

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MOHAMED MOSLEH,)
)
 Plaintiff,)
)
 v.) Civil Action No. 01-418-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

Michael J. Goodrick, Esquire, Wilmington, Delaware. Counsel for Plaintiff.

Colm F. Connolly, United States Attorney, and Paulette K. Nash, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant. Of Counsel: Frank V. Smith, III, Acting Regional Chief Counsel, and William B. Reeser, Assistant Regional Counsel, Social Security Administration, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: September 26, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Mohamed Mosleh filed this action against defendant Jo Anne B. Barnhart, the Commissioner of Social Security ("the Commissioner"), on June 20, 2001. (D.I. 1) Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g), of a decision by the Commissioner denying his claim for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-403. Currently before the court are plaintiff's motion for summary judgment (D.I. 9) and defendant's cross-motion for summary judgment. (D.I. 14)

For the reasons that follow, the court finds that the Commissioner's decision is not supported by substantial evidence. The ALJ's decision (1) failed to consider the plaintiff's borderline age status; (2) improperly inferred a finding of illiteracy; and (3) failed to resolve inconsistent testimony regarding the plaintiff's transferable skills. The case is therefore remanded to the ALJ for further consideration in accordance with this opinion.

II. BACKGROUND

A. Procedural History

On November 30, 1999, plaintiff filed an application for a period of disability and disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433.¹

(D.I. 7 at 64) Plaintiff alleged disability since September 25, 1998 due to a left foot injury, back condition and diabetes.

(Id. at 95) The back condition resulted from a 1992 work accident; the left foot injury resulted from an accident at work on September 25, 1998. Plaintiff's application for disability insurance benefits was denied initially and upon reconsideration.

(Id. at 51-59) Plaintiff requested a hearing before an administrative law judge ("ALJ") and the hearing was held on October 13, 2000. (Id. at 28-48, 60) At the hearing, counsel represented plaintiff and a vocational expert testified. (Id.)

On November 29, 2000, the ALJ issued a decision denying plaintiff's disability benefits application. (Id. at 15-21) In consideration of the entire record, the ALJ made the following findings:

¹Plaintiff claims in his brief in support of his motion for summary judgment that he filed a concurrent claim for supplemental security income and disability insurance benefits. (D.I. 10 at 4) However, the court finds no record of plaintiff's applying for supplemental social security income.

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through December 31, 2003.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability, September 25, 1998.
3. The claimant has a crush injury to his left foot, an impairment considered "severe" based on the requirements in the Regulations 20 CFR § 404.1520(b). However, his diabetes mellitus, lower back impairment, and kidney stones are nonsevere.
4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.
5. The claimant's allegations regarding his limitations are not fully credible for the reasons set forth in the body of the decision.
6. All of the medical opinions in the record regarding the severity of the claimant's impairments have been carefully considered (20 CFR § 404.1527).
7. The claimant retains the following residual functional capacity: sedentary work with a sit/stand option and no pushing or pulling with the lower extremities. He cannot climb or squatting [sic]. The remaining postural activities can be performed only occasionally. He must work on level ground and must avoid concentrated exposure to wetness, dampness, or cold whether.
8. The claimant is unable to perform any of his past relevant work because it exceeded his

current residual functional capacity for sedentary work (20 CFR § 404.1565).

9. The claimant is now 44 years old (20 CFR § 404.1563).

10. The claimant has acquired skills transferable to sedentary semiskilled work. (20 CFR § 404.1568).

[11.] There are a significant number of jobs in the national economy that he could perform. Examples of such jobs include work in the following categories: inspector/examiner (1,100 regionally and 170,000 nationally) and cashier (9,400 regionally and 500,000 nationally).

[12.] The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 404.1520(f)).

(Id. at 20-21)

The decision from the ALJ was appealed to the Appeals Council on May 16, 2001. (Id. at 8) 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.

(Id.) Therefore, the ALJ's November 20, 2000 decision became the final decision of the Commissioner. See 20 C.F.R. §§ 404.955,

404.981, 422.210 (2001); see also Sims v. Apfel, 530 U.S. 103, 106-07 (2000); Matthews v Apfel, 239 F.3d 589, 592 (3d Cir. 2001). Plaintiff now seeks review of this decision pursuant to 42 U.S.C. § 405(g).

B. Facts Evinced at the Administrative Law Hearing

Plaintiff was born on February 3, 1956 (D.I. 7 at 32) and was 44 years of age at the time of the administrative hearing on October 13, 2000. He is married and lives in a home with his wife. (Id. at 32-33) No one else lives in the household. (Id. at 33) Plaintiff attended school in Yemen for four to five years and has no other relevant education. (Id. at 33-34) He has a Delaware driver's license and drives to the market. (Id. at 33) Plaintiff testified he could only understand and speak English "a little bit" and is unable to write any English. (Id.) He came to the United States in 1975 and tried to learn English, but could not. (Id. at 34)

Plaintiff testified that he last worked in September 1998, with the exception of two weeks in December 1999. (Id.) He had worked at the Chrysler Company since arriving in the United States and last held an inspection position which required him to stand all the time. (Id. at 34-35, 42) He learned his job through observation. (Id. at 42) He was injured on September

25, 1998, and was receiving worker's compensation at the time of the hearing. (Id. at 34, 42)

Plaintiff testified that a "vehicle ran over my foot, breaking four bones or four of my toes and crushing the top of my foot."² (Id. at 35) He stated that his foot was numb all the time, he had little motion in his foot, and that all of the veins in his foot had been severed. (Id. at 36) He uses a cane to help him move around. (Id. at 35) Plaintiff stated he has diabetes but it is controlled by medication. (Id. at 36) He was also taking medication to relieve pain in his foot. (Id. at 37)

Plaintiff testified that in 1992 he lifted glass for the doors on the assembly line at Chrysler and injured his back. (Id.) He stated that his back occasionally bothered him and he could not lift anything. (Id. at 37-38) He could only walk a short distance before needing to sit and rest his foot. (Id. at 38) His foot also bothers him if he remains in one position too long, and he could have sharp pains in his leg at any given time. (Id. at 38-39) He stated he needed his wife's help with personal

²Although neither the parties nor the ALJ have questioned whether an accident occurred, the court notes that the medical report from the date of the incident indicates plaintiff allegedly injured his foot in a conveyor belt accident (D.I. 7 at 248), but plaintiff testified his injury was the result of a vehicle running over his foot. (Id. at 35)

needs and chores around the house, although he handles the money and pays the bills. (Id. at 39-40)

Plaintiff briefly returned to work in December 1999; however, he needed help with his duties and was unable to stand for an extended period of time. (Id. at 40) He was able to work, but needed to sit frequently due to pain in his foot. (Id. at 35)

C. Vocational Evidence

During the hearing, the ALJ called Dr. Steven Gumaman as a vocational expert. (Id. at 41) Dr. Gumaman opined as to the exertional and skill requirements of plaintiff's prior job, and concluded that the job of inspector/examiner would be at the light exertional level and semi-skilled. (Id. at 43)

D. Medical Evidence

1. Back Condition

In June 1992, after an accident at work, plaintiff sought medical treatment from Dr. Gliwa, the Chrysler Corporation physician at the plant.³ (Id. at 136-39) Plaintiff complained of severe lower back pain after lifting the rear door glass of a car on the assembly line. (Id.) Dr. Gliwa sent plaintiff to the Newark Emergency Center, where he was treated with an

³The doctor's name is sometimes spelled Glebor in the record. (Id. at 136-138)

intramuscular injection and pain medications. (Id. at 128, 136-39) The next day, plaintiff was unable to get out of bed and was taken to the Christiana Hospital emergency room by ambulance. (Id.) He was again treated with an intramuscular injection and pain medications. (Id.)

Plaintiff began daily physical therapy at Blue Hen Physical Therapy as an outpatient. (Id.) He continued complaining of pain. On June 25, 1992 he was seen by Dr. Parviz Sorouri. (Id.) An examination revealed "severe tenderness in the paravertebral muscles in the lumbosacral area[.]" (Id. at 138) Plaintiff was diagnosed with a lumbosacral sprain with possible disc syndrome. (Id.) Dr. Sorouri advised him to continue his physical therapy and prescribed pain medication. (Id.)

On July 13, 1992, plaintiff returned to Dr. Sorouri complaining of severe back pain. (Id. at 136-39) The examination revealed a "severe spasm of the lumbosacral paravertebral muscles with tenderness to palpation and straightening of the lumbosacral curvature." (Id. at 136) Plaintiff was admitted to The Medical Center of Delaware hospital and referred to Dr. Magdy I. Boulos. (Id. at 136-39) A CT scan of the lumbar spine revealed a "central disk herniation at the L4-5 and L5-S1 levels" and a "flattening thecal sac with impingement upon the right S1 nerve root at the L5-S1 level."

(Id. at 137) An EMG revealed S1 radiculopathy on the left side and normal results on the right side. (Id.) Plaintiff was treated with bed rest, physical therapy, medication and TENS treatment. (Id.) He was discharged on July 17, 1992. (Id.)

Plaintiff continued to see Dr. Boulos for follow-up visits on August 19, September 28, and November 24, 1992. (Id. at 151-53) He continued his physical therapy until December 1993. (Id. at 177-245) After December 1993, the record does not reflect any further medical attention for his back condition.

2. Foot Injury

On September 25, 1998, plaintiff went to the Christiana Care Health Services emergency room due to an accident at work in which his left foot was crushed. (Id. at 246-51) He was diagnosed with fractures involving the second through fifth metatarsals with displacement laterally at the third metatarsal. (Id.) Plaintiff received follow up treatment for the foot injury from Dr. Evan H. Crain. (Id. at 288-332) He was placed in a splint and Dr. Crain treated several blisters on his foot which required care and dressing changes. (Id. at 324-25) One month after the injury, plaintiff began physical therapy to reduce swelling and to regain full motion in his foot. (Id. at 320) Dr. Crain advised that he could return to sedentary type work only. (Id.)

On December 16, 1998 Dr. Crain reported that the "soft tissue injury has now localized to the dorsum at approximately a half dollar in size. It is overlying the second and third metatarsal bases." (Id. at 308) Dr. Crain performed a surgical debridement of the wound down to healthy tissue on December 23, 1998. (Id. at 257-61, 304-08) Approximately one month later, Dr. Crain reported the wound had completely healed and would not require a skin graft. (Id. at 299) Plaintiff complained of pain at the fracture, but Dr. Crain did not believe surgery was necessary and recommended plaintiff return to light-duty work in a job where he could stay off his feet. (Id.) On February 22, 1999, Dr. Crain evaluated plaintiff and again recommended light-duty work, but not in his previous position as it required him to stand all day. (Id. at 297) Dr. Crain believed the plaintiff's pain in his foot was due to injury to the nerves themselves. (Id.)

On April 12, 1999, Dr. Crain reported that x-rays showed a complete union of all previous fractures, including the third metacarpal which had been displaced. (Id. at 295) Plaintiff continued to complain of pain. (Id.) Dr. Crain believed the pain was caused by soft tissue injury. (Id.) He stated that plaintiff "very clearly is going to have permanent injury

following the accident.” (Id.) He continued to recommend light-duty work without standing. (Id.)

Finally, on May 24, 1999, Dr. Crain reported:

At this point I believe [plaintiff] has reached a point of maximal medical improvement. He does not need further surgery. I believe his pain is neuritic in nature. I am not sure that an exploration of the nerves would yield any beneficial outcome. It has become obvious that he has a permanent injury. He will not be able to stand at an assembly line type of position. He should be able to work seated without restriction. I think it would be best for him to find a job, hopefully within his present employer, that he can work at. This would be best for him mentally. He needs to get back to working. Hopefully they can make provisions so that he can work. I would like to check him back in six months. He will need to be seen at that time and then at a year. At that point we will likely be able to discharge him from active care.

(Id. at 291)

3. Kidney Stones and Diabetes

The court notes that plaintiff also has a history of kidney stones and diabetes. The kidney stones were treated with several non-invasive procedures and the problem appears to have been resolved by Dr. Jose Gueco. (Id. at 270-87) Plaintiff states that his diabetes is controlled by medication. (Id. at 36)

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 Menswear 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. Standards for Determining Disability

Title II of the Social Security Act, 42 U.S.C. § 423(a) (1) (D), as amended, "provides for the payment of insurance benefits to persons who have contributed to the program and who suffer from a physical or mental disability." Bowen v. Yuckert, 482 U.S. 137, 140 (1987). A disability is defined as the "inability 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) (2002).

In Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999), the Third Circuit outlined the applicable statutory and regulatory process for determining whether a disability exists:

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory twelve-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."

The Social Security Administration has promulgated regulations incorporating a sequential evaluation

process for determining whether a claimant is under a disability. In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. If a claimant is found to be engaged in substantial activity, the disability claim will be denied. In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. If the claimant fails to show that her impairments are "severe", she is ineligible for disability benefits.

In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. The claimant bears the burden of demonstrating an inability to return to her past relevant work.

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Id. at 427-28 (internal citations omitted). If the Commissioner finds that a claimant is disabled or not disabled at any point in

the sequence, review does not proceed to the next step. See 20 C.F.R. § 404.1520(a) (2002).

The determination of whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Social Security Administration Regulations ("the grids"). Cf. Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (noting use of the grids for determination of eligibility for supplemental social security income) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). In the context of this five-step test, the Commissioner has the burden of demonstrating that the plaintiff is able to perform other available work. See Bowen, 482 U.S. at 146 n.5. In making this determination, the ALJ must determine the individual's residual functional capacity, age, education, and work experience. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(c) (2002). The ALJ then applies the grids as a framework for determining if an individual is disabled or not disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(d) (2002).

B. Determination of "Not Disabled" by the ALJ

In the case at bar, the first four steps of the five-part test to determine whether a person is disabled are not at issue: (1) plaintiff is not currently engaged in substantial gainful activity; (2) plaintiff suffers from a severe impairment; (3)

plaintiff does not suffer from an impairment presumed severe enough to preclude any gainful work; and (4) plaintiff is unable to perform his past relevant work because it exceeds his residual functional capacity. The issue in this case concerns the fifth step: whether or not plaintiff can perform other work existing in the national economy. See Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993).

The ALJ referred to the grids, specifically grid rule 201.26, which indicates that a claimant aged 18-44 with limited literacy in English, a semi-skilled work history with transferable skills, and the residual functional capacity for sedentary work, is not disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.26 (2002). The ALJ acknowledged that plaintiff's limitations reduced the range of sedentary work to jobs with a sit/stand option, no pushing or pulling with the lower extremities, no climbing or squatting, no concentrated exposure to wetness, dampness or cold weather and working on level ground. (D.I. 7 at 21) Relying on testimony by a vocational expert, the ALJ concluded that there were such positions in the national and regional economy suitable for plaintiff, including inspector/examiner and cashier. (Id.)

C. Application of the Grid Rules

The issue before the court is whether substantial evidence supports the Commissioner's decision that plaintiff was not disabled. The ALJ applied grid rule 201.26 as a guide based on his evaluation of plaintiff's residual functional capacity, age, literacy, and skill level. The ALJ's finding that plaintiff's maximum sustained work capability is limited to sedentary work is not disputed.

Plaintiff argues that the ALJ should have applied grid rule 201.17 as a guide for determining whether plaintiff was disabled, instead of "mechanically" applying grid rule 201.26. Plaintiff asserts: (1) he was only four months from an older age category at the time of the hearing; (2) he is illiterate; and (3) he does not possess any transferable skills from his previous job. Thus, using grid rule 201.17 as a guide, plaintiff argues he should be considered disabled.

The Commissioner argues that: (1) the ALJ applied the proper age category of 18-44; (2) plaintiff's claim of illiteracy is not credible; and (3) plaintiff is semi-skilled and, thus, would be deemed not disabled under the grid rules regardless of his age category or literacy.

1. "Borderline Age" Claim

In determining the appropriate age category, the regulations state:

We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

20 C.F.R. § 404.1563(b) (2002).

The ALJ applied grid rule 201.26 to determine plaintiff's status as disabled or not disabled. (D.I. 7 at 20) At the time of the administrative hearing, plaintiff was 44 years and 8 months old. Thus, plaintiff was 4 months from the older age category under the grid rules.

Plaintiff specifically noted at the administrative hearing that the ALJ has the discretion to evaluate plaintiff in the next older age category. (Id. at 45-46) The ALJ, however, failed to address plaintiff's "borderline age" claim. The ALJ only found that plaintiff was 44 years old at the time of the decision without discussing whether plaintiff was of borderline age. (Id. at 21) Based on the record presented, the court cannot determine whether the ALJ "consider[ed] whether to use the older age category after evaluating the overall impact of all the factors

of [plaintiff's] case." 20 C.F.R. § 404.1563(b) (2002); see Cox v. Apfel, No. 98-7039, 1998 WL 864118, at *4 (10th Cir. 1998) ("[B]ecause plaintiff was within six months of the next age category . . . at the time the ALJ issued his decision, he erred by not addressing whether plaintiff was of borderline age before choosing a rule from the grids."). Thus, the court shall remand this case to the ALJ for proper evaluation of plaintiff's "borderline age" claim.

2. Literacy and Skill Transferability Findings

The "borderline age" claim is only relevant if the older age category changes the determination of plaintiff's status from not disabled to disabled. See 20 C.F.R. § 404.1563(b) (2002). If the ALJ's findings regarding plaintiff's literacy and skill transferability were based on substantial evidence, remand would not be necessary, as the plaintiff's age category would not change the decision. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, §§ 201.17-201.26 (2002). Thus, the court must determine if the ALJ's findings regarding literacy and skill transferability are supported by substantial evidence.

a. Literacy Determination

The ALJ stated:

I note that [plaintiff] has worked at the Chrysler assembly plant for over twenty years. He had a semi skilled job that certainly require somw [sic]

significant ability to speak and understand English. However, despite being in this country for over twenty years and holding that kind of job, he stated that he could not speak or understand any English. I do not accept this as fact.

(Id. at 19)

Plaintiff argues that the ALJ's rejection of his claim of illiteracy is not supported by substantial evidence. The court agrees. The applicable regulation states, "We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name." 20 C.F.R. § 404.1564(b)(1) (2002).

The plaintiff testified at the hearing that he could only speak and understand English "a little bit" and he could not write any English. (D.I. 7 at 33) He was accompanied by friends to assist with interpretation at the hearing. (Id. at 30-31) The record shows that others completed forms for plaintiff. (Id. at 109) The ALJ's finding is based on a rejection of plaintiff's uncontroverted testimony and an inference of literacy based on plaintiff's work history.

The Tenth Circuit faced a similar record and finding in Eggleston v. Bowen, 851 F.2d 1244 (10th Cir. 1988). The Court held the ALJ's finding to be error, stating:

Our examination of the record reveals no evidence that [plaintiff] is literate. Thus the ALJ apparently relied solely on an inference derived from

[plaintiff's] previous employment to support his conclusion that [plaintiff] can read and write. This inference, however, has been rebutted by direct testimony from [plaintiff] Therefore we find that there is not substantial evidence in the record as a whole to support the ALJ's finding that [plaintiff] is literate.

Id. at 1248. Based upon the record presented, the court finds that the ALJ's rejection of plaintiff's claim of illiteracy is not supported by substantial evidence. Because this issue is relevant given plaintiff's "borderline age" argument, the ALJ may reconsider his finding on remand to determine whether there is any affirmative evidence of literacy that rebuts plaintiff's testimony.

b. Skill Transferability

Finally, the Commissioner argues that the age category and literacy finding is not relevant, because even considering plaintiff in the older age category results in a finding of no disability under the grids. The Commissioner cites grid rule 201.17 in arguing that plaintiff must be considered unskilled for a finding of disabled, and plaintiff's semi-skilled work history precludes such a finding. The applicable regulation, however, states that a finding of disabled is appropriate if the plaintiff is "unskilled **or** [has] no transferable skills." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(h)(1)(ii) (2002) (emphasis added).

The Commissioner focuses only on the grid rule for the argument that plaintiff must have only unskilled work experience or no work experience at all. Grid rule 201.17, read in conjunction with the regulation, also places individuals within the rule who possess no transferable skills. The relevant question, therefore, is whether plaintiff has acquired any transferable skills from his work at Chrysler.

The ALJ determined that plaintiff acquired skills transferable to sedentary semi-skilled work. (D.I. 7 at 21) The vocational expert's testimony in this regard, however, is far from clear. The vocational expert testified:

Q: We agree that there would be an inability to do past relevant work. However you did say he rose to the semi-skilled level. Given the jobs that you offered, would there be any transferable skills acquired that would be transferable to skilled or semi-skilled work at the sedentary level?

A: That's a possibility with respect to (INAUDIBLE).

Q: Okay.

A: There are a series of semi-skilled occupations where a person would be doing inspecting and examining to determine if things are correct and proper. For the most part, though, I believe that as best I can determine, that the skills that Mr. Mosleh acquired would be specific to his occupation. I believe he was basically checking to see if things were operable. So while there may be some sedentary semi-skilled occupations, they wouldn't necessarily be occupations that (INAUDIBLE) in a short period of time. So he could still do that work, the sedentary.

Q: Okay, if I understand correctly, and I'm not sure, meaning no disrespect to you from the court, you seem to waffle a little bit there.

A: Well - -

Q: Can you say without putting me on the spot, yes or no, there would be - -

A: Yeah, I mean - -

Q: - - skills required that would be transferable to semi-skilled work at the sedentary level?

A: As I mentioned there were skills he acquired in looking to see if things are operable or working. (INAUDIBLE). So he would have some skills that could be used elsewhere.

(Id. at 46-47) The vocational expert also testified that plaintiff's past job was "bottom of the semi-skilled." (Id. at 43)

Whether the vocational expert believed any of plaintiff's skills are transferable to available jobs in the economy given plaintiff's residual functional capacity, age and education was not clear to the ALJ at the hearing, and it is not clear to the court. Given the inconsistent testimony and incomplete record in this regard, the court shall remand this case for additional proceedings to determine this issue.

V. CONCLUSION

The court finds that, based on an incomplete record, substantial evidence does not support the Commissioner's decision

that plaintiff is not disabled. The case is therefore remanded to the ALJ for further consideration in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MOHAMED MOSLEH,)
)
 Plaintiff,)
)
 v.) Civil Action No. 01-418-SLR
)
 JO ANNE B. BARNHART,)
 Commissioner of)
 Social Security,)
)
 Defendant.)

O R D E R

At Wilmington this 26th day of September, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 9) is denied.
2. Defendant's cross-motion for summary judgment (D.I. 14) is denied.
3. The case is remanded to the ALJ for further consideration in accordance with this opinion.

Sue L. Robinson
United States District Judge