

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DANIEL E. BURTON, JR., :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 03-1147-JJF
 :
 JO ANNE B. BARNHART, :
 Commissioner of Social :
 Security, :
 :
 Defendant. :
 :
 :

Gary Linarducci, Esquire of GARY LINARDUCCI, ESQUIRE, New Castle, Delaware.
Attorney for Plaintiff.

Colm F. Connolly, Esquire, United States Attorney, and Douglas E. McCann, Esquire, Assistant United States Attorney, of the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.
Of Counsel: Donna L. Calvert, Esquire, Regional Chief Counsel, David F. Chermol, Esquire, Assistant Regional Counsel of the SOCIAL SECURITY ADMINISTRATION, Philadelphia, Pennsylvania.
Attorneys for Defendant.

MEMORANDUM OPINION

January 13, 2005

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is an appeal pursuant to 42 U.S.C. § 405(g) filed by Plaintiff, Daniel E. Burton, Jr., seeking review of the final decision of the Commissioner of the Social Security Administration denying Plaintiff's application for disability insurance benefits ("DIB") under Titles II of the Social Security Act (the "Act"), 42 U.S.C. §§ 401-433. Plaintiff has filed a Motion For Summary Judgment (D.I. 11) requesting the Court to enter judgment in Plaintiff's favor. In response to Plaintiff's Motion, Defendant has filed a Cross-Motion For Summary Judgment (D.I. 14) 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 dated July 24, 2003, will be affirmed.

BACKGROUND

I. Procedural Background

Plaintiff filed the instant application for DIB on January 9, 2002, alleging disability since January 25, 2001, due to seizures. (Tr. 92-94). Plaintiff's application was denied initially and upon reconsideration. (Tr. 72-75, 78-81). Plaintiff filed a timely request for an administrative hearing, and the A.L.J. held a hearing on July 2, 2003. (Tr. 27-53).

Plaintiff was represented by counsel at the hearing, and a vocational expert testified. Following the hearing, the A.L.J. issued a decision dated July 24, 2003, denying Plaintiff's claim. (Tr. 12-20). Plaintiff filed an appeal, and the Appeal's Council denied review. (Tr. 5-6, 7-8). Accordingly, the A.L.J.'s decision became the final decision of the Commissioner. Sims v. Apfel, 530 U.S. 103, 107 (2000).

After completing the process of administrative review, Plaintiff filed the instant civil action pursuant to 42 U.S.C. § 405(g) seeking review of the A.L.J.'s decision denying his claim for DIB. In response to the Complaint, Defendant filed an Answer (D.I. 8) and the Transcript (D.I. 9) of the proceedings at the administrative level.

Thereafter, Plaintiff filed a Motion For Summary Judgment and Opening Brief (D.I. 11, 12) in support of the Motion. In response, Defendant filed a Cross-Motion For Summary Judgment and a combined Opening and Answering Brief (D.I. 14, 15) requesting the Court to affirm the A.L.J.'s decision. Plaintiff waived his right to file a Reply Brief (D.I. 17), and therefore, this matter is fully briefed and ripe for the Court's review.

II. Factual Background

A. Plaintiff's Medical History, Condition and Treatment

At the time the A.L.J. issued his decision, Plaintiff was forty-four years old. Plaintiff is a high school graduate who

attended two years of college. (Tr. 31, 120). Plaintiff's past relevant work included employment as a tractor-trailer driver and a school bus driver. (Tr. 48).

Plaintiff alleges the following impairments: seizure disorder, hypertension, cervical disc herniation and a left shoulder fracture. Plaintiff was treated for these impairments by his primary care doctor, Kanchan Kotak, M.D., a neurologist, Joseph Schrandt, M.D., and a cardiologist, Joseph Pennington, M.D. (Tr. 15-17).

Plaintiff reported to Dr. Pennington on several occasions complaining of chest pain and pressure. Following testing, Dr. Pennington found that Plaintiff's heart was structurally normal, and therefore, Plaintiff had a "low" likelihood of coronary disease. (Tr. 182). Plaintiff's blood pressure was "fairly controlled" with Cardizem (Tr. 182), and at subsequent visits, Plaintiff was prescribed Diltiazem. Dr. Pennington noted an improvement in Plaintiff's complaints of chest pain and palpitations as a result of the Diltiazem. (Tr. 180). At subsequent visits, Plaintiff continued to report chest pain, particularly with lifting and walking. (Tr. 175). Dr. Pennington twice recommended that Plaintiff undergo a heart catheterization so that he could make a complete assessment of Plaintiff's condition. (Tr. 179, 175). Dr. Pennington stated in his progress notes that if the Plaintiff had normal coronary

arteries, then Plaintiff would be able to work. (Tr. 175). In January 2002, Plaintiff failed to show up for his catheterization, missed several appointments, and did not return phone calls. (Tr. 174). As a result of Plaintiff's non-compliance, notes from Dr. Pennington's office state "[d]o not fill disability papers." (Tr. 174). In April 2003, Plaintiff returned to Dr. Pennington. He underwent the recommended cardiac catheterization, and the results were normal. (Tr. 319, 365).

In addition, during his treatment with Dr. Pennington, Dr. Pennington completed a return to work certificate for Plaintiff. Although Dr. Pennington indicated that Plaintiff could not perform his usual occupation, Dr. Pennington indicated that Plaintiff was permitted to perform other work on a full time basis. (Tr. 324). This form was completed by Dr. Pennington a few days before Plaintiff's alleged disability onset date.

Plaintiff also underwent treatment for seizures. Although Plaintiff alleged that he stopped working as a truck driver in 1999 as a result of alleged disabling conditions, his medical records from as late as June 28, 2002 show that Plaintiff continued to work as a driver of an 18 wheel tractor trailer. (Tr. 130, 202, 206, 208). On that date, Plaintiff had an incident of syncope while working that resulted in a motor vehicle accident. (Tr. 202). Plaintiff left the hospital against medical advice because he wanted to resume working.

Plaintiff indicated that he would "try" to follow-up as an out-patient. (Tr. 203).

On September 10, 2002, Plaintiff received emergency treatment after fainting. (Tr. 225). When the paramedics arrived, Plaintiff was sitting on the floor in a postical state. (Tr. 237). Plaintiff indicated that he had experienced a seizure which was witnessed by his wife. (Tr. 228). Plaintiff indicated that he lost consciousness during the seizure and that it lasted from 3-5 minutes. Plaintiff was prescribed Dilantin and released the same day. (Tr. 234).

Also on the same day, Plaintiff was seen by Dr. Kanchan Kotak. Dr. Kotak indicated that Plaintiff was unable to return to work pending a neurology evaluation. (Tr. 249).

On September 27, 2002, Plaintiff was seen by N. Joseph Schrandt, M.D., a board certified neurologist. (Tr. 280). Dr. Schrandt indicated that it was likely that Plaintiff had epilepsy, but that he would need to evaluate him further. (Tr. 282). Dr. Schrandt continued Plaintiff on Dilantin and instructed him not to drive. (Tr. 282).

Plaintiff also underwent a consultative examination with Irena O. Stolar, M.D. in September 2002. (Tr 275-278). Consistent with his reports to Dr. Schrandt, Plaintiff reported that he had experienced two seizures in the past three months. (Tr. 275).

On January 11, 2003, Plaintiff required emergency treatment after experiencing a seizure. (Tr. 326). Plaintiff had a seizure both at home and at the emergency room. (Tr. 331). The emergency room seizure was reported as a grand mal seizure that lasted about two minutes. As a result of this seizure, Plaintiff fractured his left shoulder. (Tr. 331, 326). At the time of his admission to the hospital, Plaintiff admitted that he was not taking his Dilantin regularly. Hospital notes indicate that the amount of anti-seizure drug in Plaintiff's blood was so low it was "almost unrecordable." Plaintiff was diagnosed with a seizure resulting from noncompliance with his medication. (Tr. 331-332).

On June 16, 2003, Plaintiff returned to Dr. Schrandt who ordered a series of tests, including an MRI of the thoracic spine. Shortly thereafter, Dr. Schrandt completed a seizure residual functional capacity evaluation. Dr. Schrandt diagnosed Plaintiff with a seizure disorder, but equivocally expressed the number of seizures Plaintiff experienced as "?2 per month." (Tr. 384). Dr. Schrandt twice noted on the form that Plaintiff's non-compliance with medication was the likely cause of his seizures. Dr. Schrandt indicated that Plaintiff did not experience any definite side-effects from his anti-seizure medication and ultimately opined that Plaintiff could perform moderate and low stress work. (Tr. 386).

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

On July 2, 2003, the A.L.J. conducted a hearing on Plaintiff's application for benefits. At the hearing, Plaintiff was represented by counsel. Plaintiff testified that he experienced eight to twelve grand mal seizures per month. (Tr. 36, 45). Plaintiff also testified that he had side-effects from his medication, particularly weakness and nausea. (Tr. 40).

In addition to Plaintiff, a vocational expert testified. The vocational expert testified that Plaintiff's past work as a tractor-trailer driver was classified as a semiskilled job at a medium exertional level. (Tr. 48). The A.L.J. asked the vocational expert to assume a hypothetical individual with Plaintiff's age, education and work experience, and physically capable of lifting objects weighing up to 20 pounds with frequent lifting and carrying of objects weighing 10 pounds. The A.L.J. also asked the vocational expert to assume the individual could sit for periods of six hours without alternating positions in an 8 hour workday and have the ability to stand and walk for periods of 3 hours overall. The A.L.J. further specified that the individual would have the unlimited ability to push and pull with his upper, right, dominant extremity and that any jobs should have no significant bending, stooping, climbing, reaching, pushing or pulling with the non-dominant hand. The A.L.J. also limited the hypothetical individual to jobs that would avoid

heights and moving machinery. (Tr. 49). In response to the hypothetical, the vocational expert identified four jobs that would be available: (1) cafeteria cashier at the sedentary level with 134,600 jobs nationally and 900 locally; (2) storage rental clerk at the light level with 150,000 jobs nationally and 660 locally; (3) ticket checker at the sedentary level with 124,700 jobs nationally and 1,500 jobs locally; and (4) dealership cashier at the light level with 102,100 jobs nationally and 1,200 jobs locally.

The vocational expert was also questioned by Plaintiff's attorney. Plaintiff's attorney asked if Plaintiff would be precluded from working if he experienced two to three grand mal seizures a month, and the vocational expert responded that such an individual would be precluded from working. (Tr. 51).

In his decision dated July 24, 2003, the A.L.J. found that Plaintiff suffered from a seizure disorder, hypertension, cervical disc herniation and left shoulder fracture, all of which are "severe" impairments, but that those impairments do not meet or equal one of the listed impairments in 20 C.F.R. pt. 404, subpt. P. app. 1 (2003). (Tr. 19). The A.L.J. further found that Plaintiff retained the residual functional capacity to lift objects weighing up to 20 pounds with frequent carrying of objects up to 10 pounds, the ability to sit for periods of six hours without alternating positions, the ability to stand/walk

for periods of 2-3 hours overall in an 8 hour workday, and unlimited ability to push and pull with the dominant, upper right extremity. The A.L.J. also found that Plaintiff was limited nonexertionally in that he cannot work around hazards such as heights or moving machinery, and he cannot do jobs requiring significant bending, stooping, or climbing and no pushing/pulling with his left, non-dominant hand and arm. Based on these criteria, the A.L.J. found that Plaintiff retained the residual functional capacity to perform a significant range of light work. The A.L.J. then used the Grids as a framework and concluded that Plaintiff could perform a significant number of jobs in the national economy, including storage rental clerk, auto dealership cashier, ticket checker, and cafeteria cashier, and therefore, the A.L.J. concluded that Plaintiff was not disabled. (Tr. 20).

STANDARD OF REVIEW

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 that "[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

I. Evaluation Of Disability Claims

Within the meaning of social security law, a "disability" is

defined as the inability to do 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). To be found disabled, an individual must have a "severe impairment" which precludes the individual from performing previous work or any other "substantial gainful activity which exists in the national economy." 20 C.F.R. § 404.1505. In order to qualify for disability insurance benefits, the claimant must establish that he or she was disabled prior to the date he or she was last insured. 20 C.F.R. § 404.131, Matullo v. Bowen, 926 F.2d 240, 244 (3d Cir. 1990). The claimant bears the initial burden of proving disability. 20 C.F.R. § 404.1512(a); Podeworthy v. Harris, 745 F.2d 210, 217 (3d Cir. 1984).

In determining whether a person is disabled, the Regulations require the A.L.J. to perform a sequential five-step analysis. 20 C.F.R. § 404.1520. In step one, the A.L.J. must determine whether the claimant is currently engaged in substantial gainful activity. In step two, the A.L.J. must determine whether the claimant is suffering from a severe impairment. If the claimant fails to show that his or her impairment is severe, he or she is ineligible for benefits. Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999).

If the claimant's impairment is severe, the A.L.J. proceeds to step three. In step three, the A.L.J. must compare the medical evidence of the claimant's impairment with a list of impairments presumed severe enough to preclude any substantial gainful work. Id. at 428. If the claimant's impairment meets or equals a listed impairment, the claimant is considered disabled. If the claimant's impairment does not meet or equal a listed impairment, the A.L.J.'s analysis proceeds to steps four and five. Id.

In step four, the A.L.J. is required to consider whether the claimant retains the residual functional capacity to perform his or her past relevant work. Id. The claimant bears the burden of establishing that he or she cannot return to his or her past relevant work. Id.

In step five, the A.L.J. must consider whether the claimant is capable of performing any other available work in the national economy. At this stage the burden of production shifts to the Commissioner, who must show that the claimant is capable of performing other work if the claimant's disability claim is to be denied. Id. Specifically, the A.L.J. must find that there are other jobs existing in significant numbers in the national economy, which the claimant can perform consistent with the claimant's medical impairments, age, education, past work experience and residual functional capacity. Id. In making this

determination, the A.L.J. must analyze the cumulative effect of all of the claimant's impairments. At this step, the A.L.J. often seeks the assistance of a vocational expert. Id. at 428.

II. Whether The A.L.J.'s Decision Is Supported By Substantial Evidence

By his Motion, Plaintiff contends that the A.L.J.'s decision is not supported by substantial evidence. Specifically, Plaintiff contends that the A.L.J. erred in failing to accept Plaintiff's assertion that he experienced 2-3 grand mal seizures per month, which according to the testimony of the vocational expert would render Plaintiff unable to work. Plaintiff contends that his assertions of seizure frequency were supported by the assessment of Dr. Schrandt which reported Plaintiff's seizure frequency as "2 per month." Plaintiff points out that the A.L.J. did not ask for clarification of this notation, and contends that the A.L.J. rejected the opinion of Plaintiff's treating physician without explanation.

Reviewing the decision of the A.L.J. in light of the record evidence in this case, the Court concludes that the decision of the A.L.J. is supported by substantial evidence.¹ Contrary to

¹ Defendant urges the Court to consider this as a case under 20 C.F.R. § 404.1530 based on Plaintiff's non-compliance with medical treatment. Pursuant to this regulation, a claimant's non-compliance with medical treatment precludes an award of benefits. However, the A.L.J. did not base his decision on non-compliance under 20 C.F.R. § 404.1530, and instead took the decision through step five of the sequential evaluation finding Plaintiff not disabled because he retained the RFC to

Plaintiff's assertions, the A.L.J. did not reject the opinions of Plaintiff's treating physician, Dr. Schrandt. Rather, in reaching his decision, the A.L.J. accepted the opinion of Dr. Schrandt that Plaintiff could perform moderate and low stress jobs, that Plaintiff's medication non-compliance was a precipitating factor to his seizures, and that Plaintiff might miss work once a month due to his seizures. (Tr. 17). Because the A.L.J. did not reject the opinion of Plaintiff's treating physician, he was not required to provide an explanation for rejecting that opinion.

Plaintiff contends that the A.L.J. erred in interpreting Dr. Schrandt's "?2 per month" notation to mean that the frequency of Plaintiff's seizures is "questionably/possibly two a month." The Court disagrees with Plaintiff's assertion. The A.L.J.'s interpretation of Dr. Schrandt's notes is consistent with the medical evidence of record, including the medical records from Dr. Schrandt's office (Tr. 280-281), Plaintiff's reports to the

perform a significant number of jobs in the economy. Thus, while the claimant's non-compliance is relevant to the A.L.J.'s determinations, including Plaintiff's credibility and RFC assessments, the Court declines to base its decision in this appeal on grounds which were not relied upon by the A.L.J. in his decision. Securities & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (judicial review of an administrative agency requires "a judgment upon the validity of the grounds upon which the [agency] itself based its action"); Fagnoli v. Massanari, 247 F.3d 34, 44 (3d Cir. 2001) (recognizing applicability of Chenery to social security cases).

consultative physician, Dr. Stolar (Tr. 275-278), and Dr. Schrandt's indication on the same RFC assessment that Plaintiff would likely only be absent from work once per month. (Tr. 387).

The A.L.J. also properly evaluated Plaintiff's credibility and RFC, crediting those exertional and non-exertional limitations that were supported by the record and finding Plaintiff's testimony as to other non-exertional limitations to lack credibility when evaluated in light of the record evidence. In addition to the numerous instances of Plaintiff's non-compliance with his medication, his missed doctor's appointments, and his failure to comply with his doctor's instructions regarding needed testing (Tr. 174-175, 179, 319, 331-332, 365), the evidence also shows that Plaintiff continued to work as a truck driver as late as June 28, 2002, despite his assertion that he stopped working as a truck driver in 1999 due to disabling conditions. (Tr. 130, 202, 206, 208). Plaintiff also denied having any difficulty with seizures in September 2001, when he was trying to retain his truck driver's license with the State of Delaware. (Tr. 258). However, Plaintiff reported to disability services that he experienced disabling seizures since January 2001. (Tr. 92). Plaintiff also reported to disability services that his doctors advised him not to work, but the medical certification completed by Dr. Pennington, the office notes of Dr. Pennington, and the RFC completed by Dr. Schrandt all

indicate that Plaintiff was capable of returning to work.² (Tr. 175, 324, 386). In addition, Plaintiff testified at the hearing that he experienced side-effects from his anti-seizure medication, but Plaintiff's testimony was contradicted by Dr. Schrandt's report that Plaintiff did not experience any definite side-effects from his medication. (Tr. 386). The A.L.J. noted these and other inconsistencies between Plaintiff's testimony and the record evidence and gave sufficient reasons to support his determination that Plaintiff was not fully credible. See Fagnoli v. Massanari, 247 F.3d 34, 43 (3d Cir. 2001) (holding that A.L.J.'s credibility determinations are generally entitled to great weight and deference); Hirschfeld v. Apfel, 159 F. Supp. 2d 802, 811 (E.D. Pa. 2001) (recognizing that A.L.J. may discredit a claimant's complaints of disabling pain if "he affirmatively addresses the claim in his decision, specifies the reasons for rejecting it and has support for his conclusion in the record").

Having properly assessed Plaintiff's credibility and his RFC, the A.L.J. posed an adequate hypothetical to the vocational expert taking into account those limitations which were supported

² Although Drs. Pennington and Schrandt restricted Plaintiff from returning to his past work as a truck driver, both Drs. Pennington and Schrandt noted that Plaintiff could perform other work on a full-time basis. (Tr. 324, 386). Dr. Schrandt further qualified the type of work Plaintiff could perform as work involving a moderate or low stress level. (Tr. 386).

by the record. Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999); Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). The vocational expert identified several jobs which Plaintiff was capable of performing, and therefore, the A.L.J. correctly concluded that Plaintiff was not disabled within the meaning of the Act at step 5 of the sequential evaluation.

CONCLUSION

For the reasons discussed, Defendant's Cross-Motion For Summary Judgment will be granted, and Plaintiff's Motion For Summary Judgment will be denied. The decision of the Commissioner dated July 24, 2003 will be affirmed.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DANIEL E. BURTON, JR.,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No. 03-1147-JJF
	:
JO ANNE B. BARNHART,	:
Commissioner of Social	:
Security,	:
	:
Defendant.	:
	:
	:

O R D E R

At Wilmington, this 13th day of January 2005, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Cross-Motion For Summary Judgment (D.I. 14) is GRANTED.

2. Plaintiff's Motion For Summary Judgment (D.I. 11) is DENIED.

3. The final decision of the Commissioner dated July 24, 2003 is AFFIRMED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DANIEL E. BURTON, JR., :
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 Plaintiff, :
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JO ANNE B. BARNHART, :
Commissioner of Social :
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 Defendant. :
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JUDGMENT IN A CIVIL CASE

For the reasons set forth in the Court's Memorandum Opinion and Order dated January 13, 2005;

IT IS ORDER AND ADJUDGED that judgment be and is hereby entered in favor of Defendant, Jo Anne B. Barnhart, and against Plaintiff, Daniel E. Burton, Jr.

 JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

Dated: January 13, 2005

 Deborah L. Krett
(By) Deputy Clerk