two of this process, “the Commissioner must determine whether the claimant has a medically severe impairment.” *Newell*, 347 F.3d at 545. An impairment is “not severe” only if the evidence establishes that the claimant has merely a slight abnormality or combination of slight abnormalities which have no more than a minimal effect on the claimant’s ability to perform basic work activities. *Id.* at 546. Moreover, and importantly for this case, step two requires the ALJ to consider the claimant’s ability to perform *his* past relevant work. S.S.R. 85-28 (Cum. Ed. 1985), 1985 SSR LEXIS 19, at *10-11, 1985 WL 56856, at *4 (stating that although ordinarily reasonable to conclude that claimant can perform his past relevant work if suffering only minimal limitations to performance of basic work activities, if “contrary evidence” is presented, “a denial at the ‘not severe’ step of the sequential evaluation process is inappropriate.”).

In this case, the ALJ found that Plaintiff suffered from a non-severe impairment because Plaintiff’s medical conditions amount to only slight abnormalities, which would only minimally

¹ Step one determines whether the claimant is engaged in substantial gainful activity; step two examines the severity of the claimant’s medical impairments; step three compares the claimant’s impairment to a list of impairments that are severe enough to preclude gainful work; in step four, the claimant has the burden to show that he lacks the functional capacity to perform his former work; and in step five, the Commissioner must demonstrate that the claimant is capable of performing other available work. *Burnett v. Comm’r of Soc. Sec.*, 220 F.3d 112, 118 (3d Cir. 2000).

affect Plaintiff's ability to perform basic work activities. (R. at 10-16.) The ALJ therefore ended his analysis at step two of the evaluation process, concluding that Plaintiff is not disabled. (*Id.*) The ALJ failed to consider, however, that Plaintiff proffered "contrary evidence" regarding his ability to perform his specific past relevant work. S.S.R. 85-28, 1985 SSR LEXIS 19, at *10. Plaintiff demonstrated that because he takes Neurontin and once lost consciousness, the FAA will no longer allow him to work as an airline pilot. (R. at 114.) Therefore, although Plaintiff's conditions may be only slight abnormalities, which may have only a minimal effect on his ability to perform basic work activities, he "cannot perform his [] past relevant work because of the unique features of that work." S.S.R. 85-28, 1985 SSR LEXIS 19, at *11. Accordingly, "a denial at the 'not severe' step of the sequential evaluation process [was] inappropriate." *Id.* Because Plaintiff presented evidence that the FAA had disqualified him from working as a pilot or co-pilot, the ALJ's decision to end the analysis at step two was not supported by substantial evidence. Instead, the ALJ should have found that Plaintiff's impairments were severe at step two of the sequential evaluation. Therefore, this Court remands this case.

IV. CONCLUSION

For the reasons set forth above, this action is remanded to the ALJ for further evaluation consistent with this opinion. An appropriate Order follows.

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Commissioner of Social Security,	:	No. 04-2269
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ORDER

AND NOW, this 12th day of **November, 2004**, upon consideration of the Magistrate's Report and Recommendation, Plaintiff's Objections thereto, and for the foregoing reasons, it is hereby **ORDERED** that this case is **REMANDED** to the Administrative Law Judge for further evaluation not inconsistent with this Opinion.

BY THE COURT:

Berle M. Schiller, J.