

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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on 7/15/98
MARIA CANDELARIA

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GARTH FORBES,

Plaintiff,

97 CV 0215 (RJD)

- against -

MEMORANDUM & ORDER

JOHN J. CALLAHAN,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.
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DEARIE, District Judge.

Pro se plaintiff Garth Forbes, born January 5, 1946, worked as a metal worker in a tile factory for approximately two years in the early 1980s and then as a construction worker from the late 1980s until 1991. Tr. 73, 77. On April 11, 1994, plaintiff filed an application for supplemental security income benefits, alleging disability since November 20, 1991 due to diabetes mellitus and poor vision. Tr. 69. This application was denied initially and on reconsideration. Tr. 48, 63.

On July 19, 1995, the administrative law judge ("ALJ") held a hearing at which plaintiff appeared pro se. Tr. 20-29. In his October 31, 1995 decision, the ALJ found that plaintiff was not disabled. Tr. 9-14. The decision of the ALJ became final on October 8, 1996 when the Appeals Council denied plaintiff's request for review. Tr. 2-3. This action followed.

¹ John J. Callahan became Acting Commissioner of Social Security effective March 1, 1997. He is therefore automatically substituted as the defendant in this action. Fed R. Civ. P. 25(d); 42 U.S.C. § 405(g).

Medical Evidence

In March 1994, plaintiff was admitted to the Staten Island University Hospital where he was diagnosed with insulin-dependent diabetes mellitus. Tr. 91. Plaintiff's discharge summary indicated no restrictions on his activities. Id. Plaintiff was placed on a diabetic diet and prescribed insulin and micronase. Id. Nothing in the hospital record indicated any complications caused by plaintiff's diabetes. Tr. 91-97.

On April 5, 1994, plaintiff was examined by Dr. Emmanuel Ampedu of HS Sytems Inc. Tr. 101-03. Dr. Ampedu found no complications arising from plaintiff's diabetes. Tr. 101. Dr. Ampedu noted that a tuberculosis skin test was positive, however, he noted no secondary symptoms of tuberculosis. Id. Chest x-rays were negative. Tr. 101, 106. He also found plaintiff to be both near and far sighted, for which he prescribed glasses. Tr. 101. Dr. Ampedu concluded that his physical examination and laboratory findings are not "compatible with [plaintiff's] complaints." Tr. 101. Dr. Ampedu did not indicate any potential limitations but found plaintiff "temporarily disabled/unemployable" for three months. Tr. 103.

On June 8, 1994, plaintiff was examined by Dr. Peter E. Graham, the first of two consultative examinations performed at the request of the New York State Department of Social Services. Tr. 109-112. Dr. Graham found plaintiff to be in "fair" condition. Tr. 112. He found plaintiff's visual acuity to be 20/25 in both eyes. id. Plaintiff's muscle strength and dexterity were normal. Tr. 111. Dr. Graham concluded that plaintiff has no physical abnormalities, and he "is able to sit, stand, walk, lift, carry, handle objects, hear, speak and travel." Tr. 112. Dr. Graham noted no physical signs of diabetes, alcohol or drug abuse, but he referred plaintiff for psychiatric evaluation "due to his previous history of psychiatric disorder." Id.

On June 9, 1994, Dr. Solomon Miskin conducted plaintiff's psychiatric examination. Tr. 115-17. Dr. Miskin found no "overt evidence of thought disorder." Tr. 116. Plaintiff exhibited some difficulties with his memory, but both recent and remote recall were "grossly intact." Id. Dr. Miskin diagnosed both polysubstance and alcohol abuse and dependence. Id. Dr. Miskin also diagnosed a mild case of organic mental syndrome with dementia. Id. He suggested an outpatient rehabilitation program following detoxification. Tr. 117. Dr. Miskin concluded that plaintiff had "a fair ability to understand, carry on and remember instructions and a fair ability to respond appropriately to supervision, co-workers and moderate pressures in a work setting." Tr. 116.

On August 28, 1995, Dr. Antonio Y. DeLeon conducted a third consultative examination, performed at the request of the ALJ. Tr. 129-31. Dr. DeLeon's findings were consistent with those of the other examining physicians. Dr. DeLeon found no limitations on plaintiff's movements, and plaintiff could perform both fine and gross manipulations. Tr. 130. Plaintiff's visual acuity was 20/40 in the right eye and 20/30 in the left eye. Id. Dr. DeLeon concluded that plaintiff was capable of performing work related activities with no limitations on sitting and only slight limitations on "walking, standing, carrying, lifting, pushing, [and] pulling." Tr. 131.

Non-Medical Evidence

In plaintiff's April 11, 1994 disability report, he indicated that he was "first unable to work because of a back problem," and then an elevated glucose level "caused [him] to pass out." Tr. 69. Plaintiff also stated that he suffered from "dizziness" and "problems seeing." Id. In plaintiff's August 30, 1994 report, he stated that he was capable of cooking and cleaning for himself, and he was able to walk. Tr. 85.

Plaintiff, age forty-nine on the date of his hearing, was born in Jamaica where he received a sixth grade education and took vocational classes in plumbing. Tr. 23, 73. Plaintiff was employed as a metal worker in a tile factory for approximately two years in the early 1980s, Tr. 73, and then as a construction worker from the late 1980s until 1991. Id. As a metal worker in a tile factory, plaintiff scooped gravel into a mixing machine and unloaded tile. Id. As a construction worker, plaintiff would typically lift and carry items up to twenty-five pounds and at times lift items up to one hundred pounds. Id.

Discussion

The court must determine initially whether plaintiff was accorded “a full hearing under the Secretary’s regulations and in accordance with the beneficent purposes of the Act.” Robinson v. Secretary of Health and Human Services, 733 F.2d 255, 257 (2d Cir. 1984). Where plaintiff is not represented by counsel, “the ALJ has a duty to ‘scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,’ and the reviewing court must make a ‘searching investigation’ of the record to ensure that the claimant’s rights were protected.” Barrera v. Secretary of Health and Human Services, 872 F. Supp. 24, 27 (E.D.N.Y. 1995) (quoting Cutler v. Weinberger, 516 F.2d 1282, 1286 (2d Cir. 1975)). The ALJ has a duty to compensate for the absence of counsel by making an inquiry into plaintiff’s ailments and their effect on his ability to do work. Echevarria v. Secretary of Health and Human Services, 685 F.2d 751, 755-56 (2d Cir. 1982); see also Frank v. Chater, 924 F. Supp. 416, 428-29 (E.D.N.Y. 1996).

The ALJ conducted a non-adversarial and thorough investigation into the facts. The ALJ began the hearing by advising plaintiff of his right to counsel and confirming that plaintiff

wished to proceed without counsel. Tr. 22. The ALJ asked, “[W]hen you received acknowledgment of your Request for a Hearing, you were advised of your right to appear with an attorney. You were given a list of free legal referral services, and you’ve elected to appear on your own behalf and proceed at this time. Correct?” Id. Plaintiff responded in the affirmative. Id. The ALJ asked plaintiff about his education, his use of drugs and alcohol, and his employment prospects. Tr. 23-25. The ALJ also asked plaintiff about his claimed disabilities and ailments, particularly his diabetic condition. Tr. 26-28. A post-hearing consultative examination was ordered by the ALJ, the results of which were reviewed and addressed in his opinion. Tr. 10-11, 29. The ALJ also reviewed medical records from Staten Island University Hospital, Tr. 91-97, Dr. Emmanuel Ampedu, Tr. 98-108, Dr. Peter E. Graham, Tr. 109-14, and Dr. Solomon Miskin, Tr. 115-18. In sum, the ALJ appropriately assisted plaintiff in developing the record. See Echevarria, 685 F.2d at 755-57.

In reviewing the Commissioner’s finding that plaintiff is not disabled, a district court “may only set aside a determination which is based upon legal error or not supported by substantial evidence.” Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). Substantial evidence “is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). After a review of the entire record in this case, the Court concludes that the ALJ’s decision was not based on legal error and was supported by substantial evidence.

An individual is deemed to be under a disability “only 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” 42 U.S.C. § 1382 (c) (a) (3)

(B). The Social Security regulations establish a five-step analysis to be used by the Commissioner when evaluating disability claims.

First, the [Commissioner] considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the [Commissioner] next considers whether the claimant has a “severe impairment” which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the [Commissioner] will consider him disabled Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant’s severe impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the [Commissioner] then determines whether there is other work that the claimant could perform.

Berry, 675 F.2d at 467 (2d Cir. 1982); see also DeChirico v. Callahan, 134 F.3d 117 (2d Cir. 1998).

The ALJ followed the five-step analysis in his October 31, 1995 decision. The ALJ concluded that plaintiff has “insulin-dependent diabetes mellitus, positive skin test for [tuberculosis], a pilonidal cyst, history of alcohol and drug abuse and a mild organic mental syndrome, but that he did not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P.” Tr. 13. Moving through the sequential analysis, the ALJ found that plaintiff is unable to perform his past work due to his condition. Id. The ALJ also found plaintiff’s claim of totally disabling pain and fatigue not to be “credible to the extent alleged and not supported by objective clinical findings.” Id. Addressing the final step in the sequential analysis, the ALJ concluded that plaintiff retained “the residual functional capacity to perform the physical exertion and non-exertional requirements of work except for

lifting more than 20 pounds,” but plaintiff’s “residual functional capacity for the full range of light work is reduced by his inability to comprehend and follow-through on complex and technical job instructions.” *Id.* The ALJ then concluded that even though plaintiff’s “additional non-exertional limitations do not allow him to perform the full range of light work . . . there are a significant number of jobs in the national economy which he could perform.” *Id.*

Because the ALJ found plaintiff could not return to his past relevant work, only the last step of the sequential analysis for evaluating disability is at issue in this case. The Commissioner must show that plaintiff’s residual functional capacity, in combination with his age, education, and past work experience, does not preclude him from performing other gainful activity. 20 C.F.R. §§ 404.1520, 416.920.

The evidence supports the ALJ’s findings. Neither plaintiff’s diabetes, visual impairments, nor his tuberculosis preclude him from performing the exertional requirements of light work. All examinations of record indicate plaintiff’s physical condition was normal. Tr. 102, 110-11, 130. He demonstrated normal dexterity and his coordination was “grossly normal.” Tr. 111, 130. Although plaintiff’s vision is somewhat impaired, Tr. 102, 110, no examining physician noted this to be a disabling condition. Tr. 101, 110. Nor were there any indications in the record that plaintiff’s tuberculosis exposure in any way caused functional limitations. Tr. 72, 101.

Dr. Ampedu’s opinion that plaintiff was temporarily unemployable for three months is not dispositive. Tr. 103. The ALJ must give controlling weight to a treating physician’s opinion if it is “well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case.” 20 C.F.R. § 404.1527 (d) (2);

see Diaz v. Shalala, 59 F.3d 307, 312 (2d Cir. 1995). In determining the weight to be given the treating physician's opinion, the regulations require that the length of the treatment relationship, the frequency of the treatments, and the opinion's consistency with other evidence of record be considered. 20 C.F.R. § 4004.1527 (d).

The ALJ properly disregarded Dr. Ampedu's final conclusion that plaintiff was temporarily unemployable for three months. Tr. 103. There is simply no evidence to support this conclusion. Tr. 101-03, 109-12, 115-17, 129-31. Every examining physician found plaintiff capable of performing activities associated with light work. Tr. 112, 116. Also, Dr. Ampedu's clinical findings were not markedly different from the other examining physicians and do not support his own conclusion of temporary disability. Dr. Ampedu noted that plaintiff's diabetes was both stable and controlled, Tr. 101, and he found plaintiff's poor visual acuity could be corrected with glasses. Tr. 102. These findings, along with the other medical evidence of record, led the ALJ to properly disagree with Dr. Ampedu's conclusion that plaintiff was temporarily disabled.

The ALJ finally concluded "that [c]onsidering the claimant's residual functional capacity for light work and his younger age, limited education and unskilled work background, Vocational Rule 202.17 of Table No. 1 of Appendix 2 . . . applies and suggests a finding of 'not disabled.'" Tr. 12. The ALJ further concluded that plaintiff's "non-exertional impairments do not significantly compromise his exertional capacity for light work activity." Id. As a result, the ALJ properly relied on Vocational Rule 202.17 to conclude plaintiff is not disabled without the need to introduce the testimony of a vocational expert.

The ALJ's decision complies with the Second Circuit's ruling in Bapp v. Bowen, 802

F.2d 601, 603 (2d Cir. 1986). The Bapp court held

that application of the grid guidelines and the necessity for expert testimony must be determined on a case-by-case basis. If the guidelines adequately reflect a claimant's condition, then their use to determine disability status is appropriate. But if a claimant's nonexertional impairments 'significantly limit the range of work permitted by his exertional limitations' then the grids obviously will not accurately determine disability status because they fail to take into account claimant's nonexertional impairments. Accordingly, where the claimant's work capacity is significantly diminished beyond that caused by his exertional impairment the application of the grids is inappropriate.

Bapp, 802 F.2d at 605-06 (citations omitted) (quoting Blacknall v. Heckler, 721 F.2d 1179, 1181); see also Pratts v. Chater, 94 F.3d 34, 39 (2d Cir. 1996).

Here, the ALJ found that plaintiff's non-exertional impairments did not significantly compromise plaintiff's exertional capacity for light work. The ALJ considered the medical opinion of Dr. Miskin, noting plaintiff's "[m]ental status evaluation revealed some deficits, including concrete interpretation of proverbs, somewhat diminished attention and concentration span, estimated intellectual functioning to be in the low average range, poor fund of general information and somewhat irritable and mildly dysphoric mood." Tr. 10. However, the ALJ properly concluded that despite these non-exertional limitations, there are a significant number of jobs in the economy that plaintiff is capable of performing, as long as they are of a "simple, routine and repetitive nature and not requiring complex or technical job instructions or working in a high-stress environment." Tr. 12. Considering the record as a whole, including the opinions of the examining physicians and plaintiff's daily activities, there is substantial evidence to support the ALJ's conclusion.

As shown above, the ALJ adequately described the grounds for his decision. The ALJ

must explain the reasoning that led to the decision with sufficient clarity to permit a reviewing court to judge the adequacy of the findings. Pratts, 94 F.3d at 39. The ALJ fully addressed plaintiff's consulting physician reports of record. The ALJ also discussed plaintiff's exertional and non-exertional assessments and addressed plaintiff's subjective complaints. Accordingly, in light of the substantial evidence in the record, and after a careful examination of plaintiff's complaints, the ALJ determined that plaintiff is not disabled.

For the foregoing reasons, the Commissioner's motion on the pleadings is granted and the action is dismissed. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
July 5, 1998



RAYMOND J. DEARIE
United States District Judge