

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

DENNIS SELL

V.

C.A. NO. 05-6589

JO ANNE B. BARNHART,  
Commissioner of  
Social Security

MEMORANDUM OPINION AND ORDER

GOLDEN, J.

MARCH 28, 2007

Plaintiff brought this action under 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s claim for disability insurance benefits (“DIB”) under Title II of the Social Security Act (the “Act”). The parties filed cross-motions for summary judgment which were referred to a Magistrate Judge for a Report and Recommendation. For the reasons which follow, the Court will decline to follow the Magistrate’s Report and Recommendation, deny the cross-motions for summary judgment and remand to the Commissioner for further proceedings.

Plaintiff was born on July 8, 1948. He is a veteran of the Vietnam War and was discharged from the military in 1967 after

sustaining severe leg injuries while on duty. After release from the military, Plaintiff worked approximately 11 years as a laborer for a manufacturing company. Sometime in 1980, Plaintiff left his job as a laborer allegedly because of increasing leg pain.

In his disability application, Plaintiff alleges a disability onset date of January 7, 1981. The date of his last insured for DIB was December 31, 1985. The Administrative Law Judge (“ALJ”), in a decision dated June 25, 2000, found that during this period, Plaintiff suffered from severe impairments including multiple right leg injuries with complications, depression, and post-traumatic stress disorder. However, the ALJ found that none of these severe impairments met or equaled any of the listed impairments found in 20 C.F.R. Part 404, Subpart P, Appendix 1. The ALJ also found that Plaintiff retained the residual functional capacity to perform light or sedentary exertional work requiring low levels of stress. Thus, the ALJ denied Plaintiff DIB. Tr. 23-31.

Plaintiff sought review of the decision of the Commissioner denying his claim for DIB in this Court. The case was assigned to the Honorable Eduardo C. Robreno. The parties’ cross-motions for summary judgment were referred to Magistrate Judge Linda K. Caracappa for a Report and Recommendation. The Magistrate Judge recommended that the Defendant’s motion for summary judgment

be denied, the Plaintiff's motion for summary judgment be granted and that the final decision of the Commissioner denying Plaintiff DIB be reversed. Specifically, the Magistrate Judge found that the ALJ gave insufficient weight to the medical opinion of Plaintiff's treating vascular surgeon, James McCullough, M.D. who opined that plaintiff suffered from "significant disabilities back to 1980", and insufficient weight to the Veteran Administration's ("VA") disability determination of 100 percent.

In a decision issued on November 19, 2003, Judge Robreno agreed with the Magistrate Judge's rationale, but remanded the case so that the ALJ could make specific findings as to why he rejected the medical opinion of Plaintiff's treating physician and the VA's disability determination. Sell v. Barnhart, No. 02-8617, Memorandum and Order, filed November 19, 2003.

On remand, the ALJ<sup>1</sup> found that the medical evidence established that "[F]rom April 15, 1980 through December 31, 1985, claimant's ability to engage in work-related activities was severely impaired secondary to functional limitations resulting from nerve damage and venous insufficiency involving the right lower extremity," which prevented him from performing his past work. Tr. 816. The ALJ, however, further determined that Plaintiff had the

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<sup>1</sup> The matter was heard by a different ALJ.

residual functional capacity to do limited sedentary work<sup>2</sup> with the following limitations: “he would be restricted to work which would allow him to keep his right leg elevated; he would be restricted to simple, routine one-two step jobs tasks; and he would be further restricted to jobs where he would have no more than limited contact with co-workers or the general public.” Id. The ALJ noted that a vocational expert had testified that a person with Plaintiff’s limitations could work at unskilled sedentary jobs which existed in significant numbers in the national economy such as a bench worker, inspector/sorter and system surveillance monitor. Id. As a result, the ALJ once again found that Plaintiff was not entitled to DIB during the relevant time period. Id.

Plaintiff then brought this action once again seeking review of the final decision of the Commissioner in this Court. The case was again assigned to Judge Robreno. The parties filed cross-motions for summary judgment which were again referred by Judge Robreno to Magistrate Judge Caracappa.<sup>3</sup> In a Report and

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<sup>2</sup> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.167(a).

<sup>3</sup> While Magistrate Judge Carracapa was considering her R & R, the case was transferred to the docket of the undersigned.

Recommendation dated October 31, 2006, the Magistrate Judge found that the ALJ's reasons for rejecting Dr. McCullough's opinion and for discounting the disability determination of the VA were "inadequate." The Magistrate Judge recommended that the Commissioner's motion for summary judgment be denied, the Plaintiff's motion for summary judgment be granted, the final decision of the Commissioner denying Plaintiff's request for DIB be reversed and that the matter be remanded to the Commissioner solely for a calculation of benefits beginning January 7, 1981.

The Commissioner has filed timely objections to the Report and Recommendation.

The Court must determine whether the ALJ's decision is supported by "substantial evidence." 42 U.S.G. § 405(g). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a scintilla, but may be less than a preponderance." Woody v. Secretary of Health and Human Services, 859 F.2d 1156, 1159 (3d Cir. 1988).

Since the Magistrate Judge's Report and Recommendation rests solely on the ALJ's reasons for rejecting the report of Dr. McCullough and the finding of the VA, it is imperative that we review both documents. Dr. McCullough's report, issued on

June 23, 1997 states:

[Plaintiff] was originally seen with problems with significant leg swelling requiring the use of support stockings. He had significant problems with the leg swelling to the point that this was interfering with prolonged ambulation or standing. The swelling was primarily relieved by leg elevation and use of support stockings...

In summary, [Plaintiff] has had a long history of problems with the right leg related to the original injury to the right leg and femoral artery. His significant disabilities date back to 1980 when he began to have severe problems with the leg swelling and more recently related to his arterial circulation problems which eventually resulted in the leg amputation.

Tr. 699.

In connection with the VA's disability rating, on November 10, 1980, Plaintiff requested an increase in his VA disability benefits. At this time, his disability rating was at 40 percent. Following a medical and psychiatric examination, Plaintiff's service related compensable percentage was increased to 60 percent on May 22, 1981. Two years later, on May 6, 1983, Plaintiff was found to be 70 percent disabled from service-connected disabilities. The VA added 30 percent for Plaintiff's neurosis, thereby, making his total "unemployability" rating equal to 100 percent.

In rejecting Dr. McCullough's opinion and the VA's disability determination, the ALJ stated:

In weighing the probative value of this opinion, the [ALJ] notes that records of claimant's treatment from 1975

through 1980 do show that claimant was seen from time to time for complaints of low back and/or right leg pain which reportedly worsened with prolonged periods of standing or walking. However, these records also show that claimant's symptoms were not constant and that he had good relief from his support stockings and orthopaedic shoe. In September 1981, as was noted previously, the claimant went horseback riding for four hours per day for two consecutive days without experiencing any symptoms. As was also noted, records of his treatment from March 1983 through February 1986 show that claimant rarely, if at all, complained of any problems with his right leg. Although claimant did subsequently develop significant arterial disease requiring multiple surgical procedures, this did not occur until several years after the date the claimant last met the disability insured status requirements of the Social Security Act....There is no mention of any claudication or ischemic disease at any time, prior to the date last insured. Accordingly, while the claimant may have had 'significant disabilities' dating back to 1980 which limited his ability to tolerate prolonged periods of standing or walking, there is nothing in the record to suggest that claimant would not have been able to sustain sedentary employment at all relevant times on and prior to December 31, 1985.

Tr. 814-815.

In rejecting the VA's determination of 100% disability, the ALJ stated:

The [ALJ] also notes that claimant was found to be entitled to receive disability compensation from the Veteran's Administration at the 100 % rate effective May 1983. While disability determinations made by other agencies are entitled to probative weight, they are not binding on the Social Security Administration. For all of the aforementioned reasons, the [ALJ] does not find the limitations resulting from claimant's impairment to preclude all forms of competitive employment.

Tr. 815.

The Magistrate Judge found the ALJ's reasoning for rejecting Dr. McCullough's opinion and the VA's finding was inadequate. Specifically, the Magistrate Judge stated that the record did not support the ALJ's finding that Plaintiff got significant relief from the use of support stockings so as to engage in gainful activity during the relevant period and in fact that Plaintiff had complained to a neurologist that the stockings caused tingling in his right leg. The Magistrate Judge also opined that "riding a horse for two days back in 1981 surely does not establish that plaintiff was able to work during this time." Report and Recommendation at 14. The Magistrate Judge believed that such "sporadic" activity actually supports Plaintiff's disability since it was the only activity the ALJ discussed in her decision.

With regard to the VA's finding that Plaintiff was disabled during the relevant period, the Magistrate Judge found that the ALJ rejected the VA's finding for the same reasons she rejected Dr. McCullough's opinion. Since the Magistrate Judge had already concluded that the reasons for rejecting Dr. McCullough's opinion were inadequate, the Magistrate Judge found the reasons for rejecting the VA's finding were also inadequate.

In addition, the Magistrate Judge disagreed with the ALJ that the VA's disability determination was entitled to "probative" weight. Instead, the Magistrate Judge, citing Third Circuit authority, found that the VA's determination was entitled to "substantial" weight.

In her objections to the Magistrate Judge's Report and Recommendation, the Commissioner argues that the Report and Recommendation "essentially relieves Plaintiff of his burden of proof and production prior to December 31, 1985" and instead "places the burden of proof and production on the ALJ to show that Plaintiff was not disabled...because of Dr. McCullough and the VA standard for disability." Defendant's Objections at 4. The Commissioner further argues that the Magistrate Judge relied solely on opinions and statements concerning the ultimate issue of whether Plaintiff was disabled rather than on any objective medical evidence of Plaintiff's ability to function during the relevant time period.

The Magistrate Judge was correct in stating that the Third Circuit has held that a determination made by another agency that a person is "disabled" is entitled to "substantial weight." Kane v. Heckler, 776 F.2d 1130, 1135 (3d Cir. 1985); Lewis v. Califano, 616 F.2d 73, 76 (3d Cir. 1980); Fowler v. Califano, 596 F.2d 600, 603 (3d Cir. 1979). The ALJ, however, only gave the VA's determination

“probative” weight. Tr. 815. Moreover the ALJ did not provide a detailed explanation for rejecting the VA’s determination. Rather, as noted above, the ALJ merely stated in summary fashion that “[f]or all the aforementioned reasons, the [ALJ] does not find the limitations resulting from claimant’s impairment to preclude all forms of competitive employment.” Id.

In view of the Third Circuit authority which states that a determination of disability from another agency is entitled to substantial weight, the Court will remand this matter to the Commissioner for the sole purpose of giving the Veteran’s Administration’s finding that Plaintiff was 100% disabled during the relevant period “substantial” rather than merely “probative” weight. If the Commissioner decides to reject the VA’s determination under the “substantial weight” standard, the Commissioner must give a detailed explanation for rejecting that determination.

For all the foregoing reasons, this matter is remanded to the Commissioner for further proceedings as detailed in the attached Order.

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ORDER

AND NOW, this 28<sup>th</sup> day of March, 2007, upon consideration of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa and Defendant's objections thereto, it is hereby ORDERED that the Court will NOT ADOPT the Report and Recommendation [Doc. #11] of the Magistrate Judge.

It is further ORDERED that the motion of the Plaintiff for summary judgment [Doc. #5] is DENIED.

It is further ORDERED that the motion of the Defendant for summary judgment [Doc. #8] is DENIED.

It is further ORDERED that this matter is REMANDED to the Commissioner for the sole purpose of giving the Veteran Administration's determination that Plaintiff was 100% disabled during the relevant period "substantial" rather than merely "probative" weight. If the Commissioner decides to reject the VA's determination under the "substantial weight" standard, the

Commissioner must give a detailed explanation for rejecting that determination.

The Clerk is DIRECTED to mark this case closed.

BY THE COURT:

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THOMAS M. GOLDEN, J.