

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

Barry G. Holland,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 95-CV-7937
Kenneth S. Apfel, ¹	:	
Commissioner of Social	:	
Security,	:	
Defendant.	:	

MEMORANDUM OF DECISION

McGlynn, J. **April** , 1998

Before the court in this action for social security benefits are cross-motions for summary judgment by plaintiff Barry G. Holland ("Mr. Holland") and defendant Kenneth S. Apfel, Commissioner of Social Security (the "Commissioner"), as well as the Commissioner's objections to the magistrate judge's Report and Recommendation. For the following reasons, the court will approve and adopt the Report and Recommendation denying both summary judgment motions and remanding this case to the Commissioner of Social Security.

I. Background

Mr. Holland is currently 49 years old and has a high school education. His past relevant work experience includes jobs as a foreman, operator, and laborer for the Pennsylvania Department of

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on Sept. 29, 1997. Pursuant to Fed. R. Civ. P. 25(d)(1), he is automatically substituted as the defendant in this action.

Transportation.

Mr. Holland filed for Title II Disability Insurance Benefits and Title XVI Supplemental Security Income on November 3 and 4, 1992, claiming that he was unable to work due to bronchial asthma and emphysema. He was 44 years old at the time. His claims were denied both initially and on reconsideration, and then rejected by an administrative law judge ("ALJ") after a hearing in which both Mr. Holland and a vocational expert testified. The Social Security Administration Appeals Council denied Mr. Holland's request for review, making the ALJ's decision the Commissioner's final position.

During the administrative hearing, Mr. Holland testified that his medical regimen requires use of a "nebulizer" device four times a day. R. at 39. The nebulizer is an air compressor that forces medicine-saturated air into the lungs. R. at 39. It measures one foot by two feet and requires an electrical outlet for operation. R. at 39-40.

In his written opinion, the ALJ acknowledged that Mr. Holland "has severe chronic obstructive pulmonary disease and asthma" and recognized his special need "to work in a relatively pollution free environments and environments not involving changes in temperature." R. at 18-20. Despite this, the ALJ ultimately determined that Mr. Holland had the exertional capacity for light work and that his age, education, and work experience compelled a conclusion of "not disabled." R. at 18-20. This decision was based, at least in part, upon the

testimony of a vocational expert ("VE"). The VE formulated her opinion regarding the availability of jobs for Mr. Holland based on the following hypothetical characteristics proposed by the ALJ:

an individual approximately 46 years of age with the training, education, and experience as in the present case who is able to lift 20 pounds, who is able to stand and walk six hours of an eight hour day, was unable to walk steps frequently or steep inclines, was able to sit generally without restriction, who is unable to engage in vigorous and repeated postural changes throughout the day, who is unable to tolerate temperature extremes, or excessive humidity, or dampness, and requires a relatively clean air environment in which to function.

R. at 18.

Given those characteristics, the VE opined that there were 6,000 light and sedentary jobs in the local economy and 1,000,000 in the national economy which Mr. Holland could perform. The ALJ's hypothetical, however, did not include Mr. Holland's need for nebulizer treatments four times a day.

On December 26, 1995, Mr. Holland brought this action seeking judicial review of the Commissioner's decision. Mr. Holland moved for summary judgment on December 24, 1997. On January 22, 1998, the Commissioner responded with his own motion for summary judgment. The court referred the case to Magistrate Judge Charles B. Smith, who issued a Report and Recommendation on February 23, 1998, recommending that the court deny both summary judgment motions and remand the case to the Commissioner of Social Security to determine the impact of Mr. Holland's use of a

nebulizer on his ability to work.

II. Legal Standard

In reviewing a decision by the Commissioner of Social Security, the court may not re-weigh the evidence. Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986), cert. denied, 482 U.S. 905 (1987). The court must rather determine whether the Commissioner's decision is supported by substantial evidence. Richardson v. Perales, 402 U.S. 389, 401 (1971); 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 564-65 (1988). It is more than a mere scintilla, but less than a preponderance. Stunkard v. Secretary of Health & Human Services, 841 F.2d 57, 59 (3d Cir. 1988). If the Commissioner's decision is supported by substantial evidence, the court must affirm the decision regardless of whether it would have come to a different conclusion. Id. The court reviews de novo any portions of the magistrate judge's Report and Recommendation to which objections are filed. 28 U.S.C. § 636(b)(1)(C).

III. Discussion

The Commissioner has established a five-step test for determining whether a person is disabled under the Social Security Act. 20 C.F.R. §§ 404.1520, 416.920. The first two steps require the claimant to prove that he is not engaged in substantial gainful activity and that he suffers from a severe medical impairment. 20 C.F.R. §§ 416.920(b) & (c). Once these

are proven, the third step requires a comparison of medical evidence of the impairment with a list of impairments presumed severe enough to preclude gainful employment -- disabilities per se. 20 C.F.R. §§ 416.920(d); 20 C.F.R., part 404, subpart P, App. 1 (Part A). If the impairment matches or equals one of those listed, the claimant automatically qualifies for benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d). If not, the analysis proceeds to the steps four and five, which determine whether the claimant can perform his past work or other work that exists in the national economy in light of his age, education, and work experience. 20 C.F.R. §§ 416.920(e) & (f). If the claimant cannot, he is entitled to benefits. 20 Id.; C.F.R. §§ 404.1520(e)-(f). A finding of disability, however, cannot be based solely on the claimant's subjective testimony and symptomatology. 20 C.F.R. § 416.929(a). Medical evidence and laboratory tests must confirm that the claimant has a medical impairment which could reasonably produce the symptoms. Id.

In this case, the Commissioner denied benefits to Mr. Holland because he did not satisfy the fifth step -- i.e., he was capable of performing other work which existed in the national economy. Upon review, however, the magistrate judge concluded: (1) that the ALJ's hypothetical characterization of Mr. Holland's physical condition was incomplete under Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984), in that it failed to include his nebulizer regimen; and (2) that the ALJ made no findings, and the vocational expert gave no clear opinion, regarding the impact of

Mr. Holland's nebulizer regimen on his ability to work. Because the ALJ relied upon the vocational expert's estimate of the number of jobs Mr. Holland could perform, which in turn was premised upon the ALJ's deficient hypothetical question, the magistrate could not find that the ALJ's decision was supported by substantial evidence.

The Commissioner makes four objections to the magistrate judge's Report and Recommendation. First, the magistrate impermissibly made his own factual determination that the ALJ did not address Mr. Holland's nebulizer use. Def. Objections at 2. Second, Mr. Holland's testimony that he needed to use a nebulizer four times a day was unsubstantiated by objective medical evidence. Id. at 3. Third, the ALJ considered and rejected Mr. Holland's nebulizer testimony, and concluded that Mr. Holland's nebulizer treatments would not prevent him from working. Id. at 4. And lastly, remand would waste judicial and administrative resources because Mr. Holland clearly is not disabled. Id.

A. Factual Findings

The Commissioner first objects, "by specifically finding that Plaintiff's use of a nebulizer was a limitation not addressed by the A.L.J., the Magistrate Judge essentially replaced the Commissioner's findings concerning Plaintiff's impairments and resulting limitations with his own." Comm'r Objs. at 2.

It is true that a district court, when reviewing social security cases, may not make independent factual findings. Grant

v. Shalala, 989 F.2d 1332, 1338 (3d Cir. 1993). Magistrate Judge Smith, however, made no factual findings regarding Mr. Holland's claimed disability. Rather, he reviewed the record and concluded that vital facts, as required under Third Circuit case law,² were not considered by the ALJ in rendering his decision. Remand to the Commissioner for additional findings is therefore appropriate. See, e.g., Grant, 989 F.2d at 1338.

B. Objective Medical Evidence

Next, the Commissioner contends that "[t]here is absolutely no objective evidence that Plaintiff had to use a nebulizer four times per day or that he would need to use it while at work," and consequently, the ALJ correctly relied upon the vocational expert's opinion which did not consider this limitation. Comm'r Objs. at 3.

First, the Commissioner's argument that there is no objective evidence of Mr. Holland's four-times-a-day nebulizer treatment is incorrect. In Dr. Nar's consultation record of April 22, 1992, he notes that Mr. Holland was on "nebulizer treatment with Alupent q.i.d." R. at 141. It is well-established that "q.i.d." is a medical abbreviation for four times a day. Dorland's Illustrated Medical Dictionary 1399 (27th ed. 1988). In reference to Mr. Holland's medications, Dr. DeFranco also wrote in his July 11, 1994 medical summary,

² See Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984) (VE's response to hypothetical question by ALJ is not substantial evidence unless question reflects all claimant's impairments which are supported by record).

"Nebulizer," followed by three vertical lines with a horizontal slash through the middle, a possible abbreviation for the number four. R. at 207.

In addition, the vocational expert testified that if an individual were instructed to use a nebulizer four times a day, that would require use during a standard eight-hour workday. R. at 43. The Commissioner's contention that there is no objective proof of Mr. Holland's need to use the nebulizer while at work is thus belied by the vocational expert's own testimony.

Secondly, while a claimant must substantiate his or her medical impairment with medical signs and laboratory findings, 20 C.F.R. § 416.929(a), any symptom-related functional limitations which a claimant reports, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, is taken into account in disability determinations. 20 C.F.R. § 416.929(c)(3).³ This includes reports of medical

³ 20 C.F.R. § 416.929(c)(3) provides, in pertinent part:

Consideration of other evidence. Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that you, your treating or examining physician or psychologist, or other persons provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and

treatment. Id. Thus, so long as nebulizer treatments four times daily could reasonably be accepted as consistent with Mr. Holland's severe chronic obstructive pulmonary disease and asthma, Mr. Holland's testimony regarding his nebulizer regimen is sufficient under 20 C.F.R. § 416.929(c)(3) to be utilized in a disability determination.

The medical conditions from which Mr. Holland suffers could reasonably be expected to require continuing nebulizer

difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating, examining or consulting physician or psychologist, and observations by our employees and other persons. . . . Factors relevant to your symptoms, such as pain, which we will consider include: . . .

- (iv) The type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms;
- (v) Treatment, other than medication, you receive or have received for relief of your pain or other symptoms;
- (vi) Any measures you use or have used to relieve your pain or other symptoms (e.g., lying flat on your back, standing for 15 to 20 minutes every hour, sleeping on a board, etc.); and
- (vii) Other factors concerning your functional limitations and restrictions due to pain or other symptoms.

treatments. The record is filled with references to Mr. Holland's nebulizer treatments by his treating physicians.⁴ None of the reports submitted by these doctors or the Commissioner's own examining physician contradict or undermine Mr. Holland's testimony regarding his four-times-daily nebulizer treatments. On this basis alone, there was sufficient evidence for the ALJ to consider the impact of Mr. Holland's nebulizer use on his ability to work.

C. Plaintiff's Ability to Work

In his third objection, the Commissioner argues that the ALJ reasonably concluded "that the use of a nebulizer was not a limitation supported by the record, and would not prevent Plaintiff from performing the light and sedentary jobs identified by the vocational expert." Comm'r Objs. at 4.

After examination of the record, it is clear the ALJ came to no such conclusion. The Commissioner suggests that the ALJ

⁴ Dr. Nar's consultation record of 5/6/91 suggested starting Mr. Holland on nebulizer treatment, a treatment plan which was put into effect and documented by Dr. Nar's consultation records of 6/4/91, 9/17/91, 10/15/91, 4/22/92, and 6/12/92. R. at 94, 113-14, 123, 141, 148. Dr. DeFranco's discharge summaries of 12/8/91, 1/24/92, 6/11/92, 8/17/92 noted that Mr. Holland was receiving nebulizer treatments. R. at 110, 119, 145, 138-141. On 3/5/93 Dr. Nar's progress notes stated, "[c]ontinue . . . nebulizer treatment with Alupent" R. at 150. On 3/31/93, the Pennsylvania Bureau of Disability Determinations' own medical examiner, Dr. Dale Weisman, noted Mr. Holland's use of Alupent. R. at 152. Dr. DeFranco's updated report to the Bureau of Disability stated that Mr. Holland was under "Alupent nebulizer treatmt. [sic]." R. at 162. Dr. Nar reported on 7/15/93 that Mr. Holland was taking "Alupent inhalation Solution (nebulizer)." R. at 165. As late as 2/22/94, Dr. Nar noted to continue Mr. Holland on his nebulizer treatments. R. at 186.

considered -- and discounted -- Mr. Holland's testimony regarding his nebulizer regimen, and then properly relied on the vocational expert's opinion that Mr. Holland could work. The transcript of the hearing and the ALJ's written decision, however, contain no evidence that the ALJ made a credibility determination as to Mr. Holland's testimony on this issue. Furthermore, the ALJ failed to address Mr. Holland's nebulizer treatments both when questioning the vocational expert, R. at 41-43, and in his written decision. R. at 15-20. As a result, there is no evidence that the ALJ ever considered the impact of Mr. Holland's nebulizer regimen on his ability to work.

The Commissioner also argues that Mr. Holland "could use the nebulizer three times at home during the course of a workday; before he goes to work, when he returns home, and before he goes to bed." Comm'r Objs. at 3. With this suggestion, the Commissioner seeks to substitute his own inexpert medical opinion for that of Mr. Holland's treating physicians. This proposed thrice-a-day treatment plan, however, is unsupported by medical evidence, and the record is barren of proof that the ALJ ever considered this theoretical possibility. However, even if the ALJ concluded that Mr. Holland could follow a three-times-a-day regimen, that judgment would have been improper. While an ALJ can choose between conflicting medical opinions if such opinions are properly submitted, an ALJ "is not free to set his own expertise against that of a physician who testified before him." Gober v. Mathews, 574 F.2d 772, 777 (3d Cir. 1978). Further, the

court cannot make its own factual determination that Mr. Holland could reduce his nebulizer treatments from four to three times a day. See Grant v. Shalala, 989 F.2d 1332, 1338 (3d Cir. 1993).

D. Waste of Judicial & Administrative Resources

Lastly, the Commissioner submits that "the Court risks a significant waste of judicial and administrative resources if this case is remanded for additional vocational expert testimony when it is clear that Plaintiff is not disabled." Comm'r Objs. at 4.

Courts have found remand to the Commissioner to be a waste of judicial and/or administrative resources when additional proceedings would clearly have had no impact on the ultimate disposition of a plaintiff's claim. See, e.g., Harper v. Sullivan, No. 89 C 4374, 1990 WL 186094, *2 (N.D. Ill. Nov. 12, 1990) (wasteful to remand case because of error at step two only to have Secretary reaffirm his finding at step four); Hodges v. Secretary of Health & Human Services, No. 87-CV-625, 1989 WL 281926, *5 (N.D.N.Y. Nov. 15, 1989) (finding remand wasteful when only possible conclusion was that plaintiff could perform all of, less than, or none of 30,000 jobs in national economy, and 30,000 was too insubstantial a number to deny benefits). That is not the case here, where the ALJ's decision rested partly upon the vocational expert's response to a deficient hypothetical question. The VE acknowledged that Mr. Holland's need for nebulizer treatments would be a limiting factor if there was no electricity at his workstation, or if he was unable to use it at

lunch or on breaks. R. at 43. It is therefore unclear whether Mr. Holland's nebulizer regimen would significantly alter the VE's estimate of the number of jobs Mr. Holland could perform. Under these circumstances, the court does not view remand as a waste of judicial or administrative resources.⁵

⁵ It strikes the court that submitting objections which are factually contradicted by record medical evidence and/or lacking any support in law are a greater waste of judicial and administrative resources than remand of this case. **IN THE UNITED STATES DISTRICT COURT**

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.	:	CIVIL ACTION
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Kenneth S. Apfel,	:	
Commissioner of Social	:	
Security,	:	
Defendant.	:	

ORDER

AND NOW, this day of April, 1998, upon consideration of the cross-motions for summary judgment of plaintiff Barry G. Holland and defendant Kenneth S. Apfel, Commissioner of Social Security, and Magistrate Judge Charles B. Smith's Report and Recommendation, it is hereby

ORDERED that:

- (1) Magistrate Judge Smith's Report and Recommendation is **APPROVED and ADOPTED**;

IV. Conclusion

For the foregoing reasons, this Court will approve and adopt the magistrate's report and recommendation. Both summary judgment motions are denied and this case is remanded to the Commissioner of Social Security.

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- (2) both plaintiff's and defendant's motions for summary judgment are **DENIED**; and
- (3) this case is **REMANDED** to the Commissioner of Social Security for proceedings in accordance with Magistrate Judge Smith's Report and Recommendation.

BY THE COURT:

JOSEPH L. McGLYNN, JR., J.