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

VERNON IRVIN	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 04-1007
	:	
JO ANNE B. BARNHART,	:	

MEMORANDUM AND ORDER

AND NOW, this 22nd day of February, 2005, upon consideration of the cross-motions for summary judgment (Doc. Nos. 8, 9 and 10) the Court makes the following findings and conclusions:

1. On August 5, 2002, Vernon Irvin, ("Irvin") applied for supplemental security income ("SSI") under Title XVI of the Social Security Act ("Act"), 42 U.S.C. §§ 1381-1383f. (Tr. 43-46). Throughout the administrative process, including an April 7, 2003, hearing before an administrative law judge ("ALJ"), Irvin's claims were denied. (Tr. 4-6, 10-12, 23-20, 23, 24, 26-29, 42, 188-209). Pursuant 42 U.S.C. § 405(g), Irvin initiated the instant action for judicial review.

2. The ALJ found Irvin's residual effects from gunshot wounds, ventral hernia, low back disorder and bilateral avascular necrosis of the hips to be severe. (Tr. 14 ¶ 5, 19 Finding No. 2). The ALJ concluded that none of Irvin's impairments considered singly or in combination met or equalled any of the listed impairments. (Tr. 16 ¶ 15, 19 Finding No. 2); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that Irvin could not perform his past relevant work, but was not disabled, and had the residual functional capacity ("RFC") to perform sedentary work. (Tr. 13-14 ¶ 3, 18-19 ¶ 27-30, 19 Finding Nos. 4, 5, 8, 9). With the testimony of a vocational expert ("VE"), the ALJ further concluded that Irvin was able to make an adjustment to work that exists in significant numbers in the national economy. (Tr. 19 ¶ 30).

3. The Court has plenary review of legal issues, but reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 431 (3d. Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 401 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ's conclusion is supported by substantial evidence, this Court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

4. Irvin makes four arguments that the determination by the ALJ was incorrect. Each argument is addressed below. After a thorough review and analysis of the record, this Court finds that there is substantial evidence in the record to support the conclusions in the ALJ's decision.

a. Irvin argues that the ALJ improperly rejected the opinion of treating physician, Richard I. Mintz, M.D. Specifically, Irvin complains that the ALJ improperly rejected Dr. Mintz's March 12, 2003, RFC limiting Irvin to less than sedentary work (Tr. 171-172) because there had been no objective tests since November 2000 and Dr. Mintz did not refer Irvin for further testing or evaluation by a specialist. In addition to his objection to the ALJ's bases for rejecting Dr. Mintz opinion, Irvin argues that Dr. Mintz's opinion should be given controlling weight based on the fact that his treatment relationship reflects continuing observation over a period of two and a half years.

Generally, more weight is given to treating sources if their opinions are well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. §416.927(d)(2); see also Social Security Ruling, ("SSR") 96-8p, 1996 WL 374184, at * 7. Here, the ALJ's basis for rejecting Dr. Mintz's opinion is that it is not supported by the evidence and not consistent with the substantial evidence of the case record. (Tr. 17 ¶ 23). Apart from prescriptions for heavy pain killers,[1] Dr. Mintz's treatment notes do not reflect an impairment that is consistent with the significant functional limitations documented in his RFC assessment. (Tr. 91, 92, 96, 97, 99, 157-163, 167, 171-172). In addition, although the existence of conflict between Dr. Mintz and the records of Dr. Schwartz (Tr. 101-105) is unclear,[2] the existence of conflict between the state agency consultative examiner (148-155) is clear.[3] (Tr. 18 ¶ 26). Since the ALJ properly determined that Dr. Mintz did not meet the threshold for controlling weight, the ALJ's additional reasons for discounting the weight to afford Dr. Mintz's opinion are not important.[4] Finally, Irvin's assertion that he is entitled to controlling weight as a result of the duration of their doctor-patient relationship is without merit.

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[1] To the extent that such prescriptions are based on subjective complaints of pain, an ALJ may discredit a physician's opinion premised largely on the claimant's own subjective complaints of pain when the complaints are properly discounted. Morris v. Barnhart, 78 Fed Appx. 820, 825 (3d Cir. 2003). Here, the ALJ found Irvin to be less than fully credible. (Tr. 17 ¶ 20, 19 Finding No. 3); see discussion *infra* at Part 4(d).

[2] The government claims that Dr. Schwartz's notes indicate that Irivin was functionally independent before receiving a gunshot wound, when in actuality Dr. Schwartz merely noted "functionally he was independent with a single point cane *prior to admission due to AVN of his hips*." (Tr. 101, see 103). While this statement arguably supports, rather than conflicts with, Dr. Mintz's diagnosis, the statement, by itself, is not enough to support Irvin's claim that he is unable to perform even sedentary work.

[3] The consultative examiner's report is relevant for comparative purposes even though the opinion was given less than full weight.

[4] Irvin complains that the ALJ improperly drew inferences about Irvin's symptoms and their functional effects from a failure to seek further tests and failure to securing referrals to specialists without considering Irvin's explanation. (Tr. 17-18 ¶ 23); Newell v. Comm'r of Soc. Sec., 347 F.3d 541, 547 (3d Cir. 2003); SSR 96-7p,1996 SSR LEXIS 4, at * 22. Such an inference, if made by the ALJ, is harmless because the ALJ has not used Irvin's lack of testing or visits to specialists as bases for reducing his credibility in contravention to Third Circuit law, but uses it as a basis for reducing the weight to afford to Dr. Mintz. Id.

The duration of their relationship is merely a factor to be given consideration by the ALJ in determining what weight to afford a treating physician after the ALJ intends to reject or give little weight to treating sources opinion. 20 C.F.R. § 416. 927(d)(2)-(6). Therefore, contrary to the parties assertions, neither the duration of Dr. Mintz's relationship with Irvin, nor the fact that Dr. Mintz is not a specialist, affects the ALJ's decision on controlling weight, but merely affects how much weight to afford Dr. Mintz once the issue of controlling weight is decided. Id.

b. Next, Irvin argues that the ALJ failed to analyze all the evidence of record and provide an adequate explanation for disregarding certain evidence. Farnoli v. Halter, 247 F.3d 34, 43 (3d Cir. 2001). This argument is without merit. It is clear from the ALJ's decision that he analyzed the specific evidence about which Irvin complains, the objective tests of record. This argument, although creative, is merely another attempt to find fault with the ALJ's rejection of Dr. Mintz's opinion, which Irvin argues, is consistent with the objective tests being "tacitly dismissed" without explanation. However, since the ALJ articulated his consideration of the objective tests of record and adequately explained his reasoning for reducing the weight afforded to Dr. Mintz, this argument must fail. (Tr. 17-18¶ 23, 27).

c. Next Irvin argues that the ALJ failed to fully develop the record as a part of his duty to secure sufficient evidence to make a sound determination. Ferguson v. Schweiker, 765 F.2d 31, 36, n. 4 (3d Cir. 1985). Specifically, Irvin argues that the ALJ failed to get a consultative exam ("CE") and specialized tests when the regulations provide for such examinations and tests to resolve ambiguity. 20 C.F.R. § 416.919a(b). Although it is incumbent upon the Commissioner to secure enough evidence to make a sound determination in SSI cases, the purchase of such tests is discretionary. Id; 20 C.F.R. § 416.919k (stating that a medical examinations such as CE's, laboratory tests, and other services *may* be purchased when the evidence as a whole, is not sufficient to support a decision on plaintiff's claim). Here, the ALJ properly considered the pertinent evidence in Irvin's file, including the testimony at the hearing, the objective findings of examinations and diagnostic tests, and the opinions of treating physicians, in reaching an ultimate disability decision. (Tr. 18 ¶ 27); 20 C.F.R. § 416.919a(a)(1). It is evident that, upon reviewing the above evidence, the ALJ felt that the record contained sufficient evidence to make a decision without purchasing a CE or additional tests. Because such measures are fully within the ALJ's discretion, I must defer to his decision.

d. Finally, Irvin argues that the ALJ erred in dismissing his testimony. He argues that once sufficient evidence exists to support a claim of disability an ALJ must not dismiss the evidence as simply not credible, but must point to contrary medical evidence. However, courts "ordinarily defer to an ALJ's credibility determination because he or she has the opportunity at a hearing to assess the witness's demeanor." Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003). The ALJ may reject this testimony if he does not find it to be credible. Schaudeck v. Commissioner of SSA, 181 F.3d 429, 433 (3d Cir. 1999). Here, the ALJ found Irvin's complaints to be exaggerated and less than fully credible. (Tr. 17 ¶ 20, 19 Finding No. 3). Despite this, the ALJ's decision to limit Irvin to sedentary work, suggests that the ALJ found Irvin's complaints to be partially credible and therefore, did not dismiss the evidence as simply not credible as Irivin contends. Because credibility assessments are within the province of the ALJ and because the ALJ appears to have given Irvin the benefit of the doubt anyway, the credibility finding must stand. See Holiday v. Barnhart, 76 Fed. Appx. 479, 482 (3d Cir. 2003) (citing Dardovitch v. Haltzman, 190 F.3d 125, 140 (3d Cir. 1999)).

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner applied the correct legal standards and that the record contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby **ORDERED** that:

5. The motion for summary judgment by the Vernon Irvin is **DENIED**;

6. The motion for summary judgment by the defendant is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST VERNON IRVIN;** and

7. The Clerk of Court is hereby directed to mark this case closed.

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LOWELL A. REED, JR., S.J.