

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

ROBERTA BROWN, o/b/o	:	CIVIL ACTION
ROBERT GABRIEL (deceased)	:	
	:	
v.	:	NO. 04-4679
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

MEMORANDUM AND ORDER

AND NOW, this 23rd day of May, 2006, upon consideration of the cross-motions for summary judgment filed by the parties (Doc. Nos. 9 and 10) and the reply thereto (Doc. No. 11), the court makes the following findings and conclusions:

1. On February 20, 1993, an administrative law judge (“ALJ”) found Robert Gabriel (“plaintiff”) disabled as of September 4, 1990, due to alcoholism. (Tr. 240-245). The state agency terminated plaintiff’s benefits on February 3, 2000.¹ (Tr. 248-251). In a redetermination notice dated March 22, 2000, the state agency further found that plaintiff’s alcoholism was a contributing factor material to his disability, and, as a result, he was not entitled to disability insurance benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 as of October 1, 1999. (Tr. 254-256).² After an initial hearing, a remand order from the Appeals Council, and a second hearing before a different ALJ on December 4, 2003, the ALJ ultimately agreed with the state agency that alcohol was a contributing factor material to plaintiff’s disability in a decision dated February 19, 2004. (Tr. 16-25; 26-68; 69-105; 403-414; 436-440). The Appeals Council found no reason to review the ALJ’s decision, and, thus, the ALJ’s decision became the final decision in the case. (Tr. 8-10). Pursuant to 42 U.S.C. § 405(g), plaintiff filed his complaint in this court on October 5, 2004.

2. In her decision, the ALJ concluded that plaintiff had severe impairments consisting of depression and substance abuse and that while his depression did not meet a listing, his substance abuse did meet listing 12.09 and was a contributing factor material to his disability. (Tr. 21 ¶¶ 2-4; 24 Findings 3 & 4).³ As a result, the ALJ concluded that, absent the substance abuse, plaintiff retained the residual functional capacity (“RFC”) to perform his past relevant work and, thus, was not disabled. (Tr. 23 ¶¶ 4-6; 24 Findings 6-10).

3. The Court has plenary review of legal issues, but reviews the ALJ’s factual

¹ Plaintiff died on April 2, 2000.

² In 1996 Congress amended Title II of the Social Security Act to bar the award of disability benefits based on alcoholism or drug addiction. *Torres v. Chater*, 125 F.3d 166, 169 (3d Cir. 1997); (Tr. 79; 243). As a result, plaintiff is only entitled to benefits if he can show that alcoholism was not a factor material to his disability, meaning that he must show that he would still be disabled even if he stopped using alcohol. *Id.* (citing 42 U.S.C.A. § 423(d)(2)(C)); (Tr. 79; 254).

³ All numbered paragraph references to the ALJ’s decision begin with the first full paragraph on each page.

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 is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (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 conclusion of the ALJ 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. Plaintiff raises two arguments in which he alleges that the determinations by the ALJ were either not supported by substantial evidence or were legally erroneous. These arguments are addressed below. However, upon due consideration of all of the arguments and evidence, I find that the ALJ’s decision is legally sufficient and supported by substantial evidence.

A. First, plaintiff contends that the ALJ erred in finding that he was capable of work, absent alcohol abuse, after relying on the opinion of a non-examining independent medical expert, Sharon Wainright M.D. (“Dr. Wainright”) instead of on the opinion of his treating doctor Thomas Cullen, Jr., Ph.D. (“Dr. Cullen”). The majority of plaintiff’s argument on this point is simply an invitation to re-weigh the evidence in this case, which I am not permitted to do. Hartranft, 181 F.3d at 360 (citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 -1191 (3d Cir. 1986)). Instead, my duty is to determine whether the evidence is sufficient to support the conclusion of a reasonable person after considering the evidentiary record as a whole. Monsour Med. Ctr., 806 F.2d at 1190-1191. I note that plaintiff has the burden of proving that he would have been disabled even without the effects of alcohol. Doughty v. Apfel, 245 F.3d 1274, 1279-80 (11th Cir. 2001); Mittlestedt v. Apfel, 204 F.3d 847, 852 (8th Cir. 2000); Brown v. Apfel, 192 F.3d 492, 498-99 (5th Cir. 1999).

I find that the ALJ’s decision to reduce the weight of Dr. Cullen’s opinion was reasonable and based on substantial evidence. The ALJ explained that he discounted Dr. Cullen’s opinion in post-hearing interrogatories that plaintiff was disabled regardless of whether he was using alcohol because the opinion was inconsistent with his prior treatment notes, the notes from a substance abuse program at the University of Pennsylvania (“Penn”) attended by plaintiff, and the opinion of Dr. Wainright. (Tr. 22 ¶ 4 - 23 ¶ 1). Treating physicians are only entitled to controlling weight if their opinions are well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2); SSR 96-8p. In this case, Dr. Wainright opined and the ALJ agreed that Dr. Cullen’s notes did not support his final assessment and hearing testimony because the notes showed that plaintiff was more functional when he was not drinking. (Tr. 76-77; 82; 85; 87-88; 94-96; 375-398; 458-460). Dr. Cullen’s opinion is also suspect because it appears that plaintiff was not always truthful with him. For example, Dr. Cullen reports that plaintiff completed the Penn program but the notes from Penn indicate that he did not complete the program. (Tr. 22 ¶¶ 4-5; 326-327; 376). Similarly, the intake history dated May 24, 2000, from the Penn program indicates that plaintiff had drunk daily for the last eighteen months.⁴ (Tr. 353). Contrarily, Dr. Cullen’s notes show

⁴ The actual text of the Penn intake note is: “ETOH: Sober 1 1/2-2 yrs; current use x 18 mos; 12 (16 oz) beers; 30/30 days, has used 3 hrs ago: 32 oz beer.” (Tr. 353). Plaintiff has a different interpretation of this intake history, but I find that the ALJ’s and Dr. Wainright’s interpretation is reasonable.

that plaintiff claimed that he was not using alcohol at this time. (Tr. 377; 379-380); see (Tr. 77).⁵ Finally, Dr. Cullen's opinion appears inconsistent with the evidence because he reported that plaintiff was unable to live outside of a highly supportive living environment and was unable to function independently but, as noted by the ALJ, plaintiff lived alone until he died, there is no evidence that he was unable to live independently, and Dr. Cullen did not suggest he change his living arrangements. (Tr. 22 ¶ 6; 31; 49; 296; 458). The above examples illustrate that the ALJ's decision to discount the opinion of Dr. Cullen was supported by substantial evidence.

Likewise, the ALJ's conclusion that plaintiff was able to adequately function when not abusing alcohol and his reliance on Dr. Wainright was also reasonable and supported by substantial evidence. The ALJ adequately explained that she credited Dr. Wainright because her opinion was consistent with the record including the records from Penn and Dr. Cullen's notes. (Tr. 21 ¶ 3; 22 ¶ 6; 23 ¶ 2; 75-98; 326-338; 353-356; 375-398); see also (Tr. 290-97; 371-73). I specifically note that Dr. Wainright's opinion is consistent with the statement in the Penn notes that plaintiff's depression was most likely alcohol induced. (Tr. 334). I recognize, as did Dr. Wainright, that based on the record evidence experts could and did reasonably reach conflicting conclusions on the issue of plaintiff's functionality. (Tr. 95-96). Nonetheless, for the reasons stated, the ALJ's conclusion that plaintiff was not disabled, absent alcohol abuse, is reasonable and supported by substantial evidence.

B. Second, plaintiff asserts that the ALJ failed to adequately address his credibility pursuant to SSR 96-7p. Specifically, plaintiff contends that the ALJ merely recited that she had the duty to consider symptoms and pain pursuant to SSR 96-7p and concluded in a conclusory manner that "claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision" but failed to properly discuss credibility in the decision. (Tr. 21 ¶ 5; 24 Finding 5). SSR 96-7p states that:

It is not sufficient to make a conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible' The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

SSR 96-7p. The ALJ's credibility analysis is rather sparse and there is no central discussion of plaintiff's credibility. Nonetheless, by reading the decision, the reviewer is able to discern from her statements and conclusions why she discounted plaintiff's credibility. For example, the credibility of plaintiff's complaints was paramount to the opinions formed by both Dr. Cullen and Dr. Wainright. As discussed above, the ALJ properly addressed why she discounted Dr. Cullen's opinion, which relied on plaintiff's reports being credible and which was suspect due to plaintiff possibly being untruthful with him⁶, and why she accepted Dr. Wainright's opinion which necessarily relied on the assumption that plaintiff was less than credible. (Tr. 21 ¶ 3; 22 ¶ 6 - 23 ¶ 2). The ALJ also acknowledged that Dr.

⁵ Dr. Cullen admitted that he did not always record whether plaintiff had been drinking but claimed he could tell if plaintiff had been drinking by his smell, appearance and demeanor. (Tr. 460).

⁶ Of course, the very fact that plaintiff was possibly untruthful with Dr. Cullen reflects negatively on his credibility as well.

Wainright had considered plaintiff's daily activities and his ability to function independently in her analysis. (Tr. 21 ¶3). The ALJ further discussed the fact that the notes from the Penn program reflected that plaintiff did not complete the program while plaintiff told Dr. Cullen that he had completed the program. (Tr. 22 ¶¶ 4-5). It is evident that the ALJ felt this was significant. More importantly, many of the factors usually discussed by an ALJ regarding a claimant's credibility are simply not applicable in this case. First, the ALJ never met plaintiff, because he died before the hearing, and, thus, she was unable to witness his demeanor. Second, plaintiff's own statements regarding his ability to function absent alcohol are rather sparse and unhelpful. For example, during his first hearing, he testified in a conclusory manner that he could become very anxious and depressed while not using alcohol. (Tr. 43-44). The only other statements from plaintiff that seem relevant to this issue are from his original filings for disability due solely to alcoholism. These statements have little worth because the issue of whether he could work absent alcohol abuse could not have been foreseen. However, if one were to credit these statements, they would not be helpful to plaintiff. (Tr. 122) ("When I am not drinking, I can lead a normal life"); (Tr. 138) ("I'm capable of caring for my personal hygiene except when I get drinking"). Similarly, although plaintiff stated at his first hearing after his benefits were revoked the daily activities of which he was capable, he also stated that he was drinking three quarts of beer per day. (Tr. 38; 46-47; 53). Thus, these statements are worthless in determining whether he could work absent alcohol abuse. In light of the above, even if the ALJ technically violated SSR 96-7p, I find that the error could not have changed the outcome of the case and a remand is not warranted. See Rutherford v. Barnhart, 399 F.3d 546, 553 (3d Cir. 2005) (refusing to remand where stricter compliance with a social security ruling would not have changed the outcome of the case).

Upon careful and independent consideration, the record reveals that the Commissioner applied the correct legal standards and that the record as a whole 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 filed by Roberta Brown on behalf of Robert Gabriel is **DENIED**;
6. The motion for summary judgment filed by the Commissioner is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST ROBERT GABRIEL**; and
7. The Clerk of Court is hereby directed to mark this case as **CLOSED**.

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