

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETER G. COPELAND, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 03-425-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 Patricia C. Hannigan, Esquire, Assistant United States Attorney, of the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.
Of Counsel: James A. Winn, Esquire, Regional Chief Counsel, Region III, and Kelly C. Connelly, Esquire, Assistant Regional Counsel of the SOCIAL SECURITY ADMINISTRATION, Philadelphia, Pennsylvania.
Attorneys for Defendant.

MEMORANDUM OPINION

September 28, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is an appeal pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3), filed by Plaintiff, Peter G. Copeland, seeking review of the final decision of the Commissioner of the Social Security Administration denying Plaintiff's application for disability insurance benefits ("DIB") under Title II of the Social Security Act (the "Act"), 42 U.S.C. §§ 401-433, and supplemental security income ("SSI") under Title XVI of the Act, 42 U.S.C. § 1381-1383f. Plaintiff has filed a Motion For Summary Judgment (D.I. 13) requesting the Court to enter judgment in Plaintiff's favor, or in the alternative, to remand this matter to the A.L.J. In response to Plaintiff's Motion, Defendant has filed a Cross-Motion For Summary Judgment (D.I. 15) requesting the Court to affirm the Commissioner's decision. For the reasons set forth below, Defendant's Motion For Summary Judgment will be granted in part and denied in part, and Plaintiff's Motion For Summary Judgment will be granted in part and denied in part. The decision of the Commissioner dated February 21, 2003, will be affirmed in part and reversed in part and remanded to the A.L.J. for further findings and/or proceedings consistent with this Memorandum Opinion.

BACKGROUND

I. Procedural Background

Plaintiff filed applications for DIB and SSI on January 7,

2002, alleging disability since August 19, 2001 due to epileptic seizures and a heart condition (Tr. 92). Plaintiff's application was denied initially and upon reconsideration. (Tr. 50-51, 247, 249). Plaintiff filed a timely request for a hearing, and the A.L.J. held a hearing on February 5, 2003. (Tr. 31-49). Plaintiff was represented by counsel at the hearing, and a vocational expert testified. Following the hearing, the A.L.J. issued a decision on February 21, 2003, denying Plaintiff's claim. (Tr. 13-24). Plaintiff filed an appeal, and the Appeal's Council denied review. 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) and 1383(c)(3), seeking review of the A.L.J.'s decision denying his claim for DIB and SSI. In response to the Complaint, Defendant filed an Answer (D.I. 9) and the Transcript (D.I. 10) of the proceedings at the administrative level.

Thereafter, Plaintiff filed a Motion For Summary Judgment and Opening Brief (D.I. 14) in support of the Motion. In response, Defendant filed a Cross-Motion For Summary Judgment and a combined Opening and Answering Brief (D.I. 16) 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-eight years old. Plaintiff reported conflicting information with respect to his education, reporting at various times that he had a twelfth, tenth, eighth and seventh grade education. (Tr. 35, 98). Plaintiff had past relevant work experience in the skilled job of a welder. (Tr. 35, 37, 45). Although Plaintiff initially alleged disability due to seizures and a heart condition, Plaintiff now alleges disability primary due to mental retardation. (D.I. 18-34).

The medical evidence of record indicates that Plaintiff suffers from a seizure disorder, organic brain syndrome and degenerative disc disease of the lumbar spine. (Tr. 18). On August 16, 1995, Plaintiff was brought by ambulance to St. Francis Hospital after suffering a seizure. (Tr. 124-125). Plaintiff reported a history of seizure disorder beginning in early childhood. (Tr. 124). Plaintiff was given oral anti-convulsant medication and was discharged. (Tr. 124).

Approximately one year later, in August 1996, Plaintiff was seen by Irwin Lifrak, M.D. for a consultative examination performed at the request of the Disability Determination Service. Plaintiff reported to Dr. Lifrak that he experienced seizures

once a month for several minutes at a time and that he takes Dilantin, Tegretol and Gabapentin. Describing the nature of his seizures, Plaintiff indicated that they were sudden in nature and resulted in complete loss of consciousness with gross and uncontrolled motor activity, tongue biting and loss of bladder and bowel control. Plaintiff also reported that he experiences global headache and disorientation following his seizures.

Plaintiff's physical examination was not remarkable as Dr. Lifrak's findings were all within the normal ranges and limits. Upon neurological examination, Dr. Lifrak reported that Plaintiff was awake, alert and oriented to time, place and person. Dr. Lifrak indicated that Plaintiff responded appropriately to the questions asked of him and that he was able to recall two out of three digits after a period of approximately twenty minutes. (Tr. 131).

A Residual Functional Capacity Assessment completed on August 22, 1996, indicated that Plaintiff had no exertional limitations, no manipulative limitations, no visual limitations and no communicative limitations. (Tr. 133-136). The non-examining physician opined that Plaintiff would be limited in his ability to work at unprotected heights and that he should avoid exposure to hazards such as machinery and heights.

From June 1, 1998 until November 28, 2000, Plaintiff was seen at the Neurology Clinic at Wilmington Hospital. In March

1999, Plaintiff reported that he had not had a seizure for a year, but indicated that he felt tired and was having trouble sleeping. At visits in June and September 1999, Plaintiff continued to report that he had not experienced any seizures. Plaintiff's doctors continued him on Neurontin and Tegretol to control his seizure disorder.

In February 2000, Plaintiff complained of dizzy spells, sleeplessness and pain in his lower back and legs. Plaintiff indicated that his dizzy spells felt like the onset of a seizure, but Plaintiff did not report any seizures. (Tr. 148).

On March 8, 2000, Plaintiff underwent an MRI of the brain and lumbar spine. Images of Plaintiff's brain revealed no abnormalities. However, images of Plaintiff's spine indicated that he had degenerative disc disease at L4-L5 with disc herniation causing moderate to severe spinal canal stenosis and encroachment of the right existing L4 nerve root sleeve. Disc bulging was reported at L3-L4 causing moderate spinal canal stenosis. Plaintiff was referred to physical therapy and occupation therapy. (Tr. 146).

At a follow-up examination on March 28, 2000, Plaintiff reported continued back pain and that his legs "gave-out" when walking up stairs. Plaintiff reported that he had not had any seizures, but that he did have positive auras. (Tr. 144).

In May 2000, Plaintiff reported continued positive results

with his seizure medication. However, Plaintiff indicated that he had been fired from his job and could not start physical or occupational therapy because of insurance concerns and anxiety. (Tr. 142). Plaintiff's seizure medications were continued.

On June 15, 2001, Plaintiff sought treatment from Henrietta Johnson Medical Center because the Neurology Clinic at Wilmington Hospital closed. At this examination, Plaintiff reported that he had not had a seizure for two years. Plaintiff was referred to Douglas B. Gersh, M.D. for a neurological evaluation. (Tr. 165).

On July 9, 2001, Plaintiff was scheduled for an appointment with Dr. Gersh, but did not appear because he could not find his office. (Tr. 179). Plaintiff reported to Dr. Gersh on December 13, 2001, for the purpose of having a medical certification completed so that Plaintiff could have his driver's license reinstated. Dr. Gersh opined that Plaintiff had drug seeking behavior and was disheveled, loud, demanding and boisterous. According to Dr. Gersh, Plaintiff wanted a refill of his prescription for Tylenol with codeine that he reportedly received from the Emergency Room at Wilmington Hospital. (Tr. 172-173). Dr. Gersh noted that Plaintiff had experienced a seizure in the two months prior to his visit. Upon neurological examination, Plaintiff was able to recall three out of three items after a five minute delay and could spell a five letter word forward and backwards. (Tr. 173). Dr. Gersh completed Plaintiff's medical

certification and did not offer Plaintiff another appointment because he found his presence discomfoting. (Tr. 174).

On February 11, 2002, Plaintiff underwent a consultative examination with S. Mohammed Iqbal, Ph.D. Contrary to his disability report, Plaintiff reported to Dr. Iqbal that he attended special education in school and that his education "was probably up to the tenth grade." (Tr. 180). Plaintiff reported that he could not read or write and denied ever having a driver's license, although Plaintiff indicated that he could drive. Plaintiff reported that he was independent in his daily living activities, but stated that he experienced a seizure two weeks prior to his examination.

Upon examination, it was revealed that Plaintiff had a verbal I.Q. of seventy and a performance I.Q. of seventy. Dr. Iqbal indicated that Plaintiff was "showing an overall psychomotor retardation and slowness." (Tr. 182). According to Dr. Iqbal, Plaintiff had poor memory, memory gaps and difficulty paying attention. Dr. Iqbal noted that it appeared that Plaintiff experienced petit mal seizures that interrupted his concentration and memory. Memory test scores placed Plaintiff at or less than .1 percentile rank in every category of testing. Dr. Iqbal also administered the Vineland Adaptive Behavior Scales to determine Plaintiff's personal and social functioning. Results of this test put Plaintiff at the age capacity of five

and a half years in the communication domain and four and a half years in the socialization domain. However, Dr. Iqbal found that Plaintiff was capable of managing funds and was "streetwise," but also stated that he was functioning in the range of mild mental retardation. Dr. Iqbal diagnosed Plaintiff with organic brain syndrome secondary to congenital seizure disorder, but did not diagnose Plaintiff with mental retardation.

In completing a psychological functional capacities evaluation form, Dr. Iqbal found that even though Plaintiff was independent in his activities of daily living, he experienced moderate limitations in his daily activities. Dr. Iqbal also found moderate limitations in all psychological activities. (Tr. 185-186).

In February 2002, Dr. Iqbal's findings were reviewed by Pedro M. Ferreira, Ph.D., a state agency psychologist. (Tr. 197-214). Dr. Ferreira agreed with Dr. Iqbal that Plaintiff had an organic brain disorder, but not mental retardation. (Tr. 198, 201). However, Dr. Ferreira indicated that the profound memory impairment found by Dr. Iqbal was not consistent with Plaintiff's history, activities of daily living or employment history. Dr. Ferreira noted that Plaintiff was not compliant with his medication and found Plaintiff to be less than fully credible. Dr. Ferriera also found that Plaintiff did not make an honest effort to complete memory testing in Dr. Iqbal's office. Dr.

Ferriera assessed Plaintiff's abilities and found that Plaintiff was able to perform light work. (Tr. 213)

In March 2002, Plaintiff was seen at Henrietta Johnson Medical Center. The examining doctor found Plaintiff's mental status to be fragmented and indicted that it was difficult to follow his thought process. The treating doctor noted that Plaintiff's last seizures were in March and June of 2001, and that Plaintiff sought a medical certification to obtain his driver's license.

In August 2002, Carlene Tucker-O'Kine, Ph.D., a state agency psychologist, reviewed the medical evidence of record and completed a second mental RFC and psychiatric review technique form. Dr. Tucker-O'Kine also diagnosed Plaintiff with organic mental disorder, not mental retardation. Dr. Tucker-O'Kine opined that Plaintiff was capable of performing simple work. (Tr. 241).

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

On February 5, 2003, the A.L.J. conducted a hearing on Plaintiff's application for benefits. At the hearing, Plaintiff was represented by counsel. In addition to Plaintiff, a vocational expert testified. The vocational expert testified that Plaintiff's past work as a welder was skilled, heavy work. The A.L.J. asked the vocational expert to consider a hypothetical individual with Plaintiff's age and work experience who could

lift up to 20 pounds occasionally and 10 pound frequently, could stand, sit and/or walk for up to six hours and could not work with hazardous heights or dangerous moving machinery. The A.L.J. further offered that the hypothetical person was capable of spelling a five letter word forwards and backwards, had normal recall on formal testing and was able to understand, remember and carry out simple instructions. Considering this hypothetical, the vocational expert testified that such an individual would be capable of performing unskilled, sedentary and light work including sedentary assembler with 490 positions locally and 161,000 positions nationally, garment sorter or classifier, with 200 positions locally and 68,000 nationally and institutional cleaner with 1,2000 jobs locally and 430,000 nationally. The vocational expert also indicated that a number of other similar positions existed, but he did not list them.

On cross-examination, the A.L.J. asked the vocational expert to add back pain and a seizure disorder necessitating the employee to miss work one or two days a month. In response, the vocational expert indicated that most employers would consider these absences to be excessive. (Tr. 47).

In his decision dated February 21, 2003, the A.L.J. found that Plaintiff suffered from the "severe" conditions of seizure disorder, organic brain syndrome and degenerative disc disease of the lumbar spine, but that these conditions did not meet or equal

one of the listed impairments in 20 C.F.R. pt. 404, subpt. P. app. 1 (2003). (Tr. 18). The A.L.J. further found that Plaintiff retained the residual functional capacity to lift objects weighing up to 20 pounds with frequent lifting or carrying of objects weighing up to ten pounds. The A.L.J. also found that Plaintiff could sit and stand/walk for period of six hours in an eight hour day. The A.L.J. found that Plaintiff was capable of understanding, remembering and carrying out simple instructions, and that Plaintiff was limited nonexertionally from working around hazards such as unprotected heights and moving or dangerous equipment. Based on these findings, the A.L.J. concluded that Plaintiff had the residual functional capacity to perform a significant range of light work. Using the Grids as a framework for his decision and relying on the testimony of the vocational expert, the A.L.J. concluded that Plaintiff was not disabled, because he could perform a significant number of jobs in the national economy, including the jobs of assembler, laundry sorter and institutional cleaner.

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), 1382(c)(a)(3). 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, 416.905. 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), 416.912(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, 416.920. 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 (1) failing to conclude that Plaintiff met Listing 12.05 of the Listing of Impairments; (2) failing to include all of Plaintiff's non-exertional limitations in his assessment of Plaintiff's residual functional capacity; and (3) posing an inaccurate hypothetical question to the vocational expert. The Court will consider each of Plaintiff's arguments in turn.

A. Whether The A.L.J. Erred In Applying Listing 12.05 To Plaintiff And Concluding That Plaintiff Did Not Meet The Requirements For That Listing

Plaintiff contends that the A.L.J. should have concluded that he was disabled at step three of the sequential evaluation. Specifically, Plaintiff contends that he presented sufficient evidence to establish that he suffered from "mental retardation" as defined in Listing 12.05. 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05.

In order to meet a listed impairment, the plaintiff must demonstrate that his impairment meets all of the criteria for the listing. Sullivan v. Zebley, 493 U.S. 521, *530 (1990). An impairment that meets only some of the listed criteria, "no matter how severe[], does not qualify." Id. The requirements of Listing 12.05(C) are as follows:

Listing 12.05. Mental retardation. Mental retardation [which] refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

* * *

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function . . .

20 C.F.R. pt. 404, subpt. P, app. 1, § 12.05(C) (2003) (emphasis added).

Plaintiff contends that he satisfied the criteria for Listing 12.05(C), because Dr. Iqbal determined that Plaintiff had a verbal IQ of 70, a performance IQ of 70 and a full scale IQ of 67. Plaintiff also contends that his hearing testimony coupled with Dr. Iqbal's diagnosis that Plaintiff suffered from mild mental retardation satisfies the requirement that Plaintiff demonstrate that he suffered from mental retardation before age 22.

The A.L.J. expressly considered whether Plaintiff satisfied the criteria of Listing 12.05(C) and concluded that he did not.

Reviewing the A.L.J.'s decision in light of the record evidence, the Court concludes that the A.L.J.'s decision is supported by substantial evidence. Although Dr. Iqbal opined during the course of Plaintiff's mental status examination that Plaintiff was cognitively functioning in the range of "mild mental retardation," Dr. Iqbal did not diagnose Plaintiff with mental retardation. Instead, Dr. Iqbal diagnosed Plaintiff with organic brain syndrome secondary to congenital seizure disorder and seizure disorder of congenital type. Indeed, it is evident that Dr. Iqbal's reference to mild mental retardation described Plaintiff's then current cognitive functioning, and therefore, Dr. Iqbal's suggestion of mental retardation does not satisfy the criteria that mental retardation be present before the age of 22. Further, as the A.L.J. observed, there is no other medical evidence from any source diagnosing Plaintiff with mental retardation, and both state agency reviewing physicians, Dr. Tucker-O'Kine and Dr. Ferreira, declined to diagnose Plaintiff with mental retardation. See Maggard v. Apfel, 167 F.3d 376, 380 (7th Cir. 1999) (affirming A.L.J.'s decision that plaintiff did not meet criteria for Listing 12.05(C) because, among other things, he was never diagnosed with mental retardation); Paschel v. Apfel, 2000 WL 1468742, *6 (N.D. Ill. Sept. 29, 2000) (same); Akopyan v. Sullivan, 1991 WL 142619, *1 (9th Cir. July 29, 1991) (unpublished) (same). Accordingly, the Court concludes that the A.L.J. correctly found that Plaintiff did not meet the criteria

for Listing 12.05(C).

B. Whether The A.L.J. Failed To Include All Of Plaintiff's Non-Exertional Limitations In His Residual Functional Capacity Assessment

"[R]esidual functional capacity ["RFC"] is defined as that which an individual is still able to do despite the limitations caused by his or her impairment(s)." Fargnoli v. Massanari, 247 F.3d 34, 41 (3d Cir. 2001). When determining an individual's RFC at step four of the sequential evaluation, the A.L.J. must consider all relevant evidence including medical records, observations made during medical examinations, descriptions of limitations by the claimant and others, and observations of the claimant's limitations by others. Id. Before an individual's RFC can be expressed in terms of an exertional level of work, the A.L.J. "must first identify the individual's functional limitations or restrictions and assess his or her work related abilities on a function by function basis." SSR 96-8p. The RFC must also address both the exertional and non-exertional capacities of the individual. Id. Non-exertional capacity refers to "all work-related limitations and restrictions that do not depend on an individual's physical strength." Id. Examples of work-related non-exertional limitations that are psychological or mental in nature include: difficulty functioning due to nervousness, anxiety and depression; difficulty concentrating and maintaining attention; difficulty understanding, carrying out and/or remembering detailed instructions; difficulty making

appropriate judgments in work-related decisions; difficulty responding appropriately to supervision, co-workers and work situations; and difficulty in coping with changes in a routine work setting. Id.; see also 20 C.F.R. § 1469(a)(c).

By his Motion, Plaintiff contends that the A.L.J. failed to include all of Plaintiff's non-exertional limitations in his residual functional capacity assessment. Specifically, Plaintiff contends that the A.L.J. did not consider Dr. Iqbal's findings that Plaintiff had (1) the communication skills of a five year old; (2) the socialization skills of a four and a half year old; (3) difficulty concentrating and paying attention; (4) memory problems; (5) a moderate¹ degree of impairment in his (a) ability to relate to other people, (b) restrictions of daily activities, (c) deterioration of personal habits, (e) constriction of interests, (f) ability to understand simple, primarily oral instructions, (g) ability to carry out instructions under ordinary supervision, and (h) ability to perform routine, repetitive tasks under ordinary supervision; and (6) a moderately severe² degree of impairment in his (a) ability to sustain work performance and attendance in a normal work setting, and (b) in

¹ As used in the assessment form completed by Dr. Iqbal, the term "moderate" is defined as "an impairment which affects but does not preclude ability to function." (Tr. 186),

² As used in the assessment form completed by Dr. Iqbal, the term "moderately severe" refers to "an impairment which seriously affects ability to function." (Tr. 186).

his ability to cope with the pressures of ordinary work (i.e. meeting quality and production norms).

The A.L.J.'s RFC assessment must "be accompanied by a clear and satisfactory explanation of the basis on which it rests." Fargnoli, 247 F.3d at 41. In weighing the evidence, the A.L.J. must give some indication of the evidence which he rejects and his reason for discounting the evidence. Burnett v. Comm'r of Soc. Sec. Admin., 220 F.3d 112, 121 (3d Cir. 2000); see also SSR 96-8p. "In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981).

In this case, it appears that the A.L.J. rejected the non-exertional limitations identified by Dr. Iqbal during his consultative examination of Plaintiff and credited the findings of the non-examining, reviewing physicians, Drs. Tucker-O'Kine and Ferreira. However, the A.L.J. did not, in the Court's view, adequately explain his reasons for rejecting the findings of Dr. Iqbal's consultative examination. With regard to Dr. Iqbal's examination, the A.L.J. stated:

[T]he claimant provided that source [Dr. Iqbal] with (another) history inconsistent with known facts and personal histories provided to other sources. The state agency adjudicators, correctly so, did not adopt the report of the consultative examiner.

The A.L.J. did not specify what history he is referring to and did not explain how the Plaintiff's rendition of his medical

history impacted Dr. Iqbal's findings regarding his then-current non-exertional limitations. Based on the reports of Dr. Ferreira, a reviewing, non-examining physician, the Commissioner suggests that Plaintiff did not use his full efforts on testing performed by Dr. Iqbal. However, Dr. Iqbal made no such observations during his testing. To the contrary, Dr. Iqbal reported that Plaintiff appeared to be trying to pay attention, but that he was easily distracted and suffered from memory gaps and blanks. Further, Dr. Ferreira's opinion regarding Plaintiff's lack of effort on testing was linked to the memory portion of Plaintiff's testing. Dr. Ferreira did not make any connection between Plaintiffs' effort and his results in other areas tested by Dr. Iqbal.

It appears to the Court, that the A.L.J. was concerned about Plaintiff's credibility overall based on his inconsistent reports of seizure frequency. However, the parties have not challenged the A.L.J.'s credibility determination of Plaintiff, and therefore, the Court makes no findings in this regard. Indeed, it may well be that the A.L.J. was justified in discounting Plaintiff's testimony based on his inconsistent reports of seizure frequency; however, the rejection of Plaintiff's testimony as credible does not explain the A.L.J.'s rejection of Dr. Iqbal's assessments, which were based on both his observations during examination and the testing results of Plaintiff. Dr. Iqbal was an examining state agency physician,

and therefore, his opinion is ordinarily entitled to more weight than a non-examining source. 20 C.F.R. § 404.1527(d)(1). Accordingly, the Court concludes that the A.L.J. failed to adequately explain his reasons for rejecting the non-exertional limitations identified by Dr. Iqbal, and therefore, the Court concludes that remand is appropriate for the A.L.J. to more specifically identify and explain the evidence he is crediting and rejecting.

C. Whether The A.L.J.'s Hypothetical Question To The Vocational Expert Was Inadequate

Plaintiff also contends that the hypothetical question posed to the vocational expert was inadequate, because it did not include all of the limitations identified by Dr. Iqbal. For the response of a vocational expert to be considered substantial evidence supporting the A.L.J.'s decision, the hypothetical question posed to the vocational expert must reflect all of the claimant's impairments which are supported by the record. Burns v. Barnhart, 312 F.3d 113, 123 (3d Cir. 2002); Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). The A.L.J.'s hypothetical question may not consist of only a generalized statement regarding the individual's limitations. Stevens v. Barnhart, 2003 WL 22016922 (E.D. Pa. June 27, 2003).

The question of whether the A.L.J. properly included the limitations identified by Dr. Iqbal in his hypothetical question to the vocational expert necessarily overlaps with the issue

regarding whether the A.L.J. properly rejected Dr. Iqbal's assessment. Because the A.L.J. did not identify and provide adequate explanation regarding the evidence he credited and rejected, the Court is unable to determine whether Dr. Iqbal's limitations should have been included in the hypothetical question to the vocational expert. On remand, the A.L.J. should either include these limitations in his hypothetical question or adequately explain why they are not being credited. See e.g. Stevens, 2003 WL 22016922 at 7.

CONCLUSION

For the reasons discussed, Defendant's Motion For Summary Judgment will be granted in part and denied in part, and Plaintiff's Motion For Summary Judgment will be granted in part and denied in part. The decision of the Commissioner dated February 21, 2003 will be affirmed in part and reversed in part and remanded for further findings and/or proceedings consistent with this Memorandum Opinion.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETER G. COPELAND, :
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 Plaintiff, :
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 v. : Civil Action No. 03-425-JJF
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 JO ANNE B. BARNHART, :
 Commissioner of Social :
 Security, :
 :
 Defendant. :

O R D E R

At Wilmington, this 28th day of September 2004, 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. 18) is GRANTED IN PART AND DENIED IN PART.

2. Plaintiff's Motion For Summary Judgment (D.I. 14) is GRANTED IN PART AND DENIED IN PART.

3. The final decision of the Commissioner dated July 30, 2002 is AFFIRMED IN PART, and REVERSED IN PART AND REMANDED for further findings and/or proceedings consistent with this Memorandum Opinion.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETER G. COPELAND, :
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 Plaintiff, :
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 v. : Civil Action No. 03-425-JJF
 :
 JO ANNE B. BARNHART, :
 Commissioner of Social :
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 :
 Defendant. :

JUDGMENT IN A CIVIL CASE

For the reasons set forth in the Court's Memorandum Opinion and Order dated September 28, 2004;

IT IS ORDER AND ADJUDGED that judgment be and is hereby entered in favor of Defendant, Jo Anne B. Barnhart and against Plaintiff, Peter G. Copeland with respect to the A.L.J.'s conclusion that Plaintiff did not meet the criteria for 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05(c), and judgment be and is hereby entered against Defendant, Jo Anne B. Barnhart, and in favor of Plaintiff, Peter G. Copeland on the remaining issues raised by Plaintiff.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

Dated: September 28, 2004

Susan S. Baer
(By) Deputy Clerk