

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

RICHARD D. NUNNERY : CIVIL ACTION
 :
 V. :
 : 04-5063
 JO ANNE B. BARNHART, :
 COMMISSIONER OF SOCIAL :
 SECURITY ADMINISTRATION :

MEMORANDUM AND ORDER

Baylson, J.

August 23, 2005

I. Introduction

Plaintiff Richard D. Nunnery has brought this action under 42 U.S.C. § 1383(c)(3), which incorporates 42 U.S.C. §405(g), seeking judicial review of the Commissioner of Social Security’s decision denying his claims for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§401-433. The parties have filed cross-motions for summary judgment.

II. Background

Plaintiff protectively filed his application for benefits on March 21, 2003, alleging that he had been disabled since October 4, 2001, due to severe musculoskeletal impairments and depression. The application was denied, and Plaintiff requested a hearing. On January 13, 2004, a hearing was held before Administrative Law Judge Diane C. Moskal (the “ALJ”). The ALJ issued a decision denying Plaintiff’s application on February 19, 2004. Plaintiff sought review before the Appeals Council, which denied his request for review on September 10, 2004. Plaintiff then proceeded to federal court, filing the complaint in this action on October 28, 2004.

The ALJ’s decision found that Plaintiff was not disabled because Plaintiff retained the

residual functional capacity (“RFC”)¹ for the full range of sedentary work, and there are a significant number of jobs which exist in the regional and national economies which Plaintiff could perform, including assembler, inspector, and cashier. (ALJ’s Dec’n, p. 7; Admin. Rec., p. 21).

Plaintiff argues for remand on the grounds that: (1) the ALJ’s determination that Plaintiff’s impairments did not meet or equal a listed impairment was in error; (2) the ALJ’s finding that Plaintiff was not credible was not supported by substantial evidence; and (3) the ALJ’s finding that Plaintiff did not have a severe mental impairment was in error.

The Commissioner asserts that the ALJ’s decision that Plaintiff’s impairments did not equal a listed impairment was supported by substantial evidence, that the ALJ properly evaluated Plaintiff’s credibility, and that substantial evidence supported the ALJ’s finding that Plaintiff did not have a severe mental impairment.

III. Legal Standard

The Court must review the record to determine whether substantial evidence supports the ALJ’s decision. Rutherford v. Barnhart, 399 F.3d 546, 552 (3d Cir. 2005). The factual findings of the ALJ are accepted as conclusive, provided they are supported by substantial evidence. Reefer v. Barnhart, 326 F.3d 376, 379 (3d Cir. 2003). “Substantial evidence has been defined as more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. (quotations and citations omitted). The Court must not “weigh the evidence or substitute [its own] conclusion for those of the fact-finder.” Rutherford,

¹“Residual functional capacity” is defined in the regulations as “what a [claimant] can still do despite his limitations.” 20 C.F.R. §416.945(a).

339 F.3d at 552 (quoting Williams v. Sullivan, 970 F.2d 1178, 1182 (3d Cir. 1992)).

IV. Discussion

To be eligible for benefits, Plaintiff must establish that he is unable "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 to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (2000). The ALJ evaluates applications for benefits under the five-step process of 20 C.F.R. §§404.1520, 416.920. The ALJ must consider: (1) whether the claimant is working, (2) whether he has a severe impairment, (3) whether his severe impairment meets or medically equals a listed impairment, (4) whether he has the residual functional capacity to return to past relevant work, and (5) whether he can make an adjustment to other available work. Ramirez v. Barnhart, 372 F.3d 546, 550-51 (3d Cir.2004). The parties' motions address the ALJ's determinations at the second and third steps of this process.

At the second step, the ALJ's decision discussed the evidence submitted regarding Plaintiff's depression and determined that Plaintiff suffers no severe mental impairment. Plaintiff argues that the ALJ erred by refusing to order a mental consultative exam. In her decision, the ALJ states that "[a] one time consultative examination would not satisfy either the requirement that effects of treatment be considered (Section 12.00H) or the statutory duration requirement upheld in Barnhart v. Walton, 535 U.S. 212 (2002), given the claimant's lack of any such treatment since 1999." (ALJ Dec'n, p.6; Admin. Rec., p. 20).

Plaintiff argues that Dr. John Stephen Bomalaski's observations in the fall of 2002 indicate that Plaintiff was depressed and that Plaintiff was taking Zoloft to treat his depression.

(Admin. Rec., pp. 205, 299-302). Additionally, Dr. Robert E. Schmidt, who performed the Disability Examination for the Commissioner, included in his report, dated July 29, 2003, that Plaintiff suffered from chronic depression. (Admin. Rec., p. 210).

As the Commissioner notes, however, Dr. Schmidt's impressions were drawn from Plaintiff's own reporting of his mental health, and Dr. Bomalaski, while describing Plaintiff's mood as depressed in November 2002, noted in December 2002 that his mood was "mildly depressed" and that "[h]e feels his depression has been helped somewhat with the Zoloft." (Admin. Rec. 299, 302). The functional limitations indicated on the Psychiatric Review Technique Form, dated April 29, 2003, also evaluated Plaintiff's degree of functional limitation as "mild" in the first three functional areas, and as "none" for the fourth area, "episodes of decompensation." The regulations indicate that "if we rate the degree of your limitation in the first three functional areas as "none" or "mild" and "none" in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities." 20 C.F.R. §404.1520a(d)(1). Neither Dr. Bomalaski's reports, nor any other evidence in the record, suggest that Plaintiff's mental impairment created more than a minimal limitation in Plaintiff's ability to do basic work activities. (Admin Rec. 204-206, 299-302). The ALJ's decision that Plaintiff does not suffer from a severe mental health impairment is therefore supported by substantial evidence.

As to the third step, regarding whether Plaintiff's severe musculoskeletal impairments meet the criteria of the regulations' listed impairments, Plaintiff argues that remand is necessitated by the ALJ's failure to obtain evidence from a medical expert regarding whether

additional evidence submitted before the hearing supported a determination that his impairment equaled the listed impairments. Plaintiff points specifically to Exhibits 11F-16F as significant and substantial evidence that was submitted before the hearing but after the Physical Residual Functional Capacity Assessment was completed by the Commissioner on August 29, 2003. Plaintiff argues that this additional evidence required the ALJ to obtain a medical expert opinion.

The ALJ's decision states the following in regards to the third step of the analysis:

The claimant has no impairment which meets the criteria of any of the listed impairments described in Appendix 1 of the Regulations (20 C.F.R. Part 404, Subpart P, Appendix 1). No treating or examining physician has made findings equivalent in severity to the criteria of any listed impairment. Section 1.00 musculoskeletal listings are not satisfied. The claimant walks independently and has had no surgery during the relevant period from October 2001 to date.

ALJ's Dec'n, p. 3; Admin Rec., p. 17. In the regulations, loss of function due to a musculoskeletal impairment is defined as "the inability to ambulate effectively on a sustained basis for any reason, including pain associated with the underlying musculoskeletal impairment, or the inability to perform fine and gross movements effectively on a sustained basis for any reason, including pain," which must have lasted, or be expected to last, for at least 12 months. 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 1.00. Inability to ambulate effectively "means an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities."

Id.

The Commissioner asserts that the ALJ has broad discretion in determining whether to call a medical expert, particularly in a case such as this where the record did not involve complex medical evidence and the ALJ was able to sufficiently analyze and weigh the clinical and

laboratory findings submitted before the hearing, citing Social Security Ruling 96-6p (“SSR 96-6p”).

SSR 96-6p states that “longstanding policy requires that the judgment of a physician (or psychologist) designated by the Commissioner on the issue of equivalence on the evidence before the administrative law judge or the Appeals Council must be received into the record as expert opinion evidence,” and that the requirement to receive such expert opinion may be satisfied by any of a list of documents signed by a State agency medical or psychological consultant. An ALJ is required, however, to obtain an updated medical opinion from a medical expert in the following circumstances:

When no additional medical evidence is received, but in the opinion of the administrative law judge or the Appeals Council the symptoms, signs, and laboratory findings reported in the case record suggest that a judgment of equivalence may be reasonable; or

When additional medical evidence is received that in the opinion of the administrative law judge or the Appeals Council may change the State agency medical or psychological consultant's finding that the impairment(s) is not equivalent in severity to any impairment in the Listing of Impairments.

SSR 96-6p.

Here, the medical evidence initially contained in the record, including Dr. Schmidt’s Disability Examination, provided substantial evidence to support the ALJ’s determination that Plaintiff’s musculoskeletal impairment failed to meet or equal Listing 1.00, and the ALJ’s determination that the additional medical evidence received before the hearing would not change the State agency consultant’s finding is also supported by substantial evidence. The additional evidence submitted prior to the hearing – Exhibits 11F-16F – is either irrelevant or supports the ALJ’s finding that Plaintiff’s impairment did not equal Listing 1.00 – e.g., Dr. Bomalaski’s

reports in Exhibit 16F which indicate that Plaintiff favors the left leg, but does not suggest that his ability to ambulate effectively on a sustained basis had been impaired to the degree required to meet the requirements of Listing 1.00.

Plaintiff also argues that the ALJ's finding that Plaintiff's testimony could not be fully credited was not supported by substantial evidence. The ALJ found that Plaintiff's "statement concerning his impairments and their impact on his ability to work have not been accepted **in toto** in light of the degree of medical treatment required, the reports of the treating and examining practitioners, the medical history, the findings made on examination, the claimant's assertions concerning his ability to work, and the claimant's own description of his activities and lifestyle." (ALJ's Dec'n, p. 3; Admin. Rec., p. 17).

Plaintiff cites Third Circuit precedent requiring that Plaintiff's subjective complaints be seriously considered, even where not fully confirmed by objective medical evidence. Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981). In Smith, however, "all evidence as to disabling pain [was] favorable to the plaintiff," and the Third Circuit decided that "[a]n ALJ may not make purely speculative inferences from medical reports." Id. at 972. Here, some medical evidence supported Plaintiff's complaints of pain, and the ALJ did not discount Plaintiff's complaints of pain entirely, but instead incorporated the limitations caused by pain into her evaluation of Plaintiff's residual functioning capacity. The ALJ's determination that Plaintiff's subjective complaints of pain were not wholly credible, however, was also supported by medical evidence in the record, such as Dr. Richard J. Levenberg's testimony that Plaintiff "displayed multiple Waddell signs, which are signs of symptom exaggeration, symptom magnification." (ALJ's Dec'n, p. 5; Admin. Rec., p. 19, 265-68).

In making credibility determinations, the ALJ is given great discretion, and such findings are entitled to judicial deference. Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir.1983). The ALJ should consider a plaintiff's daily activities, the location, frequency, and intensity of the pain or symptoms, the type and dosage of pain medication, and any other measures used to relieve the alleged pain. 20 C.F.R. § 404.1529(c)(3) (2003). Here, the ALJ considered these and other factors, in conjunction with the medical record, and determined that Plaintiff's testimony could not be fully credited, a determination which the Court finds was supported by substantial evidence.

V. Conclusion

After review of the parties' briefs and the administrative record, the Court affirms the decision of the ALJ to uphold the Commissioner's decision to reject Plaintiff's claim for disability insurance benefits. Defendant's motion for summary judgment will therefore be granted, and Plaintiff's motion will be denied.

An appropriate order follows.

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ORDER

AND NOW, this 23rd day of August, 2005, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 6), and Defendant's Motion for Summary Judgment (Docket No. 8), it is hereby ORDERED that Plaintiff's Motion is DENIED and Defendant's Motion is GRANTED. The Clerk shall mark this case CLOSED.

BY THE COURT:

/s/ Michael M. Baylson
MICHAEL M. BAYLSON, J.