

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

HEITI KAAR : CIVIL ACTION
 :
 v. : NO. 97-0405
 :
 KENNETH S. APFEL, :
 COMMISSIONER OF SOCIAL SECURITY :

MEMORANDUM AND ORDER

YOHN, J. December , 1997

Pursuant to 42 U.S.C. § 405(g), plaintiff Heiti Kaar seeks judicial review of the final decision of the Commissioner of Social Security (“Commissioner”), denying plaintiff’s claim for supplemental security income (“SSI”) and disability insurance benefits (“DIB”) provided under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.* Because the Commissioner’s final decision is supported by substantial evidence in the administrative record, and for the reasons set forth below, I will approve and adopt in part the Chief Magistrate Judge’s report and recommendation, deny plaintiff’s motion for summary judgment, and grant defendant’s motion for summary judgment.

BACKGROUND

Plaintiff was diagnosed with diabetes as an adult, and has been dependent on insulin since 1983. Administrative Record and Transcript (“Tr.”) 31. Plaintiff is a former machine designer and draftsman, but has not been gainfully employed since he was laid off from his job for non-health related reasons in September, 1989. Tr. 33-34, 131. Alleging disability due to diabetic ulcers on his left foot with recurrent bleeding, Tr. 117, and inability to close the fingers of his left

hand, *id.*, plaintiff applied to the Social Security Administration for SSI and DIB on March 31, 1993. Tr. 90-92, 96-99. Plaintiff's applications were denied initially and upon reconsideration. Tr. 93-95, 100-111. On December 15, 1994, a hearing was conducted before an administrative law judge ("ALJ"), at which plaintiff was present and represented by counsel. Tr. 28. At the hearing, both plaintiff and a vocational expert offered testimony. *Id.* After exhausting administrative review, plaintiff filed a civil action in this court seeking judicial review of the Commissioner's final decision. The parties have filed cross-motions for summary judgment, which I referred to Chief United States Magistrate Judge James R. Melinson for a report and recommendation, pursuant to Local Rule 72.1. Plaintiff has filed objections to the report and recommendation, and it is these objections that are currently before the court.

STANDARD OF REVIEW

The district court must perform a de novo review of any portion of a magistrate judge's recommendation to which an objection has been made. 28 U.S.C. § 636(b)(1)(C). The court may accept, reject, or modify the magistrate judge's conclusions in whole or in part. *Id.* It is not, however, this court's province to undertake a de novo review of the Commissioner's decision. *See Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 812 (3d Cir. 1986). Rather, on appeal of a denial of Social Security disability benefits, the issue to be addressed is whether the decision is "supported by substantial evidence in the record." *Adorno v. Shalala* 40 F.3d 43, 46 (3d Cir. 1994). "Substantial evidence" is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 407, 91 S.Ct. 1420, 1427 (1971); *Jesurum v. Secretary of the United States Dep't of Health & Human Servs.*, 48 F.3d 114, 117 (3d Cir. 1995). Such evidence may be less than a preponderance, *Richardson*, 402 U.S. at 401, 91

S.Ct. at 1427; *Dobrowolsky v. Califano*, 606 F.2d 403, 406 (3d Cir. 1979), but “must be sufficient to support the conclusion of a reasonable person after considering the evidentiary record as a whole, not just the evidence that is consistent with the agency’s findings.” *Monsour Medical Center v. Heckler*, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (quoting R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law and Process* 358-59 (1985)).

DISCUSSION

A claimant is deemed disabled under the Social Security Act if he is not able “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); *Adorno*, 40 F.3d at 46. In determining whether a claimant is disabled, the Commissioner must apply a five-part test, as the Supreme Court has described in *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885 (1990):

The first two steps involve threshold determinations that the claimant is not presently working, and has an impairment which is of the required duration and which significantly limits his ability to work. See 20 CFR §§ 416.920(a) through (c) (1989). In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. See 20 CFR pt. 404, subpt. P, App. 1 (pt. A) (1989). If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. §§ 416.920(e) and (f).

Mason v. Shalala, 994 F.2d 1058, 1063 (3d Cir. 1993) (quoting *Zebley*, 493 U.S. at 525, 110

S.Ct. at 888-89). The Chief Magistrate Judge (“CMJ”) found that the ALJ correctly applied the requisite five-step sequential evaluation to plaintiff’s physical impairments, and that there was substantial evidence in the record to support the Commissioner’s decision to deny benefits in this case.

Plaintiff has filed two specific objections to the report and recommendation. In considering plaintiff’s objections to the ruling of the magistrate judge, I have independently reviewed the entire record, including the CMJ’s report and recommendation (“R&R”), the ALJ’s written decision, the transcript of the hearing, and all relevant exhibits and other submissions of the parties.

1. Evidence to Support Circulatory Compromise

Plaintiff objects that the CMJ inaccurately relied upon “a portion of the ALJ’s decision in which he stated that ‘there is no evidence of circulatory problems....’” Pl.’s Objections at 1 (quoting R&R at 8). Plaintiff’s ellipsis is misleading. The ALJ’s decision, which was accurately quoted by the CMJ, finds “no evidence of circulatory problems *which would require him to elevate his legs throughout the day.*” Tr. 18 (emphasis added); R&R at 8-9. Neither the CMJ nor the ALJ contended that the record shows no evidence of circulatory problems, but only that there is no evidence of such extreme circulatory problems as to require constant elevation of the legs. The ALJ pointed out, Tr. 16, that plaintiff’s treating podiatrist, Dr. Ira Meyers, reported “adequate circulation for [ulcers] to heal.” Tr. 278. This was not inconsistent with Dr. Meyers’ contemporaneous report that “lower extremities are vascularly compromised,” Tr. 280, but merely reflected that the vascular compromise was not so severe as to prevent adequate circulation. Plaintiff’s objection is therefore without merit.

2. Reliance On Plaintiff's Conduct During Hearing

The CMJ's report includes the observation, "As for the purported need to constantly elevate his feet, the ALJ noted that Kaar did not engage in *any* form of foot elevation during the hearing, even though the hearing lasted in excess of two hours. (Tr. 46-47.)" R&R at 11-12. Plaintiff objects to "the Magistrate's reliance on Plaintiff's failure to elevate his legs during his administrative hearing." Pl.'s Objections at 3. Although the ALJ briefly questioned plaintiff about that conduct, Tr. 47, the ALJ did not indicate in the decision that plaintiff's failure to elevate his legs during the hearing was given any weight whatsoever.¹ Tr. 14-20. Because there is other substantial evidence to support the ALJ's determination, absent any mention of whether plaintiff elevated his legs during the hearing, the CMJ need not have taken that conduct into account in any way. I will therefore decline to adopt the single sentence in the CMJ's report to which plaintiff's objection is addressed.

3. Plaintiff's Previously Raised Objections

Plaintiff also relies on the arguments previously raised in his brief and his reply to defendant's brief. In essence, plaintiff urges this court to determine that frequent elevation of the legs above the heart is a "reasonable" or "appropriate" treatment for plaintiff's condition. Pl.'s Br. Supp. Summ. J. at 24-25, 28-31; Pl.'s Reply Def.'s Br. Supp. Summ. J. at 2-4. However, if

1. If the ALJ had based his decision on his own lay opinion of plaintiff's conduct during the hearing, and had ignored uncontroverted medical evidence to the contrary, plaintiff would have been correct in labeling such a decision as "sit and squirm" jurisprudence, which has been condemned in evaluating mental illness or subjective pain. *Van Horn v. Schweiker*, 717 F.2d 871, 874 (3d Cir. 1983); *Freeman v. Schweiker*, 681 F.2d 727, 731 (11th Cir. 1982). "In this approach, an ALJ who is not a medical expert will subjectively arrive at an index of traits which he expects the claimant to manifest at the hearing. If the claimant falls short of the index, the claim is denied." *Id.*

this court were to undertake its own analysis of plaintiff's treatment by "picking and choosing between conflicting evidence and crediting certain witnesses' testimony over that of others," I would "improperly transform[] the role of the reviewing court into that of a factfinder."

Terwilliger v. Chater, 945 F.Supp. 836, 844 (E.D. Pa. 1997) (citing *Cotter v. Harris*, 642 F.2d 700, 704-05 (3d Cir. 1981)). As the CMJ points out:

This request does not properly recognize the role of this court as previously stated. A review by this court is not performed *de novo* but instead is limited to a determination of whether the ALJ's decision is supported by substantial evidence that exists in the record.

R&R at 9 (citing *Doak v. Heckler*, 790 F.2d 26, 28 (3d Cir. 1986); *Newhouse v. Heckler*, 753 F.2d 283, 285 (3d Cir. 1985)). The ALJ found as follows:

The claimant states that he must elevate his legs frequently throughout the day. The medical reports of record do not reflect such a requirement, and there is no evidence of circulatory problems which would require him to elevate his legs throughout the day. Based on the evidence as a whole, the claimant's subjective complaints are not reasonably supported by the medical evidence and are not fully credible with regard to his medical condition prior to his date last insured, or at the present time.

Tr. 18. The medical reports on record are devoid of evidence specifically supporting the purported requirement that plaintiff must elevate his legs above his heart every two hours, and the medical reports indicate that plaintiff's physicians have recommended other, more conservative treatments.² For the reasons enunciated by Chief Magistrate Judge Melinson in his thorough report, I find that the decision of the ALJ regarding plaintiff's treatment is supported by substantial evidence. R&R at 8-11.

2. Plaintiff responded positively to "various conservative and documented treatments, such as diabetic teaching, foot soaks or hydrotherapy, antibiotics, orthopedic shoes, dieting, losing weight, and exercising." R&R at 11 (citations omitted).

CONCLUSION

Because the administrative record substantially supports the determination of the ALJ that plaintiff is not under a disability, as that term is defined under the Social Security Act, the Chief Magistrate Judge's report and recommendation will be approved and adopted, except for one sentence upon which this court's decision does not rely. Judgment will be entered in favor of the defendant.

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ORDER

AND NOW, this day of December, 1997, upon consideration of the parties' cross-motions for summary judgment, and after careful review of the administrative record and transcript, the report and recommendation of Chief United States Magistrate Judge James R. Melinson, and plaintiff's objections thereto, IT IS HEREBY ORDERED that:

1. The report and recommendation is APPROVED and ADOPTED in part.¹
2. Plaintiff's motion for summary judgment is DENIED.
3. Defendant's motion for summary judgment is GRANTED.
4. Judgment is entered affirming the decision of the Commissioner.

William H. Yohn, Jr., Judge

1. The court declines to adopt the final sentence on page 11 of the Chief Magistrate Judge's Report and Recommendation, beginning with "As for the purported need . . ." and concluding on page 12 with a reference to "(Tr. 46-47)." The remainder of the report and recommendation is approved and adopted.