

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARIA CANDELARIA

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JOSE BENTINEZ,

Plaintiff,

CV 97-4632 (RJD)

-against-

MEMORANDUM & ORDER

KENNETH APFEL,
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----X

DEARIE, District Judge.

Pursuant to 42 U.S.C. § 405(g) plaintiff *pro se*, Jose Antonio Bentinez, seeks review of the Commissioner's decision that he was not disabled. Defendant has moved for judgment on the pleadings.

Background

Mr. Bentinez is 54 years old. He has a second grade education and a limited command of the English language. He alleges disability on the basis of a seizure disorder and hypertension. Mr. Bentinez also has a history of alcohol abuse.

Mr. Bentinez was born July 16, 1944 in Puerto Rico and came to the continental United States in 1950. (Tr. 45). He did not attend school here and completed only two years of formal education before he left Puerto Rico; Mr. Bentinez cannot read or write in English. (Tr. 46).

Mr. Bentinez began working as a freight elevator operator in 1968. (Tr. 46). The job entailed raising and lowering the elevator by pulling a cable, as well as helping to load and unload the elevator. (Tr. 113). Mr. Bentinez left his job when the company went out of business in the early 1990s (Tr. 46). He found another position; however, he claims that he was fired from that job "because of the attacks," i.e. his seizures. (Tr. 47).

A. Medical History

The plaintiff claims that he began suffering seizures in July of 1990. (Tr. 109). His first available medical record is dated September 12, 1993. On September 12th, Mr. Bentinez fell on the street during a seizure. (Tr. 34). He was brought to Wyckoff Heights Medical Center complaining of pain in his left shoulder and numbness in his hand (Tr. 133) and was diagnosed with a fractured and dislocated humerus. (Tr. 138). The records of Mr. Bentinez's September 12th visit note a prior medical history of seizures (Tr. 133). The hospital took seizure precautions, i.e. raised and locked side rails on the stretcher and a padded tongue depressor kept at the bedside (Tr. 135); however, the record does not show that Mr. Bentinez experienced a seizure while in the hospital.

Hospital records also note Mr. Bentinez's prior history of alcohol abuse and show that he was, at that time, drinking three bottles of whiskey a day. (Tr. 133). The attending physician

prescribed Thiamin, Motrin, Maalox, and Valium (Tr. 133) and the dislocation was corrected. (Tr. 137).

On September 14, 1993, Mr. Bentinez fell in the shower. (Tr. 128). He again dislocated his shoulder. X-rays of Mr. Bentinez's injured arm also revealed displaced bone fragments from the fracture. (Tr. 131). Seizure precautions were taken while Mr. Bentinez remained in the hospital overnight (Tr. 129), though records do not note any seizure activity. Mr. Bentinez's blood pressure ranged from 120/80 to 140/80 during this time. (Tr. 129). His shoulder was re-set (Tr. 132) and he was discharged on the morning of September 15th with instructions to return to the clinic for a check-up. (Tr. 129).

The available medical records for Mr. Bentinez show no treatment for nearly two years after he injured his arm. Then, on August 10, 1995, Mr. Bentinez was admitted to Wyckoff Heights Medical Center after he was found unconscious in his home at approximately 5 a.m. (Tr. 163-64). Mr. Bentinez had been drinking heavily (Tr. 166, 169). Though an early diagnosis recommended the plaintiff be watched for possible *delirium tremens* ("DTs") (Tr. 178), another physician later ruled that out. (Tr. 172). Mr. Bentinez's unresponsiveness may have been due to his having had a seizure, as he had recently been suffering frequent attacks. (Tr. 163-64). However, EMS personnel did not witness any seizure activity. (Tr. 177). In the emergency room, Mr. Bentinez became agitated and had to be restrained, though he remained somewhat disoriented. Hospital personnel noted that Mr.

Bentinez was incapable of providing his medical history and at times mumbled incomprehensibly. (Tr. 169-170, 177). The records also show that Mr. Bentinez was suffering from hypertension. (Tr. 174). His blood pressure remained in the range of 129/70 to 140/90 during his hospital stay. (Tr. 163, 170, 173, 176-77).

Mr. Bentinez had been prescribed Dilantin to control his seizures; however, a blood work-up showed a Dilantin level of less than 0.5 UG/ML when the plaintiff was admitted. (Tr. 176). It is standard for test results showing a Dilantin level of less than 10.0 to be automatically flagged by the lab as low, because Dilantin is most effective at 10.0-20.0 UG/ML. (See e.g. Tr. 142 & 148). A blood sample collected on August 11, after Mr. Bentinez had been back on Dilantin for less than a day, showed a Dilantin level of 7.6. (Tr. 185).

Mr. Bentinez was also diagnosed with a staphylococcus (staph) infection (Tr. 162), for which the attending physician prescribed Cipro, an antibiotic. (Tr. 187).

Mr. Bentinez did not have any seizures from the time he was admitted on August 10, 1995, until the time he signed himself out of the hospital, against medical advice, on August 19th. (Tr. 162). Brain scans revealed no neurological abnormalities. (Tr. 181). His discharge instructions included prescriptions for Dilantin, Thiamin, Cipro, and Folic Acid. He was directed "not to drink alcohol again." (Tr. 187). He could carry out his normal activities "as tolerated" and was instructed to return to the clinic in three weeks. (Tr. 188).

Mr. Bentinez has periodically visited the Ambulatory Services clinic at Wyckoff Heights Medical Center. On September 1, 1995 he complained of abdominal discomfort and was diagnosed with gastritis. Maalox was prescribed. His prescriptions for Thiamin, Folic Acid, Procardia, and Dilantin were renewed (Tr. 154); he reported no recent seizures, headaches or blurred vision. (Tr. 155).

When Mr. Bentinez returned to the clinic on October 20, 1995, however, he reported that he had experienced a seizure one month prior. A blood test showed that the plaintiff's Dilantin level had again dropped below 0.5. The physician noted in Mr. Bentinez's chart that he had explained to the patient that he kept having seizures because he failed to take his medicine and had re-instructed him on taking it. (Tr. 159). Mr. Bentinez's blood pressure was 140/80. (Tr. 159).

On November 3, 1995, clinic records show that the plaintiff reported no seizures within the prior four weeks. However, his Dilantin level was again below 0.5 and he admitted that he sometimes did not take his medication because when he did, he "felt sleepy." Mr. Bentinez's non-compliance was noted in his medical records and he was instructed to take his medication regularly and to refrain from drinking alcohol. (Tr. 157).

On November 26, 1995, Mr. Bentinez was hospitalized at Wyckoff Heights Medical Center. (Tr. 139-147). He arrived in an ambulance after having more than one seizure on the same day. (Tr. 141) The day before he had drunk from a half bottle to a bottle of Bacardi (Tr.

144), and his Dilantin level had dropped to 1.4. (Tr. 142). The plaintiff was given Dilantin and seizure precautions were taken. (Tr. 145).

The record also includes a lab report from the Wyckoff Heights Medical Center Laboratory Department dated December 8, 1995 showing that plaintiff's Dilantin level had dropped again, this time to 1.8. (Tr. 148).

After his hospitalization in late November of 1995, Mr. Bentinez returned to the Wyckoff Heights Ambulatory Services clinic on December 15th for a follow-up exam. (Tr. 158). He was diagnosed with lower gastrointestinal bleeding and was prescribed Mylanta. His prescriptions for Dilantin and Procardia were renewed. (Tr. 154).

On January 5, 1996 the plaintiff had his prescriptions for Dilantin, Procardia, and Mylanta renewed at the clinic once more. (Tr. 154). A letter from his physician, Matilde S. Zapata, M.D., dated September 17, 1996, "certifies that [Mr.] Bentinez . . . suffers from seizure disorder . . ." and hypertension, for which he is being treated with Dilantin and Procardia, respectively. (Tr. 191).

B. Procedural History

On August 23, 1995, Mr. Bentinez applied for Supplemental Security Income (SSI) and disability insurance payments. (Tr. 53-55, 84-86). The plaintiff claimed as the starting date of his disability November 24, 1993 (Tr. 53, 84).¹

¹ The record includes a transcript of a hearing that took place November 4, 1993, over a year before the disability claim that is

On December 12, 1995, the Social Security Administration (SSA) determined that Mr. Bentinez was not disabled and, therefore, not entitled to SSI or disability insurance payments. (Tr. 66-69, 88-91). The decision was based solely on Mr. Bentinez's medical records from September 12th-15th, 1993 (when he dislocated his shoulder), as no other records were available and as Mr. Bentinez had failed to take the medical exam requested by the SSA. (Tr. 69). On January 18, 1996, Mr. Bentinez requested reconsideration of the decision. He asserted that he would have undergone the requested medical exam if he had received the notice but that the notice had been sent to the incorrect address. The plaintiff also acknowledged his right to representation. (Tr. 70).

In March, Mr. Bentinez underwent a residual physical functional capacity assessment (RFC), at which time he was diagnosed with a seizure disorder and alcoholism. (Tr. 72). According to the RFC, plaintiff could occasionally lift and carry up to 50 pounds and frequently lift and carry up to 25 pounds. He could stand for about six hours in an eight-hour workday and could sit for the same. (Tr. 73). The examining physician determined that Mr. Bentinez's seizure disorder prohibited him from working around hazards, such as machinery or heights, but that he could do "other work." (Tr. 76).

Upon reconsideration of Mr. Bentinez's claim, the Social Security

the subject of this proceeding was filed. A note on the August 23, 1995 disability report indicates that an ALJ decision was entered on November 23, 1993. (Tr. 109).

Administration (SSA) found on March 19, 1996 that he was not entitled to benefits (Tr. 80-83, 102-105). This decision was based on the RFC assessment and the medical records from September of 1993 as well as records dating back to November 24, 1993. (Tr. 83, 105). Mr. Bentinez subsequently requested and was granted a hearing before an Administrative Law Judge (ALJ). (Tr. 19-24, 106-07).

Prior to the hearing Mr. Bentinez was evaluated by Gabriel Terbancea, M.D., at the request of the ALJ. (Tr. 192-195). The doctor noted that Mr. Bentinez had suffered three seizures between August 15 and October 10, 1996, the date of the evaluation. One of those seizures occurred four days before the examination. (Tr. 192).

C. The Administrative Hearing

The hearing was held on October 22, 1996, before ALJ William Kuchgaessner. (Tr. 41-52). Mr. Bentinez appeared without representation. Prior to the hearing, Mr. Bentinez had been provided with a list of legal organizations, attorneys, and representatives from which to choose someone to represent him. Mr. Bentinez testified that he had tried to obtain representation from Queens Legal Services. He stated:

I would like to ask you whether these people work in connection with this office. I would like to know why they had me sign these papers, get them notarized, go here and there and then told me that they were not going to represent me. (Tr. 51).

Despite this, when asked by the ALJ whether he wanted to go forward without representation, Mr. Bentinez said that he did. (Tr. 43). He

testified through an interpreter. (Tr. 44).

Mr. Bentinez testified about the nature of his seizure disorder. He testified that he suffered a seizure approximately every two weeks, usually on a Sunday; however, he also testified that a seizure could strike at any time. (Tr. 47). He admitted that his seizures mostly occurred when he had not taken his medicine (Tr. 49), which he was supposed to take three times a day. (Tr. 48).

Mr. Bentinez also testified about his alcohol abuse, stating "if I'm at a party I might drink one beer, but not the way I used to drink before." (Tr. 48).

Mr. Bentinez rents a room in the home of friends (Tr. 45) who do his grocery shopping for him and sometimes cook his meals (Tr. 125), as Mr. Bentinez is unable to cook "because of the danger involved." (Tr. 112). However, he cleans his room himself and goes out to do his laundry. (Tr. 125). He spends his days watching television, playing dominoes with friends at a local grocery store, visiting a nearby home for the elderly, taking short walks, and visiting his family. (Tr. 50, 125). He is able to travel on public transportation (Tr. 46) and came to the hearing by subway. (Tr. 45).

On December 13, 1996 the ALJ rendered a decision denying Mr. Bentinez benefits. (Tr. 8-18). He found that Mr. Bentinez had not engaged in substantial gainful activity since November 24, 1993, the date he claims his disability began. Further, the ALJ found that Mr. Bentinez had a history of hypertension but showed no evidence of complications or end organ involvement or damage; that he had a

history of alcoholism but had, over the previous two or three years, significantly reduced his alcohol consumption; that he had a history of a seizure disorder, which prohibited him from engaging in his prior work but which was not totally disabling. (Tr. 12). The ALJ determined that none of these disorders met or was equal to a listed impairment. (Tr. 13).

The ALJ held that Mr. Bentinez "does not have a medical condition which can reasonably be expected to produce pain" nor does he allege pain as a basis of disability. (Tr. 13). He found also that there had been no clinical observation of any of Mr. Bentinez's seizures, nor did any neurological examinations reveal abnormalities. (Tr. 12). The ALJ determined that Mr. Bentinez retained the physical capacity to perform a wide range of medium work. Considering this capacity as well as Mr. Bentinez's age, marginal education, inability to communicate in English and unskilled work background, the ALJ applied Vocational Rule 203.18 of Table No. 3 of Appendix 2 and found that Mr. Bentinez was "not disabled." (Id.)

In January of 1997, Mr. Bentinez sought and was denied a review of the hearing decision. (Tr. 4-7). On August 11, 1997, he filed a complaint with this court seeking review of the hearing decision.

Discussion

Mr. Bentinez, appearing *pro se*, seeks review of the ALJ's decision, claiming that he has been disabled since 1992 by seizures, high blood pressure, and alcoholism. The Commissioner has moved for summary judgment on the grounds that the ALJ's decision is supported

by substantial evidence.

A person who, because of a "medically determinable physical or mental impairment," is unable "to engage in any substantial gainful activity" is statutorily entitled to government assistance, in the form of SSI and/or disability insurance benefits. 42 U.S.C. §§ 423 & 1382. In order to receive either type of benefit, the claimant must be "disabled" under the meaning of the statutes. An applicant is considered disabled if he or she (1) is not engaged in "substantial gainful activity," and (2) has a severe impairment that (3) lasts for a continuous period of not less than twelve months and is either listed or equal to an impairment listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P, or (4) the impairment prevents the claimant from doing past relevant work and (5) considering the claimant's age, education, and past work experience, he or she is incapable of engaging in other employment. 20 C.F.R. § 416.920.

The role of this Court is not to decide the claimant's case *de novo*, but rather to determine whether the ALJ's findings are supported by substantial evidence. See Rivera v. Sullivan, 923 F.2d 964, 967 (2d Cir. 1991); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980). Substantial evidence is "more than a mere scintilla"; it is "such relevant evidence as a reasonable person might accept as adequate to support a conclusion." Rivera v. Sullivan, 923 F.2d at 967.

A. Substantial evidence

1. Hypertension

There is substantial evidence in the record to support the ALJ's

ruling that Mr. Bentinez's hypertension is not disabling. Mr. Bentinez's medical records show that his hypertension is fully controlled by medication. (Tr. 156, 160, 195). There is no evidence that his blood pressure has ever risen above 150/90 (Tr. 147) and it has been as low as 110/70. (Tr. 158). A patient's blood pressure is considered normal when it is below 140/90. 7 Attorney's Textbook of Medicine ¶ 31.10, at 31-3 (3d ed. 1997). With a high reading of 150/90, Mr. Bentinez is, at most, mildly hypertensive. Id. ¶ 31.44, at 31-21.

2. Alcoholism

The ALJ's ruling that Mr. Bentinez's alcohol abuse is not disabling is supported by substantial evidence. None of Mr. Bentinez's medical records shows serious physical or mental impairments resulting from his alcohol abuse. See Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1982) (citing Singletary v. Secretary of Health, Educ. and Welfare, 623 F.2d 217, 220 (2d Cir. 1980)). Alcoholism alone, without medical evidence of a physical or mental impairment, is not a disability. 20 C.F.R. § 404.1525(e). Further, there is evidence that Mr. Bentinez has the ability to control his drinking (Tr. 48-49), which would also preclude a finding that his alcohol use was a disability. Rutherford v. Schweiker, 685 F.2d at 62.

3. Seizure Disorder

The ALJ found that Mr. Bentinez suffered from a seizure disorder that prevented him from engaging in his previous employment, but which

was not totally disabling because Mr. Bentinez still had the capacity to perform a significant number of other jobs.

a. Past Work

There is substantial evidence in the record that Mr. Bentinez's seizures prohibited him from doing his prior work as a freight elevator operator. Mr. Bentinez testified that the seizures can strike at any time. There is a risk, then, that he will have a seizure while on the job. This risk was recognized by the physician who conducted Mr. Bentinez's RFC assessment and who prohibited him from operating machinery or working at heights because of the potential danger.

b. Other Work

There is also substantial evidence that there are a significant number of other jobs in the economy that Mr. Bentinez is capable of performing, because he retains the capacity for medium work. Mr. Bentinez's RFC assessment determined that he could frequently lift up to twenty-five pounds and occasionally lift up to fifty pounds. Based on this, the ALJ correctly held that Mr. Bentinez had a residual functional capacity that permitted him to do medium work (which also includes sedentary and light work). See 20 C.F.R. § 404.1567(c) (defining "medium work"). The ALJ appropriately took into consideration not only Mr. Bentinez's functional capacity but also his age, education, and past work experience, and came to the conclusion, using Vocational Rule 203.18 (the "grids"), that plaintiff was "not disabled."

Mr. Bentinez's medical records also support a finding that he is not disabled. The September 1996 letter from Dr. Zapata stated only that Mr. Bentinez was being treated for a seizure disorder; it did not aver that he was disabled or unable to work. (Tr. 191). In fact, none of Mr. Bentinez's doctors has ever diagnosed him as disabled. Mr. Bentinez's seizures are infrequent. He himself testified that they occur approximately every two weeks. (Tr. 49). In August of 1993 he spent nine days in the hospital without ever having a seizure. (Tr. 162-88). In fact, a review of his medical records reveals that no medical professional has ever documented witnessing one of Mr. Bentinez's seizures. Mr. Bentinez's seizure disorder is controlled by Dilantin. The claimant concedes that his seizures only occur when he has failed to take his pills. (Tr. 49). The hospital records confirm this, as whenever he reports a seizure, he has a low level of Dilantin in his blood. (Tr. 142, 157, 159, 176). Therefore, were Mr. Bentinez to comply with the course of treatment prescribed for him, his seizures would likely be less frequent, if he experienced them at all.

The ALJ need not specify which particular jobs the claimant is capable of performing. Rather, once the ALJ has determined the claimant's residual functional capacity, as in this case, the ALJ need only show that a substantial number of jobs exist that could be performed by someone with the claimant's capacity. See Heckler v. Campbell, 461 U.S. 458, 467 (1983). As the ALJ found, Mr. Bentinez's seizure disorder simply prohibits him from operating machinery or working at heights. Even with these limitations, he is still fit for

a significant number of other jobs. There are "[a]pproximately 2,500 separate sedentary, light, and medium occupations . . . , each representing numerous jobs in the national economy." Surely not every one of these jobs involve machinery or heights. Further, Mr. Bentinez's lack of education is not a complete barrier, because these jobs "do not require skills or previous experience and . . . can be performed after a short demonstration or within 30 days." 20 C.F.R. Pt. 404, Subpt. P., App. 2 § 203.00.

Mr. Bentinez's seizure disorder is a nonexertional limitation.² When a claimant has a nonexertional limitation, the ALJ is sometimes prohibited from making a determination of disability based on the grids. Rather, the ALJ must base his decision on the testimony of a medical vocational expert. Bapp v. Bowen, 802 F.2d 601, 603 (2d Cir. 1986). However, such testimony is only required when the nonexertional limitation "significantly diminish[es the claimant's] work capacity," that is, the claimant's condition "so narrows [his] possible range of work as to deprive him of a meaningful employment opportunity." Pratts v. Chater, 94 F.3d 34, 39 (2d Cir. 1996) (citing Bapp v. Bowen, 802 F.2d at 605-606). The ALJ found that Mr. Bentinez was only prohibited from certain specific types of jobs, those that involved operating machinery or working around heights. "[A]n

² A claimant suffers a "nonexertional limitation" where the "limitations and restrictions imposed by [his] impairment and related symptoms, such as pain, affect only [his] ability to meet the demands of jobs other than the strength demands." 20 C.F.R. § 404.1569a (c).

individual need not be able to perform each and every job in a given range of work." Bapp v. Bowen, 802 F.2d at 606, n.1. The effect of Mr. Bentinez's seizure disorder on his capacity for medium work was negligible. See id. Therefore, the ALJ was correct to apply the grids in order to determine whether Mr. Bentinez's seizure disorder constituted a disability.

B. The ALJ's duty to assist the pro se claimant

Finally, as was pointed out by the Government, Mr. Bentinez's pro se status at the hearing does not provide a basis for reversal, as the record shows both that Mr. Bentinez was apprised of his right to representation and that the ALJ fulfilled his duty to assist the claimant. Memorandum of Law in Support of the Commissioner's Motion for Judgment on the Pleadings at 19.

During the ALJ hearing on October 22, 1996, Mr. Bentinez expressed some confusion regarding Queens Legal Services' refusal to take his case. (Tr. 51). Nonetheless, at the start of the hearing Mr. Bentinez indicated that he wished to proceed without representation. (Tr. 43-44).

Moreover, Mr. Bentinez's lack of counsel could have had no impact on the disposition of his claim, as the ALJ fulfilled his duty to fully develop the record of his pro se claimant. Echevarria v. Secretary of Health and Human Servs., 685 F.2d 751, 755 (2d Cir. 1982). The ALJ asked Mr. Bentinez about his former employment and his reason for leaving (Tr. 46), his attempt to find a new job (Tr. 47),

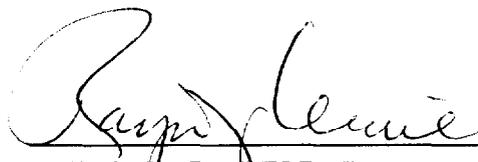
his educational background (Tr. 46), and the nature of his disability, including the frequency of his seizures (Tr. 47), his need for regular medical care (Tr. 48), and his compliance with methods of treatment prescribed by his doctors (Tr. 47-48). The ALJ also had available to him medical records detailing Mr. Bentinez's hospital stays as well as his treatment at the hospital's Ambulatory Services clinic. It appears, therefore, that "all of the relevant facts [have been] sufficiently developed and considered." Echaverria v. Secretary of Health and Human Servs., 685 F.2d at 755 (quoting Hankerson v. Harris, 636 F.2d 893, 895 (2d Cir. 1980)).

Conclusion

There is substantial evidence in the record to support the ALJ's determination that the plaintiff was not disabled during the relevant period and, therefore, not entitled to collect disability benefits. The plaintiff waived his right to representation and the ALJ fulfilled his obligation to fully develop the record. Accordingly, the defendant's motion for judgment on the pleadings is granted. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
July 15, 1998


RAYMOND J. DEARIE
United States District Judge