

**SOCIAL SECURITY ADMINISTRATION  
Office of Disability Adjudication and Review**

**DECISION**

**IN THE CASE OF**

Mike Eslava  
(Claimant)

(Wage Earner)

**CLAIM FOR**

Period of Disability and Disability Insurance  
Benefits

[REDACTED]  
(Social Security Number)

**JURISDICTION AND PROCEDURAL HISTORY**

On January 14, 2005, the claimant protectively filed an application for a period of disability and disability insurance benefits, alleging disability beginning December 31, 2000. The claim was denied initially on January 14, 2005, and upon reconsideration on May 19, 2006. Thereafter, the claimant filed a timely written request for hearing on July 7, 2006 (20 CFR 404.929 *et seq.*). The claimant appeared and testified at a hearing held on August 10, 2007, in San Bernardino, California. Also appearing and testifying were David B. Peterson, an impartial medical expert and Corinne J. Porter, an impartial vocational expert. The claimant is represented by Lawrence Maldonado, a non-attorney representative.

**ISSUES**

The issue is whether the claimant is disabled under sections 216(i) and 223(d) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

There is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 2005 (hereinafter "the date last insured"). Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

After careful consideration of all the evidence, the undersigned Administrative Law Judge concludes the claimant was not under a disability within the meaning of the Social Security Act from December 31, 2000 through the date last insured.

**APPLICABLE LAW**

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is

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**EXHIBIT**

disabled (20 CFR 404.1520(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 404.1572(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 404.1572(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 404.1574 and 404.1575). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 404.1521; Social Security Rulings (SSRs) 85-28, 96-3p, and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments meets or medically equals the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, and 404.1526). If the claimant's impairment or combination of impairments meets or medically equals the criteria of a listing and meets the duration requirement (20 CFR 404.1509), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e)). An individual's residual functional capacity is his ability to do physical and mental work activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e) and 404.1545; SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 404.1520(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long

enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b) and 404.1565). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age, education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g) and 404.1560(c)).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After careful consideration of the entire record, the undersigned makes the following findings:

- 1. The claimant last met the insured status requirements of the Social Security Act on December 31, 2005.**
- 2. The claimant did not engage in substantial gainful activity during the period from his alleged onset date of December 31, 2000 through his date last insured of December 31, 2005 (20 CFR 404.1520(b) and 404.1571 *et seq.*).**

The claimant has posted earnings in the amount of \$700 for 2001. A person has engaged in substantial gainful activity ("SGA") if their countable income averages more per month than the primary SGA amount for the particular year. According to the Tables of SGA Earnings Guidelines and Effective Dates, the primary SGA amount for 2001 was \$740. Since the claimant's average monthly earnings did not exceed this amount he did not engage in substantial gainful activity prior to December 31, 2005.

- 3. Through the date last insured, the claimant had the following medically determinable impairments: diabetes mellitus, mild cervical spine disorder; history of post traumatic stress disorder, and depressive disorder (20 CFR 404.1520(c)).**
- 4. Through the date last insured, the claimant did not have an impairment or combination of impairments that significantly limited his ability to perform basic work-related activities for 12 consecutive months; therefore, the claimant did not have a severe impairment or combination of impairments (20 CFR 404.1521).**

Basic work activities are the abilities and aptitudes necessary to do most jobs. Examples of these include:

1. Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
2. Capacities for seeing, hearing, and speaking;
3. Understanding, carrying out, and remembering simple instructions;
4. Use of judgment;
5. Responding appropriately to supervision, co-workers, and usual work situations; and
6. Dealing with changes in a routine work setting (SSR 85-28).

In reaching the conclusion that the claimant does not have an impairment or combination of impairments that significantly limits his ability to perform basic work activities, the undersigned considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. The undersigned also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

In considering the claimant's symptoms, the undersigned must follow a two step process in which it must first be determined whether there is an underlying medically determinable physical or mental impairment(s)--i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques--that could reasonably be expected to produce the claimant's pain or other symptoms.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms has been shown, the undersigned must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's ability to do basic work activities. For this purpose, whenever statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the undersigned must make a finding on the credibility of the statements based on a consideration of the entire case record.

Because a claimant's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone, 20 CFR 404.1529(c) describes the kinds of evidence, including the factors below, that the undersigned must consider in addition to the objective medical evidence when assessing the credibility of the claimant's statements:

1. The claimant's daily activities;
2. The location, duration, frequency, and intensity of the claimant's pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;

4. The type, dosage, effectiveness, and side effects of any medication the claimant takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the claimant receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the claimant uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the claimant's functional limitations and restrictions due to pain or other symptoms (SSR 96-7p).

The claimant has made several allegations concerning the nature, intensity, frequency, persistence and limiting effects of her mental and physical symptoms. At the hearing, the claimant testified that he uses a wheelchair because he cannot walk and is housebound. He said he spent last week entirely in the wheelchair except when he was lying down and also stated he takes too many medications to work. In his disability report, he alleges diabetes, post traumatic stress disorder and skin condition limit his ability to work because his hands are "sleepy," he "cannot open his hands anymore," and has "much pain in hands and legs(Exhibit 3E, p. 2)." In his disability appeal report he alleges his conditions cause hallucination, tardiness, dizziness, and sleep disorder (Exhibit 6E, p. 4). As for medications, he alleges he takes four different prescriptions relative to paranoia, sleep, flashbacks with voices, and anxiety (Exhibit 7E).

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could have been reasonably expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible.

Objective medical evidence does not fully support the claimant's complaints. Medical records show the claimant has diabetes mellitus (Exhibits 4F, 10F, pp. 2-10). However, this condition is controlled with medication provided by the Veterans Affairs Medical Center; there is no objective evidence of end organ damage; and it causes "no functional restrictions" (Exhibits 4F, pp. 1, 5, and 10F). Likewise, there are no functional limitations caused by the claimant's mild cervical spine disease (Exhibit 4F, pp. 5 and 7).

In January 2005, the Department of Veterans' Affairs determined the claimant has service connected post traumatic stress disorder and diabetes mellitus associated with herbicide exposure entitling him to individual unemployability under its standards which differ from those of the Social Security Administration (Exhibit 9F).

However, psychiatric consultative examiner Dr. Linda Smith performed a complete psychiatric evaluation of the claimant in November 2005 and did not see any evidence of the claimant's claims, nor any evidence at all that the claimant has "some kind of psychotic condition" (Exhibit 5F). She stated the following about the claimant's behavior:



“He actually behaves as if he might appear “psychotic” or “out of it,” but he is very goal oriented in his behavior. This is not credible. He is inconsistent. In fact, the entire interview appears to have been staged. There is no evidence at all of his claims. There is no evidence of an Axis I or Axis II disorder (Exhibit 5F, p. 10).”

Additionally, Dr. Peterson testified the claimant’s medical records indicate some amphetamine use, history of post traumatic stress syndrome, and depressive disorder, not otherwise specified with a history of poor compliance with medications and appointments for psychological care.

There are other factors which do not fully support claimant’s complaints and render his testimony credible only to the extent consistent with having the ability to perform work. Dr. Peterson testified there is evidence of malingering in the medical records. Specifically, psychiatric consultative examiner Dr. Linda Smith’s report indicates during the psychiatric evaluation, the claimant was evasive, minimally cooperative, gave poor effort, and appeared to stage the whole interview (*Id.*). Additionally, the claimant appeared at the hearing in a wheelchair claiming he cannot walk and is housebound. However, when the undersigned confronted him with information that he had been seen in this office the week prior to the hearing without a wheelchair, he changed his testimony. In light of the claimant’s contradictory testimony and apparent malingering, his subjective complaints are not credible.

Additionally, the claimant’s hands were observed to be calloused which is an indication he has been engaging in heavy work.

The medical expert testified also testified the claimant has a history of poor compliance with his prescribed treatment plan and appointments for psychological care. Medical records show poor follow-through, several no shows, failure to keep medication schedule (Exhibits 1F, pp. 18, 20, 31, and 48, and 7F, p. 24).

As for the opinion evidence, considerable weight is accord to medical expert Dr. Peterson’s opinion because he had an opportunity to review the entire record, including the testimony of the claimant. In addition, Dr. Peterson is a Board certified physician leaving him well qualified to evaluate impairments such as those present in this case. His testimony was credible and well supported by the claimant’s medical records (Exhibits 1F – 10F).

Significant weight is given to Board certified internist Adi Klein’s opinion that the claimant has no functional limitations given his qualifications and reliance on medically acceptable clinical data and diagnostic findings referenced in his report (Exhibit 4F).

Moreover, substantial weight is given to psychiatric consultative examiner Dr. Linda Smith’s opinion that the claimant has no mental impairment because Dr. Smith is a Board eligible psychiatrist who conducted a complete psychiatric evaluation of the claimant in November 2005 and based her opinion on a review of the claimant’s medical records, history, as well as

diagnostic findings, and clinical data referenced in her report (Exhibit 5F). Moreover, Dr. Peterson testified that Dr. Smith's report was compelling and objective.

Little weight is attributed to the Department of Veteran Affairs ("VA") decision relative to the claimant's disability and unemployability as these are issues reserved for the commissioner. Moreover, their determination is not based upon an understanding of our disability programs and their evidentiary requirements (Exhibits 1F, 9F, and 10F). Treating physician Dr. Killian's opinion is not given controlling weight because there are no objective tests, findings, or clinical data to support the opinion that the claimant's mental impairments are severe according to Dr. Peterson, with whom I agree. The claimant's malingering and poor compliance with VA treatment also causes less weight to be given to their opinion.

The claimant testified that he uses a wheelchair because he cannot walk and is housebound. However, there is no evidence to show that the claimant has no more than minimal limitation in the basic work activities of walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing or speaking (Exhibits 1F, 4F, 7F, 9F, and 10F). According to Board certified internist Adi Klein, M.D "there are no functional restrictions (Exhibit 4F, p. 6)."

Because the claimant has medically determinable mental impairment, the undersigned has considered the four broad functional areas set out in the disability regulations for evaluating mental disorders and in section 12.00C of the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1). These four broad functional areas are known as the "paragraph B" criteria.

The first functional area is activities of daily living. In this area, the claimant has mild limitation according to Dr. Peterson's testimony.

The next functional area is social functioning. In this area, the claimant has mild limitation according to Dr. Peterson's testimony.

The third functional area is concentration, persistence or pace. In this area, the claimant has mild limitation according to Dr. Peterson's testimony.

The fourth functional area is episodes of decompensation. In this area, the claimant has experienced no episodes of decompensation according to Dr. Peterson's testimony.

Consistent with Dr. Smith's opinion, the State agency psychiatric review technique assessment show the claimant has no severe mental impairment (Exhibit 6F).

Because the claimant's medically determinable mental impairments cause no more than "mild" limitation in any of the first three functional areas and "no" limitation in the fourth area, they are nonsevere (20 CFR 404.1520a(d)(1)).

**5. The claimant was not under a disability as defined in the Social Security Act, at any time from December 31, 2000, the alleged onset date, through December 31, 2005, the date last insured (20 CFR 404.1520(e)).**

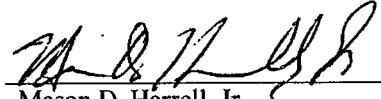


Mike Eslava [REDACTED]

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DECISION

Based on the application for a period of disability and disability insurance benefits protectively filed on January 14, 2005, the claimant was not disabled under sections 216(i) and 223(d) of the Social Security Act through December 31, 2005, the date last insured.



Mason D. Harrell, Jr.  
Administrative Law Judge

AUG 30 2007

Date

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