

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN MERKERISON)
)
 Plaintiff,)
)
 v.) Civil Action No. 02-443-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

Gary C. Linarducci, Esquire of the Law Offices of Gary C.
Linarducci, New Castle, Delaware. Counsel for Plaintiff.

Colm F. Connolly, Esquire, United States Attorney and Douglas E.
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States Attorney's Office, Wilmington, Delaware. Counsel for
Defendant. Of Counsel: James A. Winn, Esquire, Regional Chief
Counsel, Region III, and David F. Chermol, Esquire, Assistant
Regional Counsel.

MEMORANDUM OPINION

Dated: July 31, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff John Merkerison filed this action against defendant Jo Anne B. Barnhart, the Commissioner of Social Security ("Commissioner"), on May 21, 2002. (D.I. 2) Plaintiff seeks judicial review of a decision by the Commissioner denying his claim for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Currently before the court are the plaintiff's and defendant's cross-motions for summary judgment. (D.I. 15, 17) For the reasons that follow, the court shall grant defendant's motion and deny plaintiff's motion.

II. BACKGROUND

A. Procedural History

On September 14, 1983, plaintiff filed concurrent applications for Social Security benefits alleging disability due to psychiatric problems and alcohol abuse commencing on or about July 10, 1983. (D.I. 16 at 5) Plaintiff's claims for benefits were initially denied and the denial was upheld upon reconsideration. (Id.) Plaintiff subsequently received a hearing before an administrative law judge ("ALJ"). (Id.) On March 23, 1985, the ALJ issued a decision finding plaintiff disabled based on mental impairment. (Id.) Plaintiff began receiving benefits based on this determination for a number of years.

In March 1996, the Social Security Act was amended so that alcoholism could no longer provide a basis for benefits. See Public Law 104-121, codified as 42 U.S.C. § 423(d)(2)(C). The revisions, effective March 29, 1996, stated that individuals for whom drug addiction and/or alcoholism is a contributing factor material to the determination that they are disabled are no longer entitled to disability benefits. 42 U.S.C. § 423. Plaintiff's disability status was subsequently reviewed pursuant to the new law and in January 1997, plaintiff was adjudged not disabled and his disability benefits were terminated effective January 1, 1997. (D.I. 12 at 95)

On June 3, 1999, at plaintiff's request, a hearing before an ALJ to review this determination. (D.I. 12 at 43) On August 4, 1999, the ALJ issued a decision affirming plaintiff's denial of disability benefits. (D.I. 12 at 19) In consideration of the entire record, the ALJ made the following findings:

1. Claimant met the disability insured status requirements of the Act on January 1, 1997, the date his benefits were ceased, pursuant to Public Law 104-121, and his insured status continues through the date of this decision.
2. Claimant has not engaged in substantial gainful activity since January 1, 1997.
3. Claimant has severe alcohol abuse, borderline intellectual functioning, and depression.
4. Claimant does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

5. Claimant's statements with regard to the nature and degree of severity of his impairments and symptoms are not reasonably supported by the medical evidence, and are not fully credible.
6. Claimant has the residual functional capacity to perform the non-exertional requirements of work except for moderate limitations in his ability to: remember and carry out detailed instructions, concentrate, work in coordination with others, respond appropriately to changes in a work environment, and work independently of others. There are no exertional limitations (20 C.F.R. § 404.1545).
7. Claimant has no past relevant work activity.
8. Claimant is 54 years old, which is defined as closely approaching advanced age (20 C.F.R. § 404.1563).
9. Claimant has a limited education, and the evidence indicates that he has limited literacy (20 C.F.R. § 404.1564).
10. Claimant does not have any acquired work skills which are transferable to the skilled or semiskilled work function of other work (20 C.F.R. § 404.1568).
11. If claimant's non-exertional limitations did not significantly compromise his ability to perform work at all exertional levels, section 204.00, Appendix 2, Subpart P, Regulations No. 4 indicates that a finding of not disabled would be appropriate. If his capacity to work at all levels were significantly compromised, the remaining work which he would functionally be capable of performing would be considered in combination with his age, education, and work experience to determine whether a work adjustment could be made.
12. Considering the types of work which claimant is still functionally capable of performing in combination with his age, education and work experience, he can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy.

Examples of such jobs are: hand packer (light and medium), 1,000 jobs in the region, 350,000 jobs nationally; janitorial work and cleaning (mostly medium), 5,000 locally, 1.9 million jobs nationally; and housekeeping, 1,500 jobs locally, 600,000 jobs nationally.

13. Claimant was not under a "disability," as defined in the Social Security Act, at any time as of January 1, 1997, through the date of this decision 20 C.F.R. § 404.1520(f)).

(D.I. 12 at 25-27)

The decision of the ALJ was appealed to the Appeals Council on September 20, 1999. (D.I. 12 at 14) In denying the request for review, the Appeals Council made the following findings: (1) there was no abuse of discretion; (2) there was no error of law; (3) the ALJ's decision was supported by substantial evidence; (4) there were no policy or procedural issues affecting the general public interest; and (5) there was no new evidence submitted that might have required a re-evaluation of plaintiff's application.

(D.I. 12 at 6-7) Thus, the ALJ's August 4, 1999 decision became the final decision of the Commissioner. See 20 C.F.R. §§ 404.955, 404.981, 422.210 (2003); see also Bowen v. City of New York, 476 U.S. 467 (1986). Plaintiff now seeks review of the decision in this court pursuant to 42 U.S.C. § 405(g).

B. Facts Evinced at the Administrative Law Hearing

Plaintiff was 54 years of age at the time of the administrative hearing on June 4, 1999. (D.I. 12 at 46) Plaintiff attended formal special education classes until the age

of eighteen. (Id. at 47) Plaintiff has minimal reading and writing skills. (Id. at 46, 52) Plaintiff has not worked a job for at least two years, his most recent employment being janitorial work, which lasted for approximately two weeks. (Id. at 47) Plaintiff states that he has problems concentrating and, although he is able to drive a car, he occasionally gets lost or forgets his destination. (Id. at 48)

Plaintiff claims that while participating in an alcohol support group called Crossroads, he did not drink alcohol for approximately one year. (Id.) Plaintiff then left Crossroads and joined another group called Catholic Charities in February 1999. (Id.) After joining Catholic Charities, plaintiff admits to drinking alcohol two or three times, but has since been sober for the past several months. (Id. at 50) Plaintiff claims to attend Alcoholics Anonymous three to four times per week. (Id. at 51)

Plaintiff claims that he cannot work because he cannot sleep at night and does not have the energy to "get started" in the morning. (Id.) Often after waking, plaintiff sleeps or watches television. (Id. at 56) Further, plaintiff claims that he has back pain due to sitting or bending over and foot pain from standing or walking. (Id. 52-54) Plaintiff is scheduled for monthly therapy for his ailments, but often arrives late or misses appointments due to his bad memory and lack of energy.

(Id. at 52, 57)

Plaintiff alleges disability because of depression, anxiety, back problems, angina, stomach problems, and left knee impairment. (D.I. 12 at 20) Plaintiff has seen a number of different medical personnel for his physical and mental ailments. (Id. at 19-23) The ALJ concluded that with regard to plaintiff's alleged physical ailments, he is not exertionally or physically limited. (Id. at 21) Further, the ALJ concluded that plaintiff's mental limitations are moderate when considered independent of those limitations directly attributed to alcohol abuse. (Id. at 24) These moderate limitations include the ability to remember and carry out detailed instructions, concentrate, work in coordination with others, respond appropriately to changes in the work environment, and work independently of others. (Id.)

C. Vocational Evidence

At the hearing, the ALJ sought testimony of Mindy Lubeck, a vocational expert, to determine whether any jobs were available that plaintiff could perform. (Id. at 20, 25) Ms. Lubeck was asked to consider plaintiff's age, education, and work experience. (Id. at 25) Additionally, Ms. Lubeck was to assume plaintiff has moderate limitations in his ability to remember and carry out detailed instructions, concentrate, work in

coordination with others, respond appropriately to changes in the work environment, and work independently of others. (Id.) Ms. Lubeck testified that plaintiff could work as a hand packer, janitor, or housekeeper. (Id.)

D. Medical Evidence

1. Chest Pain

Plaintiff was hospitalized on February 28, 1993. A myocardial infarction was ruled out and there was no evidence of atrial or ventricular dysrhythmias. (D.I. 12 at 20) On October 31, 1996, Dr. Donald Morgan performed a consultative examination. (Id. at 151) Plaintiff never followed-up after this consultation. (Id.) Thereafter, plaintiff complained of having epigastric discomfort, exacerbated by alcohol consumption. (Id. at 152) Dr. Morgan found no evidence of organomegaly. (Id. at 153) Dr. Majid Mansoori, of Papastavros' Associates Medical Imaging LLC, x-rayed plaintiff. The x-ray showed no active pathological process of his lung and his heart was within normal limits. (Id. at 149) In January 1997, an exercise stress echocardiogram revealed no evidence of exercise-induced ischemic or arrhythmia. (Id. at 163-168) In May 1997, an EKG was essentially normal. (Id. at 152) Further, plaintiff does not take any medication for angina or other cardiovascular disorder. (Id. at 20)

2. Knee Impairment

Plaintiff complained of left knee tenderness but did not receive x-rays or treatment. (Id. at 21) On October 29, 1996, plaintiff's knee was x-rayed by Dr. Mansoory. (Id. at 149) Results showed the knee was within normal limits. (Id. at 150) Plaintiff subsequently missed every follow-up appointment through February 1997. (Id. at 21)

3. Abdominal Pain

Subsequent to the plaintiff's knee impairment, he began to complain of abdominal pain. (Id.) This pain was ultimately diagnosed as prostatitis. (Id. at 169) In May 1997, plaintiff had surgery for a urethral stricture. (Id. at 189) There are no reports of follow-up treatment or further urinary difficulties. (Id.)

4. Back Pain

On October 31, 1996, plaintiff's back was x-rayed. Results showed a narrowing of the L4-L5 intervertebral disc space. (Id. at 149)

5. Psychological Evaluation

In October 1996, Dr. Frederick Kurz, Ph.D., performed a psychological consultative evaluation. (Id. at 145) Plaintiff admitted that he was not taking his prescribed depression medication (Tofranil and Mellaril) because he could not afford it. (Id.) Plaintiff also admitted to drinking three or four

times per week and smoking two packs of cigarettes per day.

(Id.)

Dr. Kurz administered the WAIS-R (an adult intelligence test) to plaintiff, which revealed a Verbal I.Q. of 75, a Performance I.Q. of 82, and Full-Scale I.Q. of 78, placing him at the low average to borderline range of intellectual functioning. (Id. at 146) Based on these results, Dr. Kurz reported only "mild" impairment in plaintiff's ability to relate to other people, perform daily activities, maintain personal habits, maintain interests, understand simple, primarily oral, instructions, carry out instructions under ordinary supervision, sustain work performance and attendance in a normal work setting, cope with pressures of ordinary work, and perform routine, repetitive tasks under ordinary supervision. (Id. at 147-148)

6. Psychiatric Evaluation

In October 1996, Dr. George Reynolds performed a psychiatric consultative evaluation. (Id. at 139-144) Plaintiff complained of depression, but Dr. Reynolds refused to give him medication until he stopped drinking. Plaintiff told Dr. Reynolds that he lived with siblings and they assisted him with personal needs. (Id. at 141) Plaintiff reported that he engaged in no social activity. (Id.) Plaintiff had driven himself to the evaluation and was able to correctly recite the date and location. (Id. at 142) Plaintiff's memory testing was adequate. (Id.) Plaintiff

was able to do simple reading and copy figures accurately and without tremors. (Id.) Based on the evaluation, Dr. Reynolds thought plaintiff might have a developmental disorder and diagnosed alcohol dependence and abuse. (Id. at 143)

7. Depression

Dr. Sal Muleh has treated plaintiff for depression since January 28, 1986. (Id. at 201-205) Dr. Muleh stated that plaintiff had impaired concentration and memory difficulty. (Id.) Dr. Muleh completed a form for the welfare department, finding plaintiff "disabled," but does not cite specific limitations or clinical findings. (Id.) None of Dr. Muleh's reports mention alcohol abuse, which has been a major factor in plaintiff's psychiatric condition during the years Dr. Muleh has treated plaintiff. (Id.)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g) (2002); 5 U.S.C. § 706(2) (E) (1999); see Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion

of the existence of the fact to be established
It must be enough to justify, if the trial were to a
jury, a refusal to direct a verdict when the conclusion
sought to be drawn from it is one of fact for the jury.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)

(quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S.
292, 300 (1939)).

The Supreme Court also has embraced this standard as the
appropriate standard for determining the availability of summary
judgment pursuant to Fed. R. Civ. P. 56:

The inquiry performed is the threshold inquiry of
determining whether there is the need for a trial –
whether, in other words, there are any genuine factual
issues that properly can be resolved only by a finder
of fact because they may reasonably be resolved in
favor of either party.

Petitioners suggest, and we agree, that this standard
mirrors the standard for a directed verdict under
Federal Rule of Civil Procedure 50(a), which is that
the trial judge must direct a verdict if, under the
governing law, there can be but one reasonable
conclusion as to the verdict. If reasonable minds
could differ as to the import of the evidence, however,
a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)

(internal citations omitted). Thus, in the context of judicial
review under § 405(g),

[a] single piece of evidence will not satisfy the
substantiality test if the [Commissioner] ignores, or
fails to resolve, a conflict created by countervailing
evidence. Nor is evidence substantial if it is
overwhelmed by other evidence – particularly certain
types of evidence (e.g., that offered by treating
physicians) – or if it really constitutes not evidence
but mere conclusion.

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

IV. DISCUSSION

A. Five Factors

Plaintiff contends that pursuant to 20 C.F.R. § 404.1527(d) (2) (2000), a treating physician's opinion is entitled to more weight than a non-treating physician. This is because the treating physician can "provide a detailed, longitudinal picture of the claimant's medical impairment." 20 C.F.R. § 404.1527(d) (2) (2000).

The ALJ must consider five factors before giving a non-treating physician's opinion more weight than a treating physician. The five factors are as follows: (1) the length of the treatment relationship and frequency of examination; (2) nature and extent of treatment relationship; (3) the supportability of the opinion; (4) the consistency of the opinion with the record as a whole; and (5) the specialization of the

physician. 20 C.F.R. § 404.1527(d)(2) (2000). Additionally, plaintiff claims that the ALJ did not address the nature and extent of the treatment relationship between plaintiff and Dr. Muleh.

The ALJ found that Dr. Muleh is a primary care physician and not a specialist, unlike the medical specialists that the ALJ obtained to opine on plaintiff's psychological abilities. (D.I. 12 at 24) Dr. Muleh does not treat plaintiff on a regular basis. Dr. Muleh's report does not cite specific limitations or clinical findings. Dr. Muleh's reports of plaintiff's impaired concentration and memory are inconsistent with evidence of plaintiff recalling the date and location of his appointment, driving a vehicle, and remembering items when asked by Dr. Reynolds. Contrary to plaintiff's contentions, the above findings show that the ALJ intentionally addressed the nature and extent of plaintiff's relationship with Dr. Muleh.

B. Development of Evidence

Plaintiff claims the ALJ did not develop the evidence after the ALJ determined Dr. Muleh's opinion of plaintiff's mental impairment was inadequate. This was evidenced at hearing when the ALJ told plaintiff "I need to get more evidence from your doctors to get a better picture of your medical condition." (D.I. 12 at 67) However, the ALJ did not follow up to obtain additional information.

If an ALJ feels a need to know the basis of a treating physician's opinion in order to properly evaluate evidence, he has a duty to conduct an appropriate inquiry by submitting further questions to the physician. Plummer v. Apfel, 186 F.3d 422, 434 (3rd Cir. 1999). Additionally, "when the claimant is unrepresented and suffers from mental impairment . . . the ALJ's duty to carefully develop the record is even greater." Thompson v. Sullivan, 933 F.2d 581, 586 (7th Cir. 1991) (citing Ransom v. Bowen, 844 F.2d 1326, 1330 n.4 (7th Cir. 1988)).

In Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996), the ALJ failed to fully develop the record regarding the basis for the treating physician's opinion and the court remanded the case back to the ALJ because the Social Security Administration was not permitted to reject those opinions from which it did not develop a record. Pursuant to 42 U.S.C. § 405(g), a single piece of evidence will not satisfy the substantiality requirement, if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. For example, where the countervailing evidence consists primarily of plaintiff's subjective complaints of pain, the Commissioner "must consider the subjective pain and specify his reason for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

In the case at bar, the ALJ stated that he would contact Dr.

Muleh to get a better picture of plaintiff's condition. (D.I. 12 at 61) Following Bowen, the ALJ is required to consider the physician's opinion, but may reject it based on opposing medical evidence. Plaintiff argues that this would satisfy developing the evidence. Plaintiff concludes that the ALJ committed an error of law by not making the appropriate inquiries (i.e., not developing the evidence) regarding plaintiff's medical condition and therefore this court is able to reverse.

The record shows that the ALJ did contact Dr. Muleh. However, Dr. Muleh did not provide clinical documentation to support his opinion regarding plaintiff's degree of mental impairment. The ALJ responded to this lack of documentation by acquiring his own medical evidence. The ALJ obtained two separate consultative psychological evaluations, a consultative physical evaluation, and two state agency medical experts to review the findings and opine as to the extent of plaintiff's medical limitations. (D.I. 12 at 21) Pursuant to 20 C.F.R. § 404.1527(d)(5), more weight should be given to the opinions of specialists, than to non-specialists.

Furthermore, more than one piece of evidence was taken into account when determining disability, thus, satisfying the substantiality requirement, regardless of whether the Commissioner ignored or failed to resolve conflicts created by countervailing evidence. The court finds that the ALJ failed to

develop the record.

C. Plaintiff's Low IQ Scores Classify him as Mentally Retarded Under Listing 12.05

The required level of severity for mental retardation is met when the claimant has a full scale, verbal, or performance IQ of 60 to 70 and a physical or other mental impairment imposing additional and significant work-related limitations or function. 20 C.F.R. § 404, subpt. p, app. 1, 12.05. Plaintiff contends that IQ scores have an error of measurement of approximately five points thus expanding the IQ range of § 12.05 to 75 as a matter of law. Halsted v. Shalala, 862 F. Supp. 86, 90 (W.D. Pa. 1994). Therefore, plaintiff claims to be below the regulatory range and suffer from additional significant impairments. This argument is based on plaintiff's verbal IQ of 75, minus the five point rate of error, making his verbal IQ fall in the 60 to 70 score range.

Plaintiff's claims are inaccurate because it is based on the Halsted decision, which was abrogated by Burns v. Barnhard, 312 F.3d 113 (3d Cir. 2002). Burns decided that the five point margin of error argument can no longer be sustained. Id. at 125-26. The Third Circuit in Burns explicitly rejected plaintiff's argument and, consequently, this court does as well.

D. Plaintiff is not Disabled and Can Perform Some Work

Plaintiff claims he is disabled pursuant to the Grid 14. Plaintiff claims there generally is no work available for a

fifty-four year old illiterate, who can only perform light work. Further, plaintiff can not walk or stand for more than twenty-five minutes without his back hurting, and bending or stooping exacerbates this back pain.

Plaintiff's alleged physical limitations and back pain are evidenced only by the plaintiff's subjective testimony. Plaintiff is unable to point to a single medical opinion of record which supports his claims of physical limitations. Again, the Third Circuit recently rejected this type of argument in Burns. In that case, the court held plaintiff's argument to be unpersuasive because his alleged physical limitations were based only on his subjective testimony before the ALJ and was not supported by medical opinion. Id. at 129-30. This case presents the same situation where plaintiff's claim is unsubstantiated. As such, plaintiff's assertions are entitled to little weight and his claim fails.

V. CONCLUSION

The court finds that, based on the record, substantial evidence supports the Commissioner's decision that plaintiff is not disabled. The defendant's motion for summary judgment is granted, and the plaintiff's motion for summary judgment is denied.

IN THE UNITED STATES DISTRICT COURT
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JOHN MERKERISON)
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 Plaintiff,)
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 v.) Civil Action No. 02-443-SLR
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 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

O R D E R

At Wilmington this 31st day of July, 2003, consistent with
the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 15) is denied.
2. Defendant's cross-motion for summary judgment (D.I. 17) is granted.
3. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff.

Sue L. Robinson
United States District Judge