

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

DAVID L. VITATOE,)	
)	
Plaintiff)	
)	
v.)	Civil Action No: 01-831-GMS
)	
JOANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	
)	

MEMORANDUM AND ORDER

I. INTRODUCTION

Presently before the court is an appeal pursuant to 42 U.S.C. § 405(g) filed by the plaintiff, David L. Vitatoe. Vitatoe seeks review of the final decision of the Commissioner of the Social Security Administration denying the plaintiff’s claim for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. The plaintiff moved for summary judgment (D.I. 12), and the Commissioner filed a cross-motion for summary judgment (D.I. 9). For the reasons that follow, the court will deny Vitatoe’s motion, grant the Commissioner’s motion, and affirm the decision of the Commissioner dated March 22, 2001.

II. PROCEDURAL HISTORY

On April 24, 1996, the plaintiff filed an application for DIB, alleging disability from April 1, 1996. Following a hearing, Administrative Law Judge (“ALJ”) Jose R. Davila granted a closed period of disability from April 1, 1996 to July 31, 1997. Vitatoe subsequently returned to work with earnings at a level of gainful activity until the onset of his alleged current disability.

On September 30, 1999, the plaintiff again applied for DIB, alleging that he had been

disabled since September 15, 1999. The Social Security Administration (“SSA”) denied DIB to Vitatoe on January 20, 2000, and again upon reconsideration on July 7, 2000. Vitatoe timely filed a request for a hearing before an Administrative Law Judge on July 17, 2000. A hearing was held on November 15, 2000 before ALJ David S. Antrobus. By a decision dated March 22, 2001, ALJ Antrobus found that Vitatoe did not qualify for DIB under § 223 of the Social Security Act. On April 27, 2001, Vitatoe filed a request for review of the ALJ’s decision by the Appeals Council, which denied the request on October 15, 2001.

Having exhausted his administrative remedies for the current disability claim, Vitatoe filed a complaint with the court, which the Commissioner timely answered. The parties each moved for summary judgment. Because the court finds that the denial of disability insurance benefits was supported by substantial evidence, the court will deny the plaintiff’s motion and grant the defendant’s motion.

III. FACTUAL BACKGROUND

A. General

The plaintiff ceased work on September 15, 1999. At the time of his hearing, Vitatoe was forty-one years old. He has a tenth grade education, and his past employment experience includes working in a warehouse and as a truck driver. Subsequent to his closed disability period, Vitatoe operated a forklift in a warehouse. The plaintiff’s skills, according to a vocational expert, are semi-skilled but are not transferrable to other work. When the plaintiff stopped working, he alleged disability due to hypertension, asthma, bronchitis and diabetes mellitus. As a result of these impairments, Vitatoe claims he can no longer hold any gainful employment.

B. Medical Evidence

Medical records dating from between 1996 and 1997 document the plaintiff's diabetes mellitus, asthmatic bronchitis, hypertension and diverticulosis. On October 4, 1999, subsequent to the second alleged disability date, Vitatoe received emergency room treatment for his diabetes and asthma. He did not attend all of his scheduled follow-up appointments despite testing that demonstrated his diabetes was not under adequate control.

Dr. John Goodwill examined Vitatoe regarding the plaintiff's respiratory condition on December 7, 1999. During that appointment, Vitatoe told Dr. Goodwill that he had stopped taking his medication for over a year and had not sought treatment because he had been 'fed up with it all,' but that he wanted to 'turn over a new leaf.' During the examination, the plaintiff exhibited wheezing when inhaling and exhaling. Vitatoe reported to Dr. Goodwill that for the previous twenty years he had smoked about three packs of cigarettes a day, but he currently smoked one pack daily.¹ Dr. Goodwill recommended that Vitatoe adjust his asthma medication and cease smoking cigarettes, and prescribed various medications accordingly.

Beginning on January 24, 2000, Vitatoe required three days of hospitalization for treatment of pneumonia with resultant chest pain. In April of 2000, the plaintiff was treated for a cough, abdominal pain, and fever, and diagnosed with community acquired pneumonia. It appears he was discharged after a few days.

For his diabetes and signs of peripheral neuropathy, Vitatoe received treatment from Dr. Michael Glowacki and from physicians at a "Diabetic and Metabolic Disease Center." The treatment reports through March 6, 2000 indicate complaints of pain in Vitatoe's lower extremities,

¹ During a December 19, 2000 appointment with Dr. Yong Kim, the plaintiff indicated that he smoked half a pack of cigarettes daily. At the hearing, the plaintiff testified that he smokes about one to one and a half packs of cigarettes per day.

making it difficult to stand and walk. Upon referral, Dr. William Sommers also examined the plaintiff and diagnosed sensory peripheral neuropathy related to diabetes with significant pain that would require medication. Dr. Sommers did not observe trunk or limb ataxia and stated that Vitatoe was able to support his weight on his heels and toes. The plaintiff also had normal muscle mass and tone, but experienced some impairment of lower extremity sensation, and mild toe and ankle flexion weakness. On July 25, 2000, one of Vitatoe's treating physician for diabetes, Dr. Thomas Taylor, continued to observe impaired sensation of the lower extremities due to the peripheral neuropathy. Upon returning to Dr. Sommers on August 15, 2000, the physician noted Vitatoe's complaints of significant pain and a burning sensation in the feet and legs. Dr. Sommers prescribed medication and ordered the plaintiff to return in three months.

On December 19, 2000, Dr. Yong Kim performed a consultative examination of Vitatoe. During the visit, Vitatoe complained of weekly asthma attacks and described his frequent visits, five to six times in the preceding year, to the hospital for treatment thereof. The plaintiff also stated that his shortness of breath increased by walking more than a block or climbing a flight of stairs. Vitatoe also complained of sharp pain and burning sensations in both legs when walking a block, standing for half an hour, or lifting twenty to thirty pounds. Further, he complained of occasional headaches, dizziness, and abdominal pain, but stated he had no problem sitting. During this examination, Dr. Kim found no evidence that Vitatoe required use of accessory muscles to breathe, but discovered he had moderate wheezing. Vitatoe enjoyed a full range of motion of the upper and lower extremities with no joint swelling; had full range of cervical and lumbosacral motion; suffered no impairment of muscle strength in his arms and legs; displayed no atrophy or impairment of grip strength; had a normal gait; and showed no impairment of sensation in his upper extremities. Dr.

Kim found, however, that Vitatoe experienced diminished sensation in his lower extremities. Dr. Kim diagnosed Vitatoe with diabetes, diabetic neuropathy, asthma, hypertension and a history of diverticulosis.

At the ALJ's request, an internist and medical expert, Dr. Charles Cooke, reviewed the medical evidence in this case. Dr. Cooke opined that although evidence existed that Vitatoe has severe asthma and diabetes mellitus with peripheral neuropathy, he nonetheless was able to lift up to twenty pounds frequently and fifty pounds occasionally, and enjoyed the full ability to stand, sit, walk, and use his upper and lower extremities for pushing and pulling. Dr. Cooke noted, however, certain limitations of the plaintiff's functional abilities: he could balance himself only occasionally, and he was unable to climb ramps, stairs, or ladders.

C. Written Statements by the Plaintiff²

In a Disability Report completed December 15, 1999, the plaintiff complained of shortness of breath and foot problems.

In a report dated January 3, 2000, the plaintiff reiterated that he sometimes finds it difficult to breathe. Vitatoe stated that his asthma attacks required several visits to the emergency room and hospitalizations, although he could not remember the dates of these treatments or how long he was hospitalized.

In a document completed on January 5, 2000, Vitatoe described daily activities such as driving to doctors' appointments, driving his son to school, taking out the trash, mowing the grass once every two weeks, shopping, and fishing about five or six times a year. At that time, he

² These include SSA forms such as a Disability Report, two Daily Activities Questionnaires, and a Reconsideration Disability Report, submitted as exhibits at the hearing before ALJ Antrobus.

indicated that he had given up hunting due to leg pain, and that he enjoyed limited social activities other than visiting with friends. The plaintiff reported that he did not suffer any side effects from his medication.

In a report completed February 6, 2000, Vitatoe reiterated complaints about his breathing and diabetes. He also complained of “severe” and “shocking” pain and burning in his legs. The plaintiff stated that on January 22, 2000, he was admitted to Christiana Hospital for approximately four days. Vitatoe indicated that he received breathing treatments, oxygen, insulin shots and pain medication, and that his treating physician there was Dr. Cozamanis.

Finally, in a form completed on March 20, 2000, the plaintiff reported that he did not drive, do yardwork or household chores, cook, shop, read, handle bill-paying or other paperwork or engage in any social or recreational activities other than watching television and occasionally visiting family members. In the report, Vitatoe also complained of confusion and forgetfulness.

D. Testimony at the Hearing Before ALJ Antrobus

Three people testified at the hearing before ALJ Antrobus: (1) David Vitatoe; (2) the plaintiff’s girlfriend, Frances Nickle; and (3) William T. Slaven, a vocational expert. Only the relevant portions of the testimony are described.

1. Testimony by Vitatoe and Nickle Concerning The Alleged Impairments

Vitatoe claims that he lost his last job due to poor attendance. He testified that on September 29, 2000, he was hospitalized for pulmonary disease and difficult breathing. Vitatoe also stated that he has not required surgery since the date of the alleged disability. Concerning asthma, he claimed to suffer frequent attacks with shortness of breath and to experience spells where he nearly passes out or falls down. Vitatoe stated that he requires nebulizer treatments of fifteen to twenty minutes

three to four times per day. Regarding his diabetes, Vitatoe claimed the disease causes him pain in his eye, finger, and lower back, and severe pain in his leg. Further, he alleged that the pain and burning in his leg force him to limit his walking to ten to fifteen minutes at a time and prevent him from lifting very much weight, although he can lift a gallon of milk. Vitatoe also stated that he takes pain medication twice a day, which “does a little” to alleviate his pain. The plaintiff confirmed that he has been treated for diverticulosis and that his diabetes is not under adequate control.

Vitatoe claimed that he is bedridden for almost the entire day, every day, and visits his physicians, Dr. Summers and Dr. Leonard, every few months. The plaintiff also stated that he relies on his girlfriend and nephew to perform chores and yardwork. He stated that he does not have any hobbies, visits friends occasionally, watches television and attends church.

Vitatoe’s girlfriend, Frances Nickle, testified that the plaintiff is not active when at home and spends most of his time on the couch because of his pain. Nickle further testified that she assists him during severe coughing spells and claimed that Vitatoe gets out of bed only two to three times per week. Nickle stated that the plaintiff could walk only a block before resting and that his condition has worsened over the past two years.

2. Testimony of William Slaven, Vocational Expert

After reviewing the record and having heard the testimony of Vitatoe and Nickle, Slaven described the plaintiff’s past occupations as semi-skilled work entailing non-transferrable skills. To consider whether any jobs existed in the region, the ALJ posed the following hypothetical question to Slaven:

I want you to assume that I would find he’s classified as a younger individual, has a limited education, and in the past has performed semi-skilled work, does not possess residual transferable skills, and under the applicable rule and regulation would be found not disabled.

. . . [A]ssume that I find he has non-exertional impairments, specifically [inaudible] as he's indicated here today, notably pain in the area of the back, eyes and fingers. He has numbness in his feet. He has a pulmonary impairment, shortness of breath, and he cannot be present in an area [containing] any air pollution or other pulmonary irritants. Now assume on one hand that I would find these non-exertional [impairments] would exist and occur with such frequency and severity so as to preclude sustained physical and mental activities on his part. On the other hand, assume I would find that they would be of a mild to moderate nature and not as severe as I've just described to you. In light of that criteria and that alternative, could he do any of the jobs indicated in the regulations?

Transcript (D.I. 5) at 49-50.

In response to the hypothetical question, Slaven indicated that if the impairments were mild to moderate, there are several jobs that are unskilled and sedentary in nature that Vitatoc could perform. These positions include a surveillance system monitor, food and beverage order clerk, and a brokerage service information clerk. Slaven stated that in Delaware there are 1000 jobs (258,000 nationally) for surveillance monitoring, 2000 jobs (395,000 nationally) for a food and beverage order clerk, and 1200 jobs (148,000 nationally) for a brokerage information clerk. Slaven further indicated, however, that if the plaintiff's impairments were severe, there would be no jobs that Vitatoc could perform in the national economy.

IV. The ALJ's Findings

After the hearing, the ALJ issued a written decision comprising approximately ten pages. ALJ Antrobus concluded, among other things, that (1) Vitatoc had not engaged in substantial gainful activity since the alleged onset of disability; (2) the medical evidence established that the combination of the plaintiff's impairments of diabetes with peripheral neuropathy, asthma, hypertension and diverticulosis are considered "severe"; (3) Vitatoc's allegations regarding his

limitations are not fully credible; (4) the plaintiff enjoyed the residual functional capacity³ (“RFC”) to perform sedentary work which avoids respiratory irritants; (5) Vitatoe could not perform his past relevant work; (6) Vitatoe was not disabled within the meaning of the relevant regulations; and (7) Vitatoe was capable of performing jobs that exist in significant numbers in the national economy, such as those described by the vocational expert.

V. STANDARD OF REVIEW

The parties move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Pursuant to this Rule, summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* The court must evaluate the facts and all reasonable inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. In deciding the motion, the court should apply the evidentiary standard of the underlying cause of action. *Id.* at 251-52.

The evidentiary standard in this case is established by statute. The court must uphold the

³ Residual functional capacity describes the range of work activities the claimant can perform despite his impairment.

Commissioner's factual decisions if they are supported by "substantial evidence." 42 U.S.C. §§ 405 (g), 1383 (c)(3). "Substantial evidence" has been defined as less than a preponderance, but "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate." *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)) (citation omitted). Similarly, credibility determinations are the province of the ALJ, and should be disturbed on review only if unsupported by substantial evidence. *Pysher v. Apfel*, Civ. A. No. 00-1309, 2001 WL 793305, at *2 (E.D. Pa. Jul. 11, 2001) (citing *Van Horn v. Schweiker*, 717 F.2d 871, 973 (3d Cir. 1983)). To demonstrate that the ALJ's opinion is based on substantial evidence, the ALJ must make specific findings of fact to support his or her ultimate findings. *Portlock v. Apfel*, 2001 WL 753879, at *7 (D. Del. Jul. 3, 2001) (citing *See Stewart v. Secretary of HEW*, 714 F.2d 287, 290 (3d Cir. 1983)). Thus, the inquiry is not whether the court would have made the same determination, but whether the Commissioner's conclusion was reasonable. *Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988).

VI. DISCUSSION

A. Standard for Determining Disability

The purpose of the Social Security Act is to ensure that disabled individuals will be provided with a minimum income. *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (citing 42 U.S.C. § 1381). To be entitled to benefits, a person must be found to be disabled. A person is disabled if he or she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," which can result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. 42 U.S.C. § 1382c(a)(3)(A).

To determine if disability insurance benefits are warranted, a five-step analysis has been

established by governing regulations. 20 C.F.R. § 404.1520 (2002). The Commissioner evaluates each case according to this step-by-step process until a finding of “disabled” or “not disabled” is reached. In sequence, the Commissioner determines whether the claimant: (1) is currently engaged in substantial gainful activity; (2) suffers from a severe impairment; (3) has an impairment that meets or equals the criteria of a listed impairment; (4) can perform his past relevant work; and (5) if not, whether the claimant can perform other work, in light of his age, education, and work experience. *Id.* In the first four steps, the claimant bears the burden of proving the elements of the claim. *Plummer v. Apfel*, 186 F.3d 422, 428 (3d Cir. 1999). Thus, to prove the existence of a disability, the claimant must show that he or she does not engage in any substantial gainful activity, and suffers from a severe impairment that prevents the performance of the claimant’s former job.

If the claimant is successful in proving the first four elements, the Commissioner bears the burden of production in the final step of the analysis. *Id.* The Commissioner must demonstrate that the claimant has the ability to perform other work existing in the national economy, given the claimant’s medical impairments, age, education, past work experience and residual functional capacity. *Morales v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000); *see also* 20 C.F.R. § 404.1520(f) (requiring claimant to show he cannot perform other work); 20 C.F.R. § 404.1566(e) (defining work that exists in the national economy as work that exists “in significant numbers” in region where claimant lives or several other regions of the country). The ALJ is permitted but not required to hear testimony from a vocational expert or other specialist regarding other work and occupations to which the claimant’s skills may be applied. *Podedworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984); *see also* 20 C.F.R. § 404.1566(e). Keeping these shifting burdens in mind, the court will address the issues Vitatoc raises in his motion.

B. The Plaintiff's Contentions of Error

The plaintiff asks the court to review the Commissioner's finding that Vitatoe is not entitled to disability insurance benefits. Vitatoe argues that such a finding is unsupported by substantial evidence. Specifically, he argues that the ALJ should not have rejected as non-credible Vitatoe's testimony regarding the frequency and severity of his symptoms and the extent of his functional limitations.

1. The ALJ Properly Concluded Vitatoe Was Not Credible And Properly Evaluated His Residual Functional Capacity

Vitatoe argues that during the RFC determination, ALJ Antrobus erred in his conclusions regarding the credibility of Vitatoe's testimony and his alleged non-exertional limitations. Specifically, the ALJ concluded that Vitatoe was "not entirely credible as to the frequency and severity of his symptoms or the extent of his functional limitations." D.I. 5 at 17. When reviewing a decision of an ALJ regarding disability benefits, the district court must give deference to the ALJ's determinations regarding the credibility of the witnesses and whether the claimant has satisfied the burden of proof. *Steward v. Sec'y of HHS*, 2002 WL 732088 (D. Del. 2002). "Great deference is given [to the ALJ's] judgment as fact-finder, since he actually heard the witnesses' testimony and observed their demeanor. 'Most particularly, the administrative law judge to whom the Secretary delegated fact finding responsibilities, must decide issues of credibility and appropriate weight to be given the exhibits.'" *Davis v. Califano*, 439 F. Supp. 94, 98 (E.D. Pa. 1977) (quoting *Gardner v. Richardson*, 383 F. Supp. 1, 5 (E.D. Pa. 1974)). A finding that a witness is not credible, however, "must be set forth with sufficient specificity to permit the courts to engage in an intelligible review of the record." *Hanratty v. Chater*, 1997 WL 631024 (W.D.N.Y. 1997).

Residual functional capacity describes the range of work activities the claimant can perform despite her impairment. Within the RFC assessment, solicitude must be accorded to subjective allegations relating to: (1) the nature, location, duration, onset, frequency and intensity of pain; (2) precipitating and aggravating factors; (3) type, dosage, effectiveness and side-effects of any pain medication; (4) all treatments for pain relief; (5) functional restrictions; and (6) the claimant's daily activities. 20 C.F.R. § 404.1529. In this analysis, subjective complaints of pain are given 'great weight' unless contradicted by medical evidence. *Mason v. Shalala*, 994 F.2d 1058, 1067-68 (3d Cir. 1984) (quoting *Carter v. Railroad Retirement Bd.*, 834 F.2d 62, 65 (3d Cir. 1986)). Subjective complaints of pain may support a finding of a disability when they are accompanied by medical signs and laboratory findings, but they "do not in themselves constitute disability." *Green v. Schweiker*, 749 F.2d 1066, 1070 (3d Cir. 1984). Even if subjective complaints of pain are not fully supported by medical evidence, an ALJ must give them serious consideration. *Welch v. Heckler*, 80 F.2d 264, 270 (3d Cir. 1986). The ALJ is not bound to unquestioningly accept the subjective complaints, however. *Wimbley v. Massanari*, 2001 U.S. Dist. LEXIS 25202 (citing *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979)). Rather, it is within the ALJ's discretion "to evaluate the credibility of a claimant, and to arrive at an independent judgment in light of medical findings and other evidence regarding the true extent of the pain alleged by the claimant." *Brown v. Schweiker*, 562 F. Supp. 284, 287 (E.D. Pa. 1983) (citation omitted).

Regarding the plaintiff's alleged symptoms and non-exertional limitations, the ALJ concluded that: (1) Vitatoc's alleged frequent visits to the hospital for asthma are not corroborated by the objective medical evidence; (2) the plaintiff's hypertension is not accompanied by signs of chronic heart failure; (3) the plaintiff's diverticulosis has not resulted in weight loss; (4) Vitatoc's

diabetes has not produced objective evidence of acidosis, necrosis or retinopathy; and (5) Vitatoe's diabetic neuropathy does not present significant and persistent disorganization of the motor functions. D.I. 5 at 18. Accordingly, ALJ Antrobus determined the following RFC for the plaintiff: he can sit six hours in an eight-hour work day; stand and walk two hours; lift weights up to ten pounds frequently; and perform tasks that do not involve exposure to atmospheres containing air pollution or other respiratory irritants. *Id.* Vitatoe's pain and extremity numbness are mild to moderate in nature and would not interfere with sustained physical and mental activities. *Id.*

The court cannot conclude that the ALJ's assessment of Vitatoe's testimony or his findings as to the plaintiff's RFC were improper. Substantial evidence supports the ALJ's finding that Vitatoe does not have the alleged limitations proposed in his testimony.⁴ First, Vitatoe's testimony contradicted his own written statements numerous times. When discussing Vitatoe's credibility, the ALJ cited several such inconsistencies in the plaintiff's testimony. For example, ALJ Antrobus noted that although Vitatoe testified he could not perform yardwork or engage in any hobbies, some of his written statements indicate that he could perform chores and yardwork as well as fish and drive short distances. *Id.* at 16-17; 92-97; 104-107. Second, the plaintiff's various written statements regarding these activities also were inconsistent. For example, in a questionnaire dated January 5, 2000, the plaintiff indicated that he could drive short distances, take out the garbage, mow the grass with some assistance, fish, shop and read. *Id.* at 16-17; 92-97. Less than three months later, in a form completed on March 20, 2000, the plaintiff reported that he did not drive, do any yardwork or household chores, cook, shop or read. *Id.* at 16-17; 104-107.

⁴ This evidence is discussed at length in the ALJ's decision. Only a representative selection of the probative evidence will be discussed by the court.

Further, Vitatoe testified he could not lift anything weighing more than a gallon of milk, but a month earlier he had told his physician, Dr. Kim, that he could lift between twenty and thirty pounds of weight.⁵ D.I. 5 at 17; 214. Dr. Cooke also determined that the plaintiff was able to lift up to twenty pounds frequently and fifty pounds occasionally. *Id.* at 15; 225. Moreover, the ALJ refuted Vitatoe's claim of frequent emergency room visits and hospitalizations because the last such documented visit occurred on January 24, 2000, and the plaintiff could not recall the dates or durations of his alleged hospital visits. *Id.* at 17; 98-99. Indeed, as the ALJ observed, "the record is devoid" of documentation of any such visits. *Id.* at 18.

The ALJ also weighed Vitatoe's allegations as to his limitations against the objective medical evidence and found that such evidence did not support Vitatoe's allegations of an impairment meeting or exceeding the relevant regulatory criteria. *Id.* at 16-17. For example, the ALJ noted that Dr. Sommers reported no limb ataxia and only mild weakness and mild loss of sensation except in the plaintiff's lower extremity, and Dr. Kim found no impairment of Vitatoe's gait, muscle strength, or range of motion. *Id.* at 18; 193-96; 214-19. Further, none of Vitatoe's treating physicians opined that he had any disabling functional limitations, and none of them precluded him from working a sedentary job. In fact, the state agency physicians who reviewed

⁵ At the November 15, 2000 hearing, the ALJ asked Vitatoe, "Can you do any lifting?," to which the plaintiff replied, "No." ALJ Antrobus then asked, "Can you lift a gallon of milk?," and Vitatoe said, "Oh yes, I can lift a gallon of milk." D.I. 5 at 33. A month later, on December 19, 2000, in a medical evaluation by Dr. Kim, the plaintiff stated that his lifting was limited to twenty to thirty pounds. D.I. 5 at 214.

In his briefing, the plaintiff argues that the ALJ "reached the wrong conclusion" about Vitatoe's statements. Pl.'s Op. Brief (D.I. 13) at 12. Specifically, the plaintiff argues that it was improper to find an inconsistency between his testimony at the hearing and his representation to Dr. Kim because at the hearing Vitatoe was never asked to estimate the maximum amount he could lift. In light of the plaintiff's statement at the hearing that he could do *no* lifting, however, the court finds the ALJ's conclusion reasonable.

Vitaoe's medical records each determined that Vitaoe retained the capacity for work at a greater level of exertion than sedentary.⁶ D.I. 5 at 159-62, 198-99, 225-26. Nonetheless, ALJ Antrobus found that Vitaoe could not perform work at a level of exertion greater than sedentary, revealing that the ALJ partially credited the plaintiff's testimony regarding his symptoms, and applied these findings, together with the medical evidence, to determine Vitaoe's RFC.

The court finds no error in the ALJ's conclusions as to Vitaoe's allegations or credibility. Although the ALJ must consider the statements made by Vitaoe, he is obligated to do so only if the testimony is consistent and credible. *See, e.g., Serody v. Chater*, 901 F. Supp. 925, 930 (E.D. Pa. 1995) (“[A]n ALJ may discredit a claimant's complaints of pain where they are contradicted by medical evidence in the record, so long as he explains his basis for so doing.”). Indeed, the ALJ is expressly empowered to draw negative inferences, even concerning the claimant's statements about his subjective pain, from a lack of consistency between the claimant's various statements or between his statements and the medical evidence:

We will consider your statements about the intensity, persistence, and limiting effects of your symptoms, and we will evaluate your statements in relation to the objective medical evidence and other evidence in reaching a conclusion as to whether you are disabled. We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence. . . . Your symptoms, including pain, will be determined to diminish your capacity for basic work activities to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other

⁶ “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.” 20 C.F.R. § 404.1567(a).

evidence.

29 C.F.R. 404.1529(c)(4). In this case, there are several examples of inconsistencies from which ALJ Antrobus reasonably could conclude that Vitatoe's testimony was only partially credible. In light of the objective medical evidence, the opinions of several treating physicians, and the plaintiff's own written statements, the ALJ was permitted to assign limited credibility to Vitatoe's allegations about his pain and limitations.

Finally, ALJ Antrobus noted that were at least "some questions" as to Vitatoe's compliance with the prescribed medical treatment. *Id.* at 18. By the plaintiff's own admissions, he has not fully complied with the prescribed treatment of his diabetes, and, despite the recommendations of his doctors, continues to smoke cigarettes. *See, e.g., id.* at 148 (noting that the plaintiff smokes one pack of cigarettes a day and "discontinued all of his medicines for over a year"). Although the ALJ did not heavily weigh the plaintiff's noncompliance in his analysis of Vitatoe's RFC or disability status, he was entitled to consider it. *See* 20 C.F.R. §§ 404.1530(b) ("If you do not follow the prescribed treatment without a good reason, we will not find you disabled or, if you are already receiving benefits, we will stop paying you benefits."). To the extent the ALJ considered the plaintiff's noncompliance in his analysis of Vitatoe's allegations, the court finds no error.

B. The ALJ Properly Concluded That Jobs Exist in the National and Local Economy That Vitatoe Can Perform

Although not expressly disputed by the plaintiff in his briefing, the court will briefly examine the ALJ's conclusion regarding jobs that Vitatoe can perform, as this determination rests on the ALJ's findings regarding Vitatoe's limitations and RFC. If a claimant suffers from significant non-exertional impairments, such as pain or psychological difficulties, the ALJ must determine from the

evidence of record “whether these non-exertional limitations limit the claimant's ability to work beyond the work capacity obtained from reviewing” the SSA’s Medical-Vocational Guidelines or “grids.”⁷ *Nance v. Barnhart*, 194 F. Supp. 2d 302, 318 (D. Del. 2002). When there is a combination of exertional and non-exertional impairments the grids should be used as a framework only. *Id.* at 318-19. In such a case, the Commissioner must identify specific jobs that the claimant can perform. *Gilliand v. Heckler*, 786 F.2d 178, 182 (3d Cir. 1986).

ALJ Antrobus considered both Vitatoe’s exertional and non-exertional impairments and found multiple jobs within the national and local economies that Vitatoe could perform. To aid him in this analysis, ALJ Antrobus properly elicited testimony from Slaven, a vocational expert. The ALJ expressly incorporated the vocational expert’s testimony into his analysis regarding the type of work Vitatoe could perform. D.I. 5 at 18-20. The hypothetical question posed to Slaven included Vitatoe’s age, education, work history, non-exertional limitations and residual functional capacity, *id.* at 48-49, reflecting an appropriate incorporation of the criteria listed in the SSA grids. In response, the vocational expert identified various specific jobs within the labor market that could be performed by an individual with relevant limitations. *Id.* at 49. The ALJ included in his opinion these specific jobs identified by Slaven. *Id.* at 19. Thus, ALJ Antrobus properly utilized Slaven’s testimony to form a determination that other jobs existed in the national and local economy that Vitatoe could perform. The ALJ properly relied upon the Medical-Vocational Guidelines and the vocational expert’s testimony in the last step of the five-part disability analysis.

⁷ These guidelines require the ALJ to consider the claimant’s age, educational level, previous work experience, and residual functional capacity in determining what work the claimant may be able to do. 20 C.F.R. § 404.1545(a); 20 C.F.R. § 404, subst. P, app. 2 (1999).

VII. CONCLUSION

Upon review of the medical evidence, the testimony at the hearing, and the decision of ALJ Antrobus, the court concludes that the Commissioner's finding that Vitatoe was ineligible for Social Security disability insurance benefits pursuant to 42 U.S.C. §§ 401-33 is supported by substantial evidence. The ALJ's findings of fact were proper in light of the medical evidence presented. His credibility determinations regarding Vitatoe's testimony and residual functional capacity are supported by substantial evidence. Finally, the ALJ properly identified jobs within the national and local economy, through the use of a vocational expert, that Vitatoe could perform.

For these reasons, IT IS HEREBY ORDERED that:

1. The plaintiff's motion for summary judgment (D.I. 12) is DENIED.
2. The defendant's motion for summary judgment (D.I. 9) is GRANTED.
3. Judgment be and is hereby entered in favor of the defendant.
4. The Clerk of the court is directed to close this case.

Dated: July 10, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE