

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VIRGIL N. MANGRUM,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No. 04-149-JJF
	:
JO ANNE B. BARNHART,	:
Commissioner of Social	:
Security,	:
	:
Defendant.	:
	:
	:

Virgil N. Mangrum, Pro Se Plaintiff.

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

O P I N I O N

June 20, 2005
Wilmington, Delaware


Farnan, District Judge.

Presently before the Court is an appeal pursuant to 42 U.S.C. § 405(g) filed by Plaintiff, Virgil N. Mangrum, seeking review of the final decision of the Commissioner of the Social Security Administration denying his application for supplemental security income ("SSI") under Title XVI of the Social Security Act (the "Act"), 42 U.S.C. §§ 1381-1383. Plaintiff has filed a Motion For Summary Judgment (D.I. 14) 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. 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, and Plaintiff's Motion For Summary Judgment will be denied. The decision of the Commissioner dated November 8, 2002, will be affirmed.

BACKGROUND

I. Procedural Background

This appeal addresses Plaintiff's second application for SSI, protectively filed on February 1, 2001. Consistent with his first and third applications for SSI which were denied, Plaintiff alleges in his second application that he has been suffering from a disability since August 1998 due to back pain. Plaintiff's second application was denied initially and on reconsideration. Plaintiff filed a timely request for an administrative hearing, and the

A.L.J. held a hearing on August 14, 2002. Plaintiff was represented by counsel at the hearing, and a vocational expert testified. Following the hearing, the A.L.J. issued a decision dated November 8, 2002, denying Plaintiff's claim for benefits. 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) seeking review of the A.L.J.'s decision denying his claim for SSI. In response to the Complaint, Defendant filed an Answer and the Transcript of the proceedings at the administrative level.

Thereafter, Plaintiff filed a Motion For Summary Judgment and Opening Brief in support of the Motion. In response, Defendant filed a Cross-Motion For Summary Judgment and a combined Opening and Answering Brief requesting the Court to affirm the A.L.J.'s decision. In lieu of a reply brief, Plaintiff filed a document entitled "Motion To Dismiss" (D.I. 17) seeking to dismiss Defendant's papers on the grounds that Joanne Barnhart is not a defendant in this case.¹

¹ Pursuant to Federal Rule of Civil Procedure 25(d)(1) and 42 U.S.C. § 405(g), Jo Anne Barnhart is the party against whom this action should have been brought because she succeeded Acting Commissioner Larry G. Massanari effective November 14, 2001, and is the party responsible for responding to Plaintiff's motion. Accordingly, the Court will deny Plaintiff's Motion To Dismiss the papers filed by Defendant.

II. Factual Background

A. Plaintiff's Medical History, Condition and Treatment

At the time the A.L.J. issued her decision, Plaintiff was forty-five years old. Plaintiff has a GED and a certificate in computer literacy that he received after completing a 12 week training course. Plaintiff's past relevant work ranged from the light to medium exertional levels and was for the most part unskilled. Plaintiff contends that most jobs he performed were "under the table" and that he did not report income from these jobs.

Plaintiff contends that his disabling back pain resulted from an automobile accident on August 1, 1998. Plaintiff has been diagnosed with back strain, but there is no diagnostic evidence of any serious spinal injury. (Tr. 155, 168, 178, 183, 189, 198, 222, 224, 228, 235, 237). An MRI and CT Scan of Plaintiff's thoracic spine taken in 1999 were negative (Tr. 192, 194, 228, 335), and a CT scan of the same region taken in January 2001 was also negative. (Tr. 336). An MRI of Plaintiff's lumbar spine in April 2001 showed common degenerative changes. (Tr. 384, 394).

Plaintiff obtained several disability certificates from Ross M. Ufberg, M.D., which indicate that Plaintiff is temporarily totally incapacitated. However, several of these forms indicate that Plaintiff is only temporarily incapacitated insofar as his previous job duties are concerned. (Tr. 187, 188, 190, 191, 196,

220, 221, 226, 229, 230, 231, 233). In August 2002, a second physician, S. Hoxhaj, M.D. also provided Plaintiff with two medical certifications for the purpose of obtaining public assistance benefits which indicate that Plaintiff is not permitted to perform any work on a full-time basis. (Tr. 444-445). Residual Functional Capacity Assessments completed by state agency physicians indicate that Plaintiff retains the RFC to perform work ranging from the light to medium exertional levels. (Tr. 170-177, 199-208, 209-219, 356-368, 434-443).

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

On August 14, 2002, the A.L.J. conducted a hearing on Plaintiff's application for benefits. Plaintiff was represented at the hearing by counsel and a vocational expert testified.

In her decision dated November 8, 2002, the A.L.J. found that Plaintiff suffered from a severe lumbosacral sprain and strain, but that his condition did not meet or equal one of the listed impairments in 20 C.F.R. pt. 404, subpt. P. app. 1 (2003). (Tr. 22). The A.L.J. further found that Plaintiff's subjective complaints of pain were "minimally credible" and that he exaggerated the intensity, persistence and limiting effects of his symptoms. The A.L.J. concluded that Plaintiff retained the residual functional capacity for work, except for frequent lifting and carrying of more than ten pounds, occasional lifting and carrying more than twenty pounds and work which would not allow him

to alternate between sitting and standing at will. Based on this RFC, the A.L.J. concluded that Plaintiff could perform his past relevant work as a cashier/clerk. The A.L.J. also concluded that Plaintiff could perform light and sedentary work in the nature of an order clerk, customer service representative or cashier, and that substantial numbers of these jobs existed locally and regionally.

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. § 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. § 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. § 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 (1) certain medical reports were not contained in the transcript, (2) that the A.L.J. failed to consider his limitations, and (3) that the A.L.J. erred in concluding that he could return to his past relevant work as a clerk/cashier.

With regard to his first claim, Plaintiff states:

1. The decision that was made on June 29, 2004, stating that administration received Dr. Yakov Koyfman, MD, medical report on 12-08-2003, and again they denied claimant claim, therein exhibit #1.
- A. Plaintiff objects Your Honor; and states that claimants medical reports from this Dr., are not in the transcripts.

(D.I. 14 at 1).

To the extent Plaintiff contends that the June 29, 2004 reconsideration determination was erroneous because medical records were not contained in the transcript, the Court cannot review Plaintiff's claim. The application leading to the June 29, 2004 denial of Plaintiff's request for reconsideration is not before the Court and must be challenged separately by Plaintiff.

With regard to Plaintiff's second claim that the A.L.J. failed to consider his limitations on his ability to stand and walk and his episodes of drowsiness, the Court concludes that Plaintiff's claim is without merit. "[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, 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).

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 or she rejects and his or her 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).

Reviewing the A.L.J.'s decision in light of this standard, the Court concludes that the A.L.J. properly accounted for those limitations which were supported by the record and adequately explained her reasons for discounting the medical certifications of disability from Plaintiff's physicians. Under the Regulations, a statement by a physician that a claimant is "disabled" or "unable to work" is not determinative of the claimant's disability status for the purposes of a legal determination of "disability". 20 C.F.R. § 416.927(e). As the A.L.J. correctly noted, the certifications of Plaintiff's physicians were conclusory statements of disability, unsupported by any medical explanation or clinical or diagnostic findings. In these circumstances, the Court concludes that the A.L.J. did not err in declining to give these certifications any specific weight.

In addition, the Court concludes that the A.L.J. did not err in declining to credit Plaintiff's testimony regarding his exertional and non-exertional limitations. As the A.L.J. noted, Plaintiff's testimony was inconsistent with the medical evidence in the record, including the results of diagnostic tests and the reports of state agency physicians, as well as with Plaintiff's testimony concerning his daily activities. As for Plaintiff's complaints of drowsiness, the Third Circuit has observed that "[d]rowsiness often accompanies the taking of medication, and it

should not be viewed as disabling unless the record references serious functional limitations.'" Rutherford, 399 F.3d at 555 (citations omitted). The record contains no credible evidence that Plaintiff suffers from any serious functional limitations, and therefore, the Court concludes that the A.L.J.'s decision to disregard Plaintiff's complaints of drowsiness was not erroneous. Because the A.L.J. adequately explained the basis for her assessment of Plaintiff's credibility and that basis is supported by substantial evidence, the Court concludes that it is entitled to deference. Fagnoli v. Massanari, 247 F.3d 34, 43 (3d Cir. 2001); Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993).

To the extent Plaintiff challenges the A.L.J.'s conclusion that he could return to his past relevant work, the Court also concludes that the A.L.J.'s decision was not erroneous and was supported by substantial evidence. The only medical opinions in the record providing a specific RFC assessment for Plaintiff indicate that he retained the capacity for a range of medium to light work. Although these opinions are rendered by state agency physicians, the A.L.J. did not err in crediting them where, as here, they are not contradicted by any credible medical evidence.²

² See also Jones v. Sullivan, 954 F.2d 125, 128-129 (3d Cir. 1991) (upholding A.L.J.'s determination that treating physician report was not controlling where report was contradicted by opinions of non-examining state agency physicians); Masser v. Sullivan, 1992 WL 368489, *2 (E.D. Pa. Dec. 4, 1992) (citing Jones and holding that "[o]pinions of non-treating physicians are entitled to substantial weight at least

See Berrios Lopez v. Secretary of Health and Human Servs., 951 F.2d 427, 430 (1st Cir. 1991) (recognizing propriety of relying on reports of non-examining physicians where their reports are only record evidence discussing claimant's impairments in terms of functional limitations). Further, the A.L.J. adjusted the RFC's of the state agency physicians to account for certain lifting and sit/stand limitations, and posed a hypothetical question to the vocational expert adequately accounting for Plaintiff's RFC and those limitations which were credible and supported by the record. Rutherford v. Barnhart, 399 F.3d 546, 554 (3d Cir. 2005). The vocational expert concluded that such a hypothetical plaintiff could perform his past relevant work as a cashier. In the alternative, the A.L.J. asked the vocational expert to consider other jobs in the national economy, and based on this testimony, the A.L.J. concluded that Plaintiff could perform several other jobs in the local and national economy. Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987) (recognizing that vocational expert testimony constitutes substantial evidence for purposes of judicial review where the testimony is in response to proper hypothetical question which include claimant's credible impairments). Because the A.L.J.'s decision was adequately explained and supported by substantial evidence, the Court concludes that it was not

in the absence of a well-supported opinion to the contrary from a treating physician").

erroneous.³ Accordingly, the Court will grant Defendant's Cross-Motion For Summary Judgment and deny Plaintiff's Motion For Summary Judgment.

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 November 8, 2002 will be affirmed.

An appropriate Order will be entered.

³ Plaintiff also contends that the A.L.J.'s decision that he can perform work is erroneous, because he cannot get hired by any employer. However, the lack of an actual job opening or the inability to actually be hired is not relevant to a disability determination, 20 C.F.R. § 416.966(a)-(c), and therefore, Plaintiff's argument does not provide a cognizable basis upon which to challenge the A.L.J.'s decision.

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FOR THE DISTRICT OF DELAWARE

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Plaintiff,	:
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v.	: Civil Action No. 04-149-JJF
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JO ANNE B. BARNHART,	:
Commissioner of Social	:
Security,	:
	:
Defendant.	:
	:
	:

ORDER

At Wilmington, this 20 day of June 2005, for the reasons discussed in the Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion To Dismiss (D.I. 17) the papers filed by Defendant is DENIED.
2. Defendant's Cross-Motion For Summary Judgment (D.I. 15) is GRANTED.
3. Plaintiff's Motion For Summary Judgment (D.I. 14) is DENIED.
4. The final decision of the Commissioner dated November 8, 2002 is AFFIRMED.


 UNITED STATES DISTRICT JUDGE

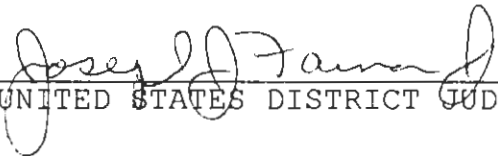
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	:
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JUDGMENT IN A CIVIL CASE

For the reasons set forth in the Court's Opinion and Order dated June 20, 2005;

IT IS ORDER AND ADJUDGED that judgment be and is hereby entered in favor of Defendant, Jo Anne B. Barnhart, and against Plaintiff, Virgil N. Mangrum.


 UNITED STATES DISTRICT JUDGE

Dated: June 20, 2005


 (By) Deputy Clerk