

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOHN HOBSON, :  
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 Plaintiff, :  
 :  
 v. : Civil Action No. 00-346-JJF  
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 KENNETH S. APFEL, :  
 Commissioner of Social :  
 Security, :  
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 Defendant. :  
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Attorney for Plaintiff.

Carl Schnee, Esquire, United States Attorney, and Virginia Gibson-Mason, Esquire, Assistant United States Attorney, of the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware. Of Counsel: James A. Winn, Esquire, Regional Chief Counsel, and William B. Reeser, Esquire, Assistant Regional Counsel of the SOCIAL SECURITY ADMINISTRATION, Philadelphia, Pennsylvania. Attorneys for Defendant.

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**MEMORANDUM OPINION**

February 28, 2001  
Wilmington, Delaware

**Farnan, District Judge.**

Presently before the Court is an appeal pursuant to 42 U.S.C. § 1383(c)(3), which incorporates 42 U.S.C. § 405(g), filed by Plaintiff, John Hobson, seeking review of the final administrative decision of the Commissioner of the Social Security Administration denying Plaintiff Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C. § 1381-1383 (the "Act"). Plaintiff has filed a Motion For Summary Judgment (D.I. 10) requesting the Court to reverse the findings of the Commissioner and award Plaintiff benefits, or in the alternative, to remand this case to the Administrative Law Judge. In response to Plaintiff's Motion, Defendant has filed a Motion For Summary Judgment (D.I. 12) requesting the Court to affirm the Commissioner's decision. For the reasons set forth below, Defendant's Motion For Summary Judgment will be granted and Plaintiff's Motion For Summary Judgment will be denied. The decision of the Commissioner will be affirmed.

**BACKGROUND**

**I. Procedural Background**

On July 3, 1996 Plaintiff filed an application for Supplemental Security Income ("SSI") alleging that he was disable as of May 1, 1996 due to the residual affects of a stroke. Specifically, Plaintiff alleged that the stroke affected his eyesight in his left eye and his left side mobility. (Tr. 81-

84). Plaintiff's application was denied initially and on reconsideration.

On July 15, 1998, an administrative law judge (the "A.L.J.") conducted a hearing on Plaintiff's claims. Plaintiff was accompanied by his live-in companion, Helena Miller, who also testified at the hearing. On July 31, 1998, the A.L.J. issued a decision denying Plaintiff SSI on the grounds that Plaintiff was not disabled as defined in the Act, because he was still engaged in substantial gainful activity. (Tr. 12-15). Following the unfavorable decision, Plaintiff filed a timely appeal to the Appeals Council. On January 6, 2000, the Appeals Council denied Plaintiff's request for review. (Tr. 5-6).

After completing the process of administrative review, Plaintiff filed the instant civil action pursuant to 42 U.S.C. § 1383(c)(3), which incorporates by reference 42 U.S.C. § 405(g), seeking review of the A.L.J.'s decision denying his claim for SSI. In response to the Complaint, Defendant filed an Answer and the transcript of the proceedings at the administrative level.

Thereafter, Plaintiff filed a Motion For Summary Judgment and Opening Brief in support of the Motion. In lieu of an Answering Brief, Defendant filed a Motion For Summary Judgment requesting the Court to affirm the A.L.J.'s decision. By letter and an accompanying filing, Plaintiff waived his right to file a Reply Brief. (D.I. 14). Accordingly, this matter is ripe for the Court's review.

## II. Factual Background

### A. Plaintiff's Medical History, Condition and Treatment

At the time of the hearing in this case, Plaintiff was a fifty-three year old male with a high school education. Plaintiff's past relevant work experience included employment with National Cash Register for sixteen and a half years as a machine repairer, stock person at a discount store, employment at a restaurant performing a variety of functions, including day manager, and clerk in a liquor store. Although Plaintiff reported no earnings since 1991, Plaintiff admitted that he worked in a boat yard and restaurant doing general maintenance work, and that he later began buying and selling goods at a flea market. Plaintiff alleges that he has not engaged in substantial gainful activity since May 1, 1996.

On April 4, 1996, while working at the flea market, Plaintiff fell down and could not get up immediately. Plaintiff did not seek medical attention for this incident, because he gradually felt better. Approximately one month later, Plaintiff went to the emergency room at the Medical Center of Delaware, due to numbness in his left arm and left leg. Dr. Karen Butler, M.D. diagnosed Plaintiff with a stroke. (Tr. 108). According to Plaintiff, he was also informed that he had suffered two or three prior small strokes. (Tr. 91). While at the hospital, Plaintiff underwent a Cat Scan. The Cat Scan revealed "multiple infarcts,"

some of which were "subacute in age." (Tr. 121). Progress notes from the hospital indicate that Plaintiff had decreased strength balance and motor planning due to decreased sensation in Plaintiff's lower left extremity. (Tr. 109). The notes also indicated that Plaintiff had good balance sitting, fair balance standing and good endurance. Plaintiff was discharged from the hospital on May 10, 1996, with instructions to take aspirin twice daily. (Tr. 108).

Prior to his treatment in May 1996, Plaintiff had not required medical treatment for many years. However, Plaintiff did have a history of alcohol abuse. Aside from his alcohol abuse, Plaintiff had been in good health. (Tr. 115-116, 118).

In June 1996, Dr. Butler referred Plaintiff to Neurology Services to evaluate Plaintiff's complaints of memory deficits and visual impairment. Specifically, Plaintiff's live-in companion stated that Plaintiff could not see thing he laid down and that Plaintiff complained that he had difficulty recognizing people and locations. (Tr. 239). Plaintiff began treating with neurological services on July 15, 1996.

In connection with his application for SSI, Plaintiff was examined by Irwin Lifrak, M.D. on August 21, 1996. (Tr. 125). Plaintiff's primary complaint at that time was difficulty with visual acuity. Plaintiff's eyesight with glasses was 20/25 in his right eye and 20/30 in his left eye. Dr. Lifrak noted that the "visual field of the left eye showed a decrease throughout

the entire circumference of the left eye's visual field when testing was performed by gross confrontation method." (Tr. 126). Dr. Lifrak also noted that Plaintiff had a "minimal degree of limp favoring the left lower extremity;" however, Plaintiff was able to walk without an assistive devices, was able to get on and off the examining table without assistance, and perform without difficulty hand maneuvers requiring dexterity like picking up small objects, with either hand. (Tr. 126). Plaintiff was, however, unable to walk on either his heels or toes. Dr. Lifrak observed that Plaintiff's grip strength was 5/5 in both his right and left upper extremities. However, Dr. Lifrak noted that "although the grip strength in the left upper extremity does qualify as being 5/5 it is noticeably weaker than that of the right." (Tr. 127).

On August 22, 1996, Patrick Hart, M.D. performed a visual examination on Plaintiff. Dr. Hart diagnosed Plaintiff with myopia and a "neurological deficit effecting cognitive ability." (Tr. 137).

In addition to these medical examinations, Plaintiff continued to treat with Neurological Services at the Medical Center of Delaware. In March 1997, Plaintiff returned before his scheduled appointment due to difficulty walking and right arm and leg weakness. (Tr. 155). At that time, Plaintiff underwent an MRI, which revealed an "old right occipital infarct which is larger than seen on previous exam dated 7/5/96 and several

microinfarcts involving the left basal ganglia and the right parietal periventricular region." (Tr. 154). Dr. Butler diagnosed Plaintiff with "stroke with extension" and "new TIAs."<sup>1</sup> Dr. Butler prescribed Coumadin an anti-coagulant and instructed Plaintiff not to drive. (Tr. 227).

In July 1997, Plaintiff treated with John Donnelly, M.D. at the Medical Center of Delaware. Dr. Donnelly noted that Plaintiff had complained of visual difficulty in the past, but that Plaintiff reported he had improved. Dr. Donnelly noted that Plaintiff had "weakness on let, in upper and lower extremities," slow, but not slurred speech, no difficulty word finding and no difficulty getting on or off the examining table.

In January 1998, Plaintiff underwent another MRI. (Tr. 196). This MRI revealed "an area of abnormal signal consistent with infarction within the right occipital lobe;" however, this was "unchanged in extent when compared with Plaintiff's March 1997 MRI." (Tr. 196). Overall, the MRI indicated "no new focal brain parenchymal abnormality . . . when compared with the previous study." (Tr. 196).

In February 1998, Plaintiff returned to the emergency room at the Medical Center of Delaware for a "possible ministroke."

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<sup>1</sup> TIAs are "Transient Ischemic Attacks," which are defined in Taber's Cyclopedic Medical Dictionary as "an increase in the size of an infarction, occurring after the initial infarction and usually accompanied by a return of acute symptoms . . . ."

(Tr. 178). Plaintiff was diagnosed with Transient Ischemic Attacks. Plaintiff was informed that a TIA means that he had a temporary decrease in blood circulation to his brain and that TIAs are often the forewarning of a stroke. Plaintiff was instructed to follow up with Adult Medicine Group Practice as soon as possible. (Tr. 188).

Plaintiff continued treatment at the Medical Center of Delaware. At these visits, Plaintiff continued to complain of left side weakness. (Tr. 165).

In July 1998, Dr. Donnelly wrote a letter indicating that Plaintiff had a "new diagnosis" as of February 1998. Specifically, Dr. Donnelly stated that Plaintiff had "TIA and right CVA with left side weakness." Dr. Donnelly opined that due to the weakness in Plaintiff's left upper and lower extremities and his decreased visual acuity, "it would be difficult" for Plaintiff to resume his normal work schedule. (Tr. 16).

B. The A.L.J.'s Decision

In his Opinion dated July 31, 1998, the A.L.J. concluded that Plaintiff was not disabled, because he "is engaging in substantial gainful activity." Examining whether Plaintiff has engaged in substantial gainful employment, the A.L.J. noted that Plaintiff reported that he continued to work as a flea market merchant subsequent to the alleged onset date of his disability. In support of his decision, the A.L.J. relied on Plaintiff's testimony at the hearing that he sells items at the flea market



on the weekends from approximately 9:00 a.m. until 3:00 p.m., that he goes to the auction on Monday, Tuesday and Wednesday nights to buy resale items, and that he spends considerable time during the week repairing and cleaning resale items. (Tr. 13). The A.L.J. concluded that the record demonstrated that Plaintiff "is self-employed in excess of sixty-four hours a month." However, the A.L.J. noted that there was a question as to how much income was generated by Plaintiff's employment, because Plaintiff had not reported any income to either Social Security or the Internal Revenue Service. (Tr. 14). The A.L.J. noted that "the regulations provide that substantial gainful activity when self-employed is not dependent on reported income but on value to the economic enterprise." (Tr. 14). Based on the record, the A.L.J. concluded that Plaintiff is not disabled, because he is engaging in substantial gainful activity. Having concluded that Plaintiff was not disabled within the meaning of the Act, the A.L.J. declined to consider the remaining steps in the sequential evaluation process under the Act. (Tr. 14).

#### **STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), findings of fact made by the Commissioner of Social Security are conclusive, if they are supported by substantial evidence. Accordingly, judicial review of the Commissioner's decision is limited to determining whether "substantial evidence" supports the decision. Monsour Medical

Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). In making this determination, a reviewing court may not undertake a de novo review of the Commissioner's decision and may not re-weigh the evidence of record. Id. In other words, even if the reviewing court would have decided the case differently, the Commissioner's decision must be affirmed if it is supported by substantial evidence. Id. at 1190-91.

The term "substantial evidence" is defined as less than a preponderance of the evidence, but more than a mere scintilla of evidence. As the United States Supreme Court has noted substantial evidence "does not mean a large or significant amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pierce v. Underwood, 487 U.S. 552, 555 (1988).

With regard to the Supreme Court's definition of "substantial evidence," the Court of Appeals for the Third Circuit has further instructed, "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 . . . or if it really constitutes not evidence but mere conclusion." Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). Thus, the substantial evidence standard embraces a qualitative review of the evidence, and not merely a quantitative approach. Id.; Smith v. Califano, 637 F.2d 968, 970 (3d Cir.

1981).

## **DISCUSSION**

In his Motion For Summary Judgment, Plaintiff contends that the decision of the A.L.J. denying Plaintiff SSI is not supported by substantial record evidence. Specifically, Plaintiff contends that (1) the A.L.J.'s committed an error of law when he found that Plaintiff was engaged in substantial gainful activity; (2) Plaintiff's condition qualifies as a presumptive disability pursuant to 20 C.F.R. § 416.934(f); and (3) the A.L.J. failed to develop the record. The Court will consider each of Plaintiff's arguments in turn.

### **I. Whether The A.L.J. Erred in Finding That Plaintiff Was Engaged in Substantial Gainful Activity**

Pursuant to Section 1382c of the Act, an individual is eligible for SSI if he or she is "disabled," meaning he or she is "unable 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 twelve months . . ." 42 U.S.C. § 1382c(a)(3)(A). In analyzing a disability claim, the Social Security Regulations provide for a five step sequential analysis. Specifically, the Commissioner must determine (1) whether the claimant is currently performing substantial gainful activity; (2) whether the claimant has a severe impairment; (3) whether the impairment meets or equals one

listed by the Commissioner; (4) whether the claimant can perform his or her past work; and (5) whether the claimant is cable of performing any work in the national economy. 20 C.F.R. § 416.920(a)-(f). The burden of proving "disability" within the meaning of the Act rests on the claimant. Gilliland v. Heckler, 786 F.2d 178, 182 (3d Cir. 1986). Thus, the claimant has the burden to prove he or she is not engaged in substantial gainful activity. Callaghan v. Shalala, 992 F.2d 692, 696 (7th Cir. 1993).

As defined in the Social Security Regulations, "substantial work activity" is "work activity that involves doing significant physical or mental activities." 20 C.F.R. § 416.972 (a). Work may be substantial even if it part-time or if it involves less responsibility or pay than previous work done by a claimant. Id. Work activity is considered gainful if it is work done "for pay or profit, whether or not a profit is realized." 20 C.F.R. § 416.972(b). For the period of January 1990 through June 1999, work activity giving rise to earnings of more than \$500 per month is presumptively considered substantial gainful activity. 20 C.F.R. § 416.974(b)(2). The Regulations also contain guidelines for evaluating whether a self-employed individual has engaged in substantial gainful activity. 20 C.F.R. § 416.975.

In this case, the A.L.J. applied the criteria set forth in 20 C.F.R. § 416.975 to conclude that Plaintiff was self-employed as a flea market merchant and that such activity constituted

substantial gainful activity within the meaning of the Social Security Regulations. After reviewing the record as it pertains to the issue of whether Plaintiff is engaged in substantial gainful activity, the Court concludes that the A.L.J.'s finding is supported by substantial evidence. Pursuant to 20 C.F.R. § 416.975(a), there are three tests for determining whether self-employed individuals are engaged in substantial gainful activity: (1) the individual renders services that are significant to the operation of the business and receives a substantial income; (2) the individual engages in work activity, in terms of such factors as hours, skills, energy output, efficiency, duties and responsibilities, that is comparable to that of an unimpaired individual in the community performing the same work; and (3) the individual is engaged in work activity, which may not be comparable to an unimpaired individual, but is worth the amount shown in 20 C.F.R. § 416.974(b)(2), approximately \$500 per month, when considered in terms of its value to the business or compared with the salary that an owner would pay an employee to do the work.

In this case, Plaintiff testified that he buys and sells items for auction at a flea market. He works at the flea market on Saturdays and Sundays from 9:00 a.m. to 3:00 p.m. He also attends auction sales on Monday, Tuesday and Wednesday nights to acquire items for resale. Although the hearing record indicates that Plaintiff's companion does most of the bidding at the

auctions, the record indicates that Plaintiff is involved not only in the process of acquiring goods in terms of selection and some bidding, but also that Plaintiff is responsible for the repair, restoration and cleaning of the goods and the ultimate sale of the goods at the weekend flea markets. (Tr. 55-58, 65). Indeed, Plaintiff's companion did not refute Plaintiff's testimony about his involvement in the cleaning, repairing and selling of the goods, nor did she indicate that she performed any of these functions. Rather, Plaintiff's companion merely testified that she does most of the bidding in terms of acquiring goods, because Plaintiff will forget to bid on items that they want to acquire. (Tr. 66). Evaluating this type of work, the vocational expert opined that it is light exertional level and semiskilled work.

As for the amount of money Plaintiff generates from his flea market work, the A.L.J. noted that the record is unclear, because Plaintiff has not reported income to either Social Security or the Internal Revenue Service for several years. When asked how much income he gets from the flea markets, Plaintiff responded, "I don't know how to judge that. I mean, I don't know how to answer that question." (Tr. 56). Plaintiff explained that his income is equal to the difference between the price he sells an item for and the price he paid to purchase the item. (Tr. 57). Although an actual dollar value is not contained in the record, there is no evidence in the record that Plaintiff was receiving

public assistance or food stamps, and at the time Plaintiff applied for SSI, he indicated that he did not want to apply for food stamps. As the A.L.J. correctly noted, whether an individual is engaged in substantial gainful activity is not solely dependent on reported income. Work activity is considered gainful "whether or not a profit is realized," and in terms of self-employment, the value of the work to the business must be considered. 20 C.F.R. §§ 416.972(b); 416.975 (a) ("We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services."). Given the extent of Plaintiff's involvement in the flea market endeavor, in terms of his time, skill, energy, duties and responsibilities, as well as the importance of his role to the business, the Court concludes that the A.L.J.'s finding that Plaintiff was engaged in substantial gainful activity is supported by substantial evidence. Accordingly, the Court will grant Defendant's Motion For Summary Judgment.

## **II. Whether The A.L.J. Failed To Adequately Develop The Record**

Plaintiff next contends that the A.L.J. failed to fully develop the record in this case. Specifically, Plaintiff contends that the A.L.J. failed to develop the record as it pertained to Plaintiff's income from the flea market sales and Plaintiff's role in the flea market endeavor.

Where, as here, a plaintiff is unrepresented by counsel at the administrative hearing, the A.L.J. has a "duty to develop the record with special care." Early v. Heckler, 743 F.2d 1002, 1007 (3d Cir. 1984); Gauthney v. Shalala, 890 F. Supp. 401, 410 (E.D. Pa. 1995). There is no bright line test for determining whether the A.L.J. failed to adequately develop the record, and the issue must be examined on a case by case basis. Thomas v. Chater, 1997 WL 256458, \*3 (E.D. Pa. May 9, 1997). However, the essential inquiry is whether the record "reveals evidentiary gaps which result in prejudice to the claimant." Gauthney, 890 F. Supp. at 410 (citations omitted). "While it is incumbent that the A.L.J. attempt to fully develop the record, the A.L.J.'s duty does not supplant the claimant's burden to prove [his or] her claim of disability." McCarthy v. Commissioner of Social Security, 1999 WL 325017, \*11 (D.N.J. May 19, 1999) (citing Hess v. Secretary of Health, 497 F.2d 837 (3d Cir. 1974)).

In this case, Plaintiff proceeded knowingly and voluntarily without the assistance of counsel at the hearing, and Plaintiff does not challenge his waiver of the right to counsel. Rather, Plaintiff contends that the A.L.J. did not comply with his heightened responsibility to develop the record in these circumstances. After reviewing the record, the Court disagrees with Plaintiff. The A.L.J. questioned both Plaintiff and the vocational expert thoroughly on the issue of Plaintiff's work at the flea markets and elicited specific information through his



questions about the type, character and quantity of work that Plaintiff performs in connection with his flea market endeavor. (Tr. 50-68). Although the A.L.J. was ultimately unable to elicit the precise income Plaintiff earned from his activity, the A.L.J. questioned Plaintiff repeatedly on this subject. (Tr. 56-57). That Plaintiff declined to respond with a straightforward answer does not mean that the A.L.J. failed to comply with his duty to develop the record. Further, the A.L.J. gave both Plaintiff and his companion ample opportunity to add additional information about Plaintiff's activities, and to date, neither Plaintiff, nor his companion, nor his current counsel have offered additional evidence in support of Plaintiff's claim. Because the A.L.J. adequately inquired into the facts regarding Plaintiff's employment at the flea markets, the Court cannot conclude that the A.L.J. failed to fulfill his duty to adequately develop the record. Accordingly, the Court will grant Defendant's Motion For Summary Judgment.

### **III. Whether Plaintiff's Condition Qualifies As A Presumptive Disability**

Because the A.L.J. concluded that Plaintiff could not establish the first element of the five sequential elements required to prove disability within the meaning of the Act, the A.L.J. did not reach the issue of Plaintiff's alleged physical impairments. Because the A.L.J. did not make any factual determinations regarding this issue, and because the Court has

concluded that the A.L.J.'s opinion is supported by substantial evidence, the Court will not address Plaintiff's argument that his condition qualifies as a presumptive disability pursuant to 20 C.F.R. § 416.934(f). Accordingly, the Court will grant Defendants' Motion For Summary Judgment.

#### **CONCLUSION**

For the reasons discussed, Defendant's Motion For Summary Judgment will be granted, Plaintiff's Motion For Summary Judgment will be denied and the decision of the Commissioner dated July 31, 1998 will be affirmed.

An appropriate Order will be entered.