IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ERIC P. SCHUH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-676-KAJ
	)	
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

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May 6, 2003
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

Presently before the Court are cross motions for summary judgment (Docket Items ["D.I."] 13, 19) filed by plaintiff Eric Schuh ("Schuh") and the Commissioner of Social Security[1] ("defendant" or "Commissioner"). Schuh brings this action pursuant to 42 U.S.C. § 405(g) seeking review of the Commissioner's final decision denying him disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401-434 (2003).

II. BACKGROUND

A. Procedural History

Schuh filed for disability benefits on May 21, 1999, alleging that he has been disabled since March 14, 1998.[2] (D.I. 11 at 114.) His claim was denied on July 26, 1999. (*Id*. at 1, 17.) On reconsideration, it was again denied on October 14, 1999. (*Id*.) Schuh then requested a hearing before an administrative law judge ("ALJ"). (*Id*. at 17.) A hearing followed on September 12, 2000. (*Id.*) At the hearing, Schuh was represented by counsel.

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[1]Plaintiff's action survives any change of the person occupying the office of the Commissioner of Social Security. 42 U.S.C. § 405(g) (2003). Accordingly, Jo Anne B. Barnhart, the acting Commissioner of Social Security, is substituted as defendant in this action. (*Id.*)

[2]Schuh claims that his "protective filing date" was the same date as his scheduled telephone appointment with the Social Security Adminstration office, June 1, 1998. (D.I. 14 at 3; D.I. 11 at 112.) The date a claimant contacts the Social Security office can be used as the filing date if the claimant's application is filed within six months of the date of the telephone appointment confirmation letter. (D.I. 11 at 113.) Since Mr. Schuh did not file an application within six months of the telephone appointment confirmation letter, he cannot use June 1, 1998 as his filing date. (*Id.* at 114-116.)

(*Id.*) Besides Schuh, the only other witness at the hearing was vocational expert, Nancy Harter. (*Id*.)

On November 8, 2000, the ALJ found that Schuh was not entitled to disability benefits because, "[a]lthough ... [his] exertional limitations do not allow him to perform the full range of sedentary work ... there are a significant number of jobs in the national economy that he could perform." (*Id.* at 26-27.) The ALJ further found that, while Schuh's physical and mental impairments were "severe," Schuh "retain[ed] the physical residual functional capacity for sedentary work with a sit/stand option" even though mentally he had "moderate" restrictions in activities of daily living, social functioning, concentration, persistence or pace and "moderately severe" difficulty in relating to other people and in his ability to perform work in contact with others. (*Id*. at 26.) Accordingly, the ALJ found that Schuh could perform the following jobs in the national and regional economy: inspector/examiner, machine operator, and assembler. (*Id.* at 25.)

Schuh appealed the ALJ's decision to the Appeals Council of Social Security ("Appeals Council"). (*Id*. at 8.) On August 21, 2001, the Appeals Council determined that there was "no basis under the ... regulations for granting" Schuh's "request for review." (*Id*.) The November 8, 2000 decision of the ALJ, therefore, became the final decision of the Commissioner. *See* 20 C.F.R. §§ 404.955, 404.981, 422.210 (2003); *see also Sims v. Apfel*, 530 U.S. 103, 106-107 (2000); *Matthews v. Apfel*, 239 F.3d 589, 592 (3d Cir. 2001). Schuh now seeks review by this Court of that decision, pursuant to 42 U.S.C. § 405(g). (D.I. 3.)

B. Facts

1. Background

Schuh was born on December 20, 1960 and was thirty nine years of age at the time of the ALJ's November 8, 2000 decision. (D.I. 14 at 3.) Schuh was thus considered a "younger person," under the applicable regulations. *See* 20 C.F.R. § 404.1563(c) (2003). He has a high school education and previous work experience as a concrete tester for the Delaware Department of Transportation ("DELDOT"). (D.I. 14 at 3.) On March 15, 1998, Schuh was terminated from his job with DELDOT because he was "unable to perform any and all reasonable work activities including sedentary work activities at [that] time and for the foreseeable future." (D.I. 11 at 18.) At the time of the ALJ's decision, Schuh had not engaged in substantial gainful activity since his alleged date of disability, March 14, 1998. (*Id.*)

Schuh alleged that he was unable to work because of permanent damage to his lower back, left ankle, and right knee and he complained of pain in his neck, back, legs, feet, left ankle, and the second and third fingers of his left hand. (*Id.*) He also claimed that he could not sit, stand, or walk for any extended period without severe pain and that his pain increased in severity when walking, standing, or exercising. (*Id.*)

Schuh lives alone and does not require assistance in his daily needs. Activities such as showering, driving, shopping, and doing laundry are all activities that Schuh can perform while taking pain medication. (D.I. 11 at 47, 157.) He claims that he has trouble getting to sleep at night because of pain and that he wakes with pain in the morning. He further claims to need a cane to walk. (*Id.* at 52, 157, 160.)

2. Medical Evidence - Physical

On May 15, 1995 and on May 22, 1995, about three years before he lost his job with DELDOT, Schuh visited the offices of orthopedic specialists Mattern & Piccioni in response to pain in his right knee. (*Id*. at 190.) His care providers ordered an MRI and prescribed Oruvail, an anti-inflammatory, and Vicodin, a pain reliever. (*Id*.) The MRI of Schuh's right knee revealed a "medial meniscus tear" which his doctor explained could be repaired with surgery. (*Id*.) Schuh, however, declined surgery and opted for non-operative treatment. (*Id*. at 189)

While at work on February 3, 1997, Schuh claims that he aggravated a back injury he had suffered in an automobile accident in 1986. (*Id*. at 18.) He saw Dr. Thiruvalam Indira for treatment, and Dr. Indira ordered x-rays of Schuh's back and prescribed Percocet for pain. (*Id*. at 195, 216.) The x-rays revealed that the "lumbar vertebrae are maintained in stature and alignment without evidence of fracture." (*Id.* at 191.) Dr. Indira's overall impression of Schuh, therefore, was "normal." (*Id*.) Dr. Indira did, however, suggest physical therapy. (*Id*. at 206.)

Thereafter, Schuh underwent physical therapy at Barker Therapy & Rehabilitation Center. (*Id*.) On March 31, 1997, care providers at Barker Therapy & Rehabilitation Center reported that Schuh claimed to not be responding to treatment. (*Id*. at 210) However, they noted, based upon their own criteria, that his condition had improved. (*Id*.) Schuh was therefore discharged with instruction to see Dr. Richard DuShuttle. (*Id*. at 202, 211.)

Dr. DuShuttle evaluated Schuh for lower back pain on April 15, 1997 and again on May 6, 1997. (*Id*. at 281, 283.) Dr. Dushuttle reviewed the x-rays performed by Dr. Indira and determined they were "essentially unremarkable." (*Id*. at 283.) An MRI of Mr. Schuh's lumbar spine was ordered and performed on April 21, 1997. (*Id.* at 196.) The MRI

revealed "degenerative disk disease, L5/S1 level, with mild central disk protrusion." (*Id.*) Dr. DuShuttle instructed Schuh to remain out of work, and to attend physical therapy three times a week for four weeks to strengthen his back. (*Id*. at 197, 281, 283.)

On May 21, 1997, Schuh began additional physical therapy at Barker Therapy & Rehabilitation Center but, after a few days, he declined to finish treatment and, instead, returned to work. (*Id*. at 206, 237.)

In March and April of 1997, Schuh was also examined by Dr. Sambhar Kumar. (*Id.* at 293.) Dr. Kumar determined that Schuh had no neurological deficits associated with his back. (*Id*. at 294.) Dr. Kumar prescribed Percocet and OxyContin to relieve Schuh's pain. (*Id*. at 290-292.) Dr. Normand Eckbold, a board certified orthopedic surgeon, also examined Schuh on May 8, 1997. (*Id*. at 331.) Dr. Eckbold found no "objective functional deficits" with regard to Schuh's low back and determined that, in a seated position, Schuh was able to sit with his torso at a ninety degree angle with his legs straight (*i.e.*, Schuh could sit normally). (*Id*. at 332.)

On October 28, 1997, based upon a referral from Dr. Kumar (*Id.* at 290-292.), Schuh was examined by Dr. Philip LaTourette at The Center for Neurology. (*Id*. at 278-279.) Dr. LaTourette reported exaggerated lumbar lordosis, facet arthropathy, degenerative changes at L2-3 and L4-5 facets with loss of joint space, and mild spurring of these joints. (*Id.*) Dr. LaTourette further reported that Schuh's light touch sensation was intact throughout all extremities, deep pedal pulses were positive, and motor strength was 5/5[3] throughout. (*Id*.)

[3]Motor strength is scaled as follows: 0/5 (no movement); 1/5 (trace movement); 2/5 (movement with the aid of gravity); 3/5 (movement against gravity but not resistance); 4/5 (movement against resistance supplied by the examiner); 5/5 (normal strength). (D.I. 20 at 6 footnote 4.)

Dr. LaTourette prescribed Percocet and scheduled Schuh for facet injections beginning November 25, 1997. (*Id*.)

Schuh received the facet injections, as prescribed, but claimed that they provided no relief. (*Id.* at 276.) Dr. LaTourette noted that this was "highly unusual" because typically "the local anesthetic used in the muscle and around the facet joint nerve decreases the patient's pain significantly at least for several hours to several days after the injections are given." (*Id*. at 276.) In contrast, Schuh claimed that his pain was reduced only when taking Percocet. (*Id*. at 274.) In subsequent exams, Dr. LaTourette opined that Schuh suffered from pain exacerbated by situational stress, facet joint arthropathy in the lumbar segment, and chronic high dose narcotic usage in the past. (*Id*. at 269-272.) Dr. Latourette further noted on March 13, 1998, two days prior to Schuh's termination from DELDOT, that Schuh had "good range of motion of his spine and flexion, extension and side bending." (*Id*. at 269.) Dr. LaTourette referred Schuh to the Johns Hopkins Pain Clinic. (*Id*. at 272.)

Earlier, on January 28, 1998, at the request of DELDOT, Schuh was examined by Dr. James Marvel. (*Id*. at 242.) Dr. Marvel concluded that Schuh's lumbar spine revealed relatively uncoordinated motion with rigidity of the lower lumbar spine and tenderness in the midline at the L3-4 level and at the L4-5 level. (*Id*. at 244.) Dr. Marvel thereafter stated that Schuh had "continuing, significant, disabling back problems associated with degenerative disc disease ..." and concluded that he was "totally and completely disabled from any and all reasonable work activities, including sedentary type of work activities at this time and for the foreseeable future." (*Id*. at 245-246.) Dr. Marvel strongly urged that Schuh go to the Johns Hopkins Pain Management Clinic where they have the capability to rehabilitate individuals for sedentary work. (*Id*. at 246.)

On June 11, 1999, Schuh went to the Emergency Department at Kent General Hospital for a right leg injury. (*Id*. at 19.) X-rays of his knee and upper tibia, however, proved normal. (*Id*.) Schuh made subsequent visits to Kent General on June 16, 1999, July 28, 1999, and August 2, 1999. (*Id*. at 263-267.) On the last visit, Dr. Craig Hochstein noted that Schuh had been prescribed Percocet on each of the previous visits; Dr. Hochstein expressed concern that Schuh was becoming addicted. (*Id*. at 263.) Dr. Hochstein also noted that Schuh requested a referral to the pain clinic at Johns Hopkins. (*Id.*)

At the request of the state agency, Delaware Disability Determination Service ("DDDS"), Schuh was examined by Dr. I.L. Lifrak on July 1, 1999. (*Id*. at 247.) Dr. Lifrak concluded that Schuh's range of motion was reduced in the area of the lumbosacral spine and pain radiated throughout Schuh's hips and lower extremities. (*Id*. at 250.) Dr. Lifrak also noted numbness in the fourth and fifth fingers of the left hand and that Schuh required a cane to walk. (*Id*.)

A DDDS physician[4] reviewed Schuh's records on July 22, 1999. (*Id.* at 253.) On the basis of that review, the physician determined that Schuh was occasionally able to lift or carry ten pounds; frequently able to lift or carry less than ten pounds; could stand or walk for a total of two-hours in a workday; sit a total of six hours in a workday; push or pull an unlimited amount; and had no manipulative, visual, or communicative limitations. (*Id*. at 254.) A second DDDS physician[5] reviewed Schuh's record on October 14, 1999 and made

[4]The physician's name is not discernable from the record. (D.I. 11 at 67, 260-262.)

[5]The physician's name is not discernable from the record. (D.I. 11 at 325-327.)

a similar assessment, except the second physician was of the opinion that Mr. Schuh was occasionally able to lift or carry twenty pounds and frequently able to lift or carry ten pounds. (*Id*. at 318.)

On October 21, 1999, Schuh was examined at the Johns Hopkins Pain Clinic by Dr. Theodore S. Grabow. (*Id*. at 350.) Schuh's musculoskeletal examination revealed tenderness over the L3-4-5 regions, his motor strength was 5/5, and his left ankle was tender to palpitation and motion. (*Id*. at 20.) He was unable to stand completely erect and a straight-leg raising test he underwent was negative in both legs. (*id.*) Dr. Grabow stated that Schuh's "chronic low back pain [was] most likely due to degenerative disease" and his ankle pain was "probably degenerative in origin." (*Id.* at 351)

On his next visit to Johns Hopkins, Schuh complained of constant pain in his back that worsened with standing and sitting for long periods of time but it was noted that he failed to "demonstrate any overt pain behaviors during the examination process." (*Id*. at 346.)

Schuh's primary physician as of October 1999 was Dr. A. Douglas Chervenak. (*Id*. at 359.) Dr. Chervenak's examination of Schuh revealed motor strength of 5/5, and negative performance on straight-leg testing and sitting root tests. (*Id*.) Dr. Chervenak also noted that his ankle pain was probably degenerative in origin. (*Id*. at 20.) An MRI of the distressed areas, on November 16, 1999, showed mild degenerative disc disease at L5-S1 and no significant disc bulge or protrusion. (*Id.* at 344.) Further diagnostic testing, performed on June 28, 2000, on Schuh's right and left ankle revealed degenerative disease with a narrowing of joint space, but no acute fracture. (*Id*. at 20.) On July 3, 2000, Dr. Chervenak advised the State Board of Pension Trustees that Schuh suffered from chronic

back and ankle pain but that vocational rehabilitation would benefit him. (*Id*. at 358.) Dr. Chervenak also noted that alternate employment was possible for Schuh. (*Id.*) Schuh was also examined in October 1999 by Dr. Jere G. Sutton. (*Id.* at 19.) According to Dr. Sutton, Schuh's past automobile accidents resulted in a 23% permanent functional impairment of his lower back and a 25% permanent functional impairment of his left ankle. (*Id.*)

3. Medical Evidence - Psychological

Schuh was examined by psychiatrist Dr. Randy Rummler on October 2, 1999. (*Id.* at 295-300.) Dr. Rummler diagnosed Schuh with paranoid personality disorder and possible drug dependency and abuse. (*Id.* at 296.) He found that Schuh's thoughts were centered on his back pain, he had no overt psychotic features (suicidal or homicidal ideation), and his concentration was intact. (*Id.*) Schuh was rated with a Global Assessment of Functioning (GAF) score of 55.[6] (*Id.)* Dr. Rummler opined that Schuh was most likely unable to function in a workplace environment in an appropriate manner and his prognosis was poor. (*Id.*) In response to a Supplemental Questionnaire as to Residual Functional Capacity provided by DDDS regarding Schuh's psychiatric condition, Dr. Rummler noted that Schuh suffers from a moderately severe[7] impairment in his ability to relate to other people and in his ability to perform work requiring frequent contact with

[6] The GAF considers psychological, social and occupational functioning, and does not include impairment in functioning due to physical (or environmental) limitations. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. 2000). A GAF of 55 is indicative of "Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." *Id.*

[7] "Moderately Severe," as defined in the "Supplemental Questionnaire as to Residual Functional Capacity" submitted by Dr. Rummler, is "an impairment which seriously affects [one's] ability to function." (*Id.* at 300.)

others. (*Id.* at 299.) Mr. Schuh received a rating of mild or moderate impairment in the remaining nine categories of assessment on the questionnaire. (*Id.* at 299-300.) Dr. Rummler further noted, in his narrative report assessment, that "if the patient's pain does improve, his preoccupation and obsession with past insults may lessen, and the patient may be able to return to the workplace." (*Id*.)

Schuh's records, consisting of his examination by Dr. Rummler, were reviewed by a psychologist[8] at the request of the DDDS in October 1999. (*Id.* at 301-315.) The psychologist listed on a Mental Residual Functional Capacity Assessment form that Schuh was moderately limited[9] in the following abilities: to understand, carry out and remember detailed instructions; to maintain attention and concentration for extended periods; to work in close proximity to others without being distracted by them; to accept instructions and respond appropriately; to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; to accept instructions and respond appropriately to criticism from supervisors; to respond appropriately to changes in the work setting; to be aware of normal hazards and take appropriate precautions; and to set realistic goals or make plans independently of others. (*Id.* at 312-313.) Schuh was found

[8]The psychologist's name is not discernable from the record. (D.I. 11 at 301-315.)

[9] "Moderately Limited" is not defined on the "Mental Residual Functional Capacity Assessment" form submitted by the psychologist. (*See Id.* at 312-315.) Mr. Schuh defines "Moderately Limited" using the definition of "Moderate" from the "Supplemental Questionnaire as to Residual Functional Capacity," submitted by Dr. Rummler. (D.I. 14 at 7; D.I. 11 at 300, 312-315.) "Moderate" is defined as "an impairment which affects but does not preclude [one's] ability to function." (D.I. 11 at 300.) "Moderately Limited" means that the claimant has some loss of ability in the activity listed for up to one-third of the time. *Morales v. Apfel*, 225 F.3d 310, 314 n. 4 (3d Cir. 2000).

not significantly limited for the remaining eleven, out of twenty, mental activities listed on the form. (*Id.*)

4. Vocational Expert Testimony

Vocational expert Nancy Harter testified at Schuh's September 12, 2000 hearing before the ALJ. (*Id.* at 55-64.) Ms. Harter reviewed Schuh's file and was present during his testimony. (*Id.* at 55-56.) In response to hypothetical questions posed by the ALJ, which instructed Ms. Harter to assume that an individual was limited according to the psychiatric evaluation in Exhibit 16F[10] and was limited to sedentary work with a sitting and standing option, Ms. Harter testified that Schuh could work as an inspector and examiner (500 jobs regionally and 35,000 nationally), machine operator (500 jobs regionally and 171,000 nationally) and assembler (700 jobs regionally and 141,000 nationally). (*Id.* at 58.) In response to questions posed by Schuh's counsel, however, which instructed Ms. Harter to assume the same facts as the ALJ's hypothetical except to assume that the individual has a moderately severe impairment in his ability to relate to others and perform work requiring frequent contact with others, Ms. Harter testified that the previously mentioned jobs would not be appropriate. (*Id.* at 59.)

III. STANDARD OF REVIEW

This Court reviews a decision of the Commissioner of Social Security to determine whether the decision is supported by substantial evidence. 42 U.S.C. § 405(g) (2003); *see Richardson v. Perales*, 402 U.S. 389, 390 (1971); *Monsour Med. Ctr. v. Heckler*, 806 F.2d 1185, 1190 (3d Cir. 1986), *cert.* denied, 482 U.S. 905 (1987). The Court's review is limited

[10] Exhibit 16F is the Psychiatric Review performed by the DDDS Psychologist and contains the "Mental Residual Functional Capacity Assessment" form.

to whether the Commissioner's decision is supported by substantial evidence and whether the correct legal principles have been applied. 42 U.S.C. §§ 405(g), 1383(c) (2003); *Jesurum v. Sec'y of the United States Department of Health & Human Serv.,* 48 F.3d 114, 117 (3d. Cir. 1995) (citing *Brown v. Bowen,* 845 F.2d 1211, 1213 (3d. Cir 1988)*; Monsour Med. Ctr.,* 806 F.2d at 1190. Substantial evidence is 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 to support a conclusion." *Perales*, 402 U.S. at 427. If the Commissioner's decision is supported by substantial evidence, then the Court is bound by those factual findings. *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999).

IV. DISCUSSION

In order for a claimant to be eligible for disability benefits, the claimant has the burden of demonstrating that he 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 12 months." 42 U.S.C. § 423(d)(1)(A) (2003); *see* 20 C.F.R. § 404.1509, 416.905(a) (2003)*; Morales*, 225 F.3d at 315-316. A claimant is disabled 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, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A) (2003)

To determine if a claimant is actually disabled, the Commissioner applies a five-step evaluation, pursuant to 20 C.F.R. § 416.920 (2003), in the following sequence:

> [T]he [Commissioner] determines first whether an individual is currently engaged in substantial gainful activity. If that individual is engaged in substantial gainful activity, he will be found not disabled regardless of the medical findings. If an individual is found not to be engaged in substantial gainful activity, the [Commissioner] will determine whether the medical evidence indicates that the claimant suffers from a severe impairment. If the [Commissioner] determines that the claimant suffers from a severe impairment, the [Commissioner] will next determine whether the impairment meets or equals a list of impairments in Appendix I of sub-part P of Regulations No. 4 of the Code of Regulations. If the individual meets or equals the list of impairments, the claimant will be found disabled. If he does not, the [Commissioner] must determine if the individual is capable of performing his past relevant work considering his severe impairment. If the [Commissioner] determines that the individual is not capable of performing his past relevant work, then he must determine whether, considering the claimant's age, education, past work experience and residual functional capacity, he is capable of performing other work which exists in the national economy."

Morales, 225 F.3d at 316 (quoting *Brewster v. Heckler*, 786 F.2d 581, 583-584 (3d Cir. 1983)).

As quoted, *supra*, the ALJ addressed all five factors in the sequential evaluation process. (D.I. 11 at 26-27.) In the first step, the ALJ found that Schuh had not engaged in substantial gainful activity since the onset of his disability on March 14, 1998. (*Id.* at 26.) Because Schuh had not engaged in substantial gainful activity, the ALJ moved onto the second step in the process and determined that Schuh had suffered from physical impairments to the back, legs, left ankle and right knee. *Id*. Additionally, Schuh suffered from a somatoform disorder, possible substance abuse and a personality disorder all of

which imposed mental functional limitations.[11] *Id*. The ALJ considered these physical and mental impairments to be severe under the second step. *Id*. However, in the third step of the sequential process, the ALJ did not find that Schuh's impairments, considered alone or a combination thereof, met the severity criteria of any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1.[12] (*Id.* at 23.) As a result, the ALJ could not find

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[11] Schuh's mental functional limitations, listed in the ALJ's decision, consisted of moderate restrictions in activities of daily living; social functioning; and concentration, persistence or pace, along with no episodes of deterioration or decompensation. *Id*.

[12] In evaluating the severity of impairments to the back, legs, left ankle and right knee the ALJ will refer to 1.01, 1.02 and 1.04 of Appendix 1.

1.01 Category of Impairments, Musculoskeletal

1.02 Major Dysfunction of a Joint - Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With: A) Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b; or B) Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00B2c.

1.04 Disorders of the Spine - (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With: A) Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight- leg raising test (sitting and supine); or B) Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or C) Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

In evaluating the severity of somatoform disorders, personality disorders and substance addiction disorders the ALJ will refer to 12.07, 12.08 and 12.09 of Appendix 1.

12.07 Somatoform Disorders - The required level of severity for these disorders is met when there is medically documented evidence of one of the following: 1) A history of multiple physical symptoms of several years duration, beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly; 2) Persistent nonorganic disturbance of vision, speech, hearing, use of a limb, or diminished or heightened sensation; 3) Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury. Additionally, 12.07 requires that two of the following must result: 1) Marked restriction of activities of daily living; 2) Marked difficulties in maintaining social functioning; 3) Marked difficulties in maintaining concentration, persistence or pace; 4)Repeated episodes of decompensation, each of extended duration.

12.08 Personality Disorders - The required level of severity for these disorders is met when there

Schuh to be disabled and had to move on to the next step. Subsequently, in the fourth step, the ALJ determined that Schuh could not perform his past relevant work because of the limitations imposed by his residual functional capacity and, therefore, proceeded to the fifth and final step. *Id*. In this last step, Schuh was found to be capable of performing a significant number of jobs in the national economy after the ALJ considered his age, education, past work experience and his residual functional capacity. (*Id.* at 25.) Schuh does not dispute the ALJ's findings as to the first four steps of the sequential evaluation process, but does contest the ALJ's finding in the last step that he is able to perform a significant number of jobs in the national economy. (D.I. 14 at 7-8; D.I. 20 at 27.)

Schuh argues that the ALJ erred in finding jobs available for him to perform because there is no evidence in the record to support such a finding. (*Id.*) Schuh asserts that the ALJ improperly based his findings concerning job availability on the wrong part of the vocational expert's testimony. (*Id.* at 7-8.) Specifically, Schuh argues that he should be found disabled because the ALJ found Schuh to have a moderately severe impairment and the vocational expert testified that a moderately severe impairment in one's ability to relate

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is a deeply ingrained, maladaptive patterns of behavior associated with one of the following: 1) Seclusive or autistic thinking; 2) Pathologically inappropriate suspiciousness or hostility; 3) Oddities of thought, perception, speech and behavior; 4) Persistent disturbances of mood or affect; 5) Pathological dependence, passivity, or agressivity; 6) Intense and unstable interpersonal relationships and impulsive and damaging behavior. Additionally, 12.08 requires that two of the following must result: 1) Marked restriction of activities of daily living; 2) Marked difficulties in maintaining social functioning; 3) Marked difficulties in maintaining concentration, persistence or pace; 4)Repeated episodes of decompensation, each of extended duration.

12.09 Substance Addiction Disorders - The required level of severity for these disorders is met when any of the following are satisfied: 1) Organic mental disorders; 2) Depressive syndrome; 3) Anxiety disorders; Personality disorders; 4) Peripheral neuropathies; 5) Liver damage; 6) Gastritis; 7) Pancreatitis; 8) Seizures.

to others and perform work requiring frequent contact with others will render that person unable to perform the job functions cited by the ALJ. (*Id.* at 8.)

The Commissioner counters these assertions by noting that the ALJ did not base his findings or his hypothetical to the vocation expert on Dr. Rummler's assessment of Schuh, as detailed in Exhibit 15F, but on the entire medical evidence of record and on the psychologist's determination that Schuh was moderately limited, as detailed in the Mental Residual Functional Capacity Assessment form completed by the psychologist (Exhibit 16F). (D.I. 20 at 28-29.) Moreover, asserts the Commissioner, the ALJ's decision to do so was "clearly supported by the record" and, therefore, justifiable. (*Id.* at 29.)

An extensive review of Schuh's medical history and the ALJ's decision, *supra*, leads to the conclusion that the ALJ did in fact have substantial evidence to support his findings. The Court also agrees with the appropriateness of the hypothetical question submitted to the vocation expert during the ALJ's September 12, 2000 hearing. In *Podedworny v. Harris*, the Court held that:

> [w]hile the ALJ may proffer a variety of assumptions to the expert, the vocational expert's testimony concerning a claimant's ability to perform alternative employment may only be considered for purposes of determining disability if the question accurately portrays the claimant's individual physical and mental impairments. Thus the expert must have evaluated claimant's particular impairments as contained in the record.

745 F.2d 210, 218 (3d Cir. 1984).

In the present case, the ALJ was inundated with medical evidence. As to Schuh's consultative examination with Dr. Rummler, the ALJ concluded that "Dr. Rummler's clinical

findings are not supportive of his conclusion that claimant's paranoid traits would probably limit him from functioning in a work environment[]" because "he was assessed with a Global Assessment of Functioning (GAF) scaled score of 55 ... [which] is indicative of moderate symptoms ... or moderate difficulty in social, occupational, or school functioning... ." (D.I. 11 at 21-22.) The Court finds this a persuasive reason to discount Dr. Rummler's assessment of Schuh. In addition, the Court finds Dr. Rummler's assessment, as did the ALJ, inconsistent with the totality of medical evidence in record. Accordingly, the Court holds that the ALJ's decision was not based on a defective hypothetical question and was in fact supported by substantial evidence.

V. CONCLUSION

For the reasons stated, the Court will grant defendant's motion (D.I. 19) and deny plaintiff's motion (D.I. 13). An appropriate order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ERIC P. SCHUH, Plaintiff, v. COMMISSIONER OF SOCIAL SECURITY, Defendant.	)	Civil Action No. 01-676-KAJ

ORDER

At Wilmington this 6th day of May, 2003,

For the reasons set forth in the Court's Memorandum Opinion of today's date in this matter,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment (D.I. 19) is GRANTED, and plaintiff's Motion for Summary Judgment (D.I. 13) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE