

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

LERROY DAVIS : CIVIL ACTION  
 :  
 v. :  
 :  
 KENNETH S. APFEL : No. 97-5830

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 25, 1999

This action against the Commissioner of Social Security Administration challenges the denial of Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) to Leroy Davis. Both parties filed motions for summary judgment and the matter was referred to United States Magistrate Judge James Melinson for a Report and Recommendation. The Report recommends plaintiff's motion for summary judgment be granted, defendant's motion for summary judgment be denied, and the case be remanded for further consideration. The Commissioner filed objections to the Report. After a de novo consideration of the objections this court approves the Report and Recommendation in part.

PROCEDURAL HISTORY

The following factual recitation is adopted from the Report and Recommendation: On January 28, 1987, Davis filed his first application for DIB for disability caused by a broken left leg and high blood pressure. (Tr. 270-273). This application was denied, and Davis did not request reconsideration. (Tr. 44,

274).

On August 1, 1990 Davis filed applications for DIB and SSI; he alleged disability as of August 15, 1989, caused by blindness in his left eye, high blood pressure, and a past fracture of his left leg. (Tr. 136-152, 171). These applications were denied initially and upon reconsideration. (Tr. 153-158, 161-165). On January 10, 1992, an Administrative Law Judge ("ALJ") heard testimony from Davis (represented by counsel) and a vocational expert. (Tr. 57-97, 190-191). The ALJ denied Davis's claim for benefits by order of February 28, 1992. (Tr. 44-48). Upon request for review, the Appeals Council vacated the ALJ's decision and remanded the case for a complete re-assessment of Davis's subjective complaints. (Tr. 359).

Following a second administrative hearing, the ALJ again denied Davis's claim for benefits by order of October 22, 1993. (Tr. 17-27). Davis's requested review of the decision by the Appeals Council was denied. (Tr. 9). Davis subsequently filed a complaint for judicial review of the Commissioner's decision denying benefits. (Tr. 598-634). On April 18, 1995, the District Court granted a stipulated remand to the Commissioner for further psychological evaluation of Davis and additional vocational expert testimony. (Tr. 487-488, 562-563).

After the psychological evaluation, supplemental hearings were conducted by a second ALJ on March 6, 1996 and January 15,

1997. (Tr. 489-513, 514-561). Davis was represented by counsel; testimony was received from Davis, his mother, and a vocational expert. By decision of March 24, 1997, the ALJ again denied Davis' claim for benefits. (Tr. 465-482). Davis's requested review by the Appeals Council was denied, (Tr. 449-450), and the ALJ's decision became the final decision of the Commissioner. Having exhausted his administrative remedies, Davis filed this complaint for judicial review of the Commissioner's decision denying benefits.

#### **FACTUAL HISTORY**

Davis was born on July 12, 1947, and was forty-nine years old at the time of the most recent administrative hearing. (Tr. 14, 516). His education terminated at the tenth grade. (Tr. 492). Davis, twice divorced with four children, lives with his mother and stepfather. (Tr. 70,138,522-523). He receives welfare benefits, food stamps, and has a medical card. (Tr. 69-70,535). Davis's past relevant work history includes work as a welder; the ALJ determined this to be heavy work. (Tr.474).

The record shows that Davis has a significant history of alcohol abuse beginning in 1980. (Tr. 399-400, 411). Davis testified that he drinks a six-pack of beer daily, that he drank more while he was employed because he had more money to spend, and that he drank on the job. (Tr. 82,86,112). Davis has been

to alcohol rehabilitation several times but has not stopped drinking. (Tr. 73,409-410,532-533). He has been incarcerated for DUI, public drunkenness, and non-support of his children; his driver's license has been revoked, and he has been charged with driving without a driver's license. (Tr. 131,498,524,525,570).

In September, 1984, Davis was referred by his treating physician to a mental health clinic for treatment. (Tr. 361-368). Upon evaluation, Davis was diagnosed with "continuous alcohol abuse" and underwent treatment in a detoxification program. Id. A psychological evaluation at that time revealed that Davis was performing in the "borderline range" of intellectual functioning. Id. Davis was later referred to the Office of Vocational Rehabilitation, but failed to follow through with scheduled appointments. Id.

On November 7, 1984, Davis was admitted to Eugenia Hospital's ADAPT Program, a drug and alcohol treatment program. (Tr. 409-412). During his treatment, Davis was diagnosed with a dysthymic and substance abuse disorder. Id. Upon discharge, Davis was directed to seek further treatment through Alcoholics Anonymous (AA) and Narcotics Anonymous(NA), but failed to do so. Id. As of November of 1995, Davis was involved in the Intensive Outpatient Treatment for Addictions (IOTA) program at St. Luke's Hospital, as well as AA meetings; however, he admits that he continues to drink. (Tr. 575).

The record also shows that Davis has received treatment for various physical impairments, including a status post internal fixation of his left hip and left eye blindness. (Tr. 470). During 1994 and 1995, Davis also received treatment for hypertension, gastritis, and hepatitis C at St. Luke's Hospital. (Tr. 593-596,635-642). Davis was diagnosed with depression and was prescribed antidepressant medication including Paxil and Zoloft. Id. Davis's treating physician, Leslie Myers, D.O., noted the medication improved Davis's depression. Id.

Davis's mother testified that Davis does his own laundry, keeps his place clean, cleans the yard, shovels snow when necessary, watches television, takes walks, and runs errands for her. (Tr. 548). She noticed that her son is depressed and easily aggravated, and that he get frustrated and disgusted because of his increased medical problems. (Tr. 549-551).

Davis testified that he cannot concentrate and has trouble with his memory. (Tr. 538, 545). He described his daily activities as cooking, watching television, going for walks, spending time with his girlfriend, cleaning his apartment, and grocery shopping. (Tr. 539-540).

#### **DISCUSSION**

This court's standard of review is de novo on those portions of the Report to which an objection is made. 28 U.S.C.

§ 636(b)(1)(B).

The initial burden is on the claimant to prove that he is unable to engage in substantial gainful activity, that he has an impairment which limits his ability to do basic work, and that he cannot perform past work. 20 C.F.R. § 404.1520. Once the claimant satisfies his/her burden of proof, the burden shifts to the Commissioner to prove that alternative work exists in the economy. Green v. Schweiker, 749 F.2d 1066, 1071 (3d Cir. 1984); Doak v. Heckler 790 F.2d 26,28 (3rd Cir. 1986).

The Magistrate Judge concluded that the ALJ had not properly considered the testimony of the treating physician that Davis was unemployable. The Magistrate Judge also found that even if the ALJ found Davis disabled, further evidence was needed to determine if his alcoholism was a contributing factor. Finally, remand was warranted to determine whether his 1987 claim should be reopened. The Commissioner raises the following objections: 1) the treating physician's testimony does not need further reconsideration; she found him unemployable because of his alcoholism and if he underwent treatment he would be employable; 2) even if the ALJ found him disabled, alcoholism is his primary impairment and a contributing factor in his disability; and 3) remand to determine if his 1987 claim should be reopened is pointless because he worked every calendar year between 1985 and 1989. After consideration the first two objections are overruled

and the third objection is sustained on other grounds.

**1. The ALJ did not properly consider the treating physicians testimony.**

The ALJ is required to explain the evidence he used to support his result and the evidence he rejected. Stewart v. Sec. of Health, Educ. & Welfare, 714 F.2d 287,288 (3d Cir. 1981). The ALJ must explain whether he is crediting certain testimony or ignoring it. Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981). If the ALJ fails to consider all relevant evidence then the action must be remanded. Id. Here, the ALJ did not address the conclusion of Dr. Myers that Davis was unemployable or explain if the testimony was ignored as conclusory or rejected because it was based on claimant's alcoholism. Further testimony may be necessary to assess whether the claimant would be disabled if his alcoholism were excluded from consideration.

The ALJ also erred in failing to give appropriate weight to the opinion of Dr. Zimmerman, Davis's psychologist. The ALJ found that his opinion was in conflict with that of Dr. Myers and rejected it. However, the opinions are not necessarily in conflict. Dr. Zimmerman concluded that Davis had poor insight, judgment, and concentration. (Tr. 573). He also opined that Davis could not learn new information and that he performed simple tasks in a poor manner. (Tr. 577-578). This analysis does not conflict with Dr. Myers's conclusion that Davis's

depression is improving. Even if the depressive state were cured, it is still possible that Davis may not be able to work because of his inability to perform simple tasks. Dr. Myers never stated that Davis could perform simple tasks because his depression was improving. The two "impairments" do not affect each other. It needs to be determined if an independent basis exists for disability, excluding alcoholism.

Additionally, claimant's subjective complaints of pain are not discredited by his daily activities of watching TV and cleaning the apartment. The issue is whether he can perform substantial gainful activity for a continuous period of time. Kangas v. Brown, 823 F. 2d 775,777 (3d Cir. 1987).

**2. If Davis is disabled, it is unknown if alcohol is a contributing factor in Davis's disability.**

A recent amendment to the Act provides that disability benefits are not available for disabled individuals if alcoholism is found to be a contributing factor. 42 U.S.C. § 423(d)(2)(C). To determine if alcohol is a contributing factor one considers whether an individual would still be disabled if he stopped using alcohol. 20 C.F.R. § 404.1535(b)(1), 416.935(b)(1). The Commissioner must determine if the remaining conditions would be disabling. On remand, the ALJ must make that finding and it would be helpful to have the opinion of the treating physician.

If alcohol were a contributing factor, Davis is not entitled

to benefits even if the alcoholism occurred before the amendment passed in 1996. All claims not finally adjudicated before March 29, 1996 are subject to the amendment. Torres v. Chater, 125 F.3d 166 (3d Cir. 1997). A case remanded for further hearing is not finally adjudicated. Id. This action was on remand in March, 1996; a hearing was not conducted until 1997. Davis's claim is therefore subject to the 1996 amendment.

Dr. Myers stated that Davis was unemployable because of alcoholism; the Commissioner argues that Davis would be employable if he were not an alcoholic. It is unclear if Davis would be disabled were it not for his alcoholism upon consideration of the opinion of Dr. Zimmerman. If Davis would have been employable, the burden shifts to the Commissioner to determine if there are alternate sources of employment in the economy. There needs to be substantial evidence of the basis of the decision that other employment exists. Terwillinger v. Chater, 945 F. Supp. 836, 840 (E.D. Pa. 1996). When Dr. Zimmerman's opinion is considered, The ALJ's conclusion is not supported by substantial evidence.

**3. This court cannot require the re-opening of Davis's 1987 disability claim.**

Davis's first filing for benefits in 1987 was denied. In his brief in support of plaintiff's motion for summary judgment, Davis acknowledges that "[t]here is no evidence that Davis

requested reconsideration or any further administrative review of that decision." (Br. in Supp. of Pl.'s Mot. for Summ. J. 2). While an application can be reopened within four years if there is new and material evidence presented, 20 C.F.R. § 404.987; Coup v. Heckler, 834 F.2d 313, 317 (3d Cir. 1987), the decision whether to reopen a claim is made by the Commissioner. 20 C.F.R. § 404.989. If the Commissioner decides, without a hearing, not to re-open a claim, the district court has no jurisdiction to review that decision. See Rogerson v. Secretary Of Health and Human Services, 872 F.2d 24, 28 (3d Cir. 1989).

It does not appear from the administrative record that Davis ever specifically asked, in his 1990 application, for a reopening of his 1987 claim. A subsequent application may be deemed a request for reopening of the prior decision when it presents the same issues as the previous application. See Aponte v. Sullivan, 823 F.Supp. 277, 281 (E.D. Pa. 1993) (citing Califano v. Sanders, 430 U.S. 99, 103 (1977)). But since the disability date claimed by Davis in his 1990 application was August 15, 1989 (with an SSI "protective filing date" of July 26, 1990) (Br. in Supp. of Pl.'s Mot. for Summ. J. 2), and the ALJ's most recent decision was based on these onset dates (Id. at 4), the 1990 application did not constitute either a request for a rehearing, or an actual rehearing, of Davis's 1987 claim. This is true even though the ALJ did consider injuries that occurred

prior to 1989. Those injuries were evaluated as evidence of disability after the 1989 onset date and not with respect to any pre-1989 claim.

Since the Commissioner never re-examined Davis's 1987 claim or made a decision about whether to reopen that claim, this court is without jurisdiction to review the merits of either the claim itself or a decision regarding its reopening.

#### **CONCLUSION**

After careful consideration of the objections to remand, the objections are overruled in part. The action will be remanded for reconsideration of the 1990 claim. The issue of whether to reopen the 1987 claim is purely within the discretion of the Commissioner and cannot be reviewed by this court.

An appropriate Order follows.

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ORDER

AND NOW, this \_\_\_\_ day of October, 1999, upon consideration of the parties' cross-motions for summary judgment, de novo review of the Report and Recommendation of Chief United States Magistrate Judge James R. Melinson, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Chief Magistrate Judge Melinson's Report and Recommendation is **NOT APPROVED** with respect to the plaintiff's 1987 claim and **APPROVED AND ADOPTED** with respect to all other claims.

2. Plaintiff's motion for summary judgment is **DENIED**.

3. Defendant's motion for summary judgment is **GRANTED** with respect to the plaintiff's 1987 claim and **DENIED** with respect to all other claims.

4. This matter is **REMANDED** to the Commissioner of Social Security to reopen the record and reconsider it in accordance with this Memorandum and Order.

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S.J.