

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANDRE T. WILLIAMS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION 10-0611-M
	:	
MICHAEL J. ASTRUE,	:	
Commissioner of Social Security,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION AND ORDER

In this action under 42 U.S.C. § 1383(c)(3), Plaintiff seeks judicial review of an adverse social security ruling which denied a claim for Supplemental Security Income (hereinafter *SSI*) (Docs. 1, 13). The parties filed written consent and this action has been referred to the undersigned Magistrate Judge to conduct all proceedings and order the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed.R.Civ.P. 73 (see Doc. 17). Oral argument was waived in this action (Doc. 19). Upon consideration of the administrative record and the memoranda of the parties, it is **ORDERED** that the decision of the Commissioner be **REVERSED** and that this action be **REMANDED** for further procedures not inconsistent with the orders of this Court.

This Court is not free to reweigh the evidence or substitute its judgment for that of the Secretary of Health and Human Services, *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983), which must be supported by substantial evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The substantial evidence test requires "that the decision under review be supported by evidence sufficient to justify a reasoning mind in accepting it; it is more than a scintilla, but less than a preponderance." *Brady v. Heckler*, 724 F.2d 914, 918 (11th Cir. 1984), quoting *Jones v. Schweiker*, 551 F.Supp. 205 (D. Md. 1982).

At the time of the administrative hearing, Plaintiff was thirty-seven years old, had completed less than a high school education (Tr. 70-73, 227), and had previous work experience as a commercial or industrial cleaner (Tr. 77). In claiming benefits, Plaintiff alleges disability due to mental retardation and depression (Doc. 13 Fact Sheet).

The Plaintiff protectively filed an application for SSI on May 8, 2008 (see Tr. 10). Benefits were denied following a hearing by an Administrative Law Judge (ALJ) who determined that although he could not perform his past relevant work, Williams was capable of performing limited medium work jobs existing in

the national economy (Tr. 10-23). Plaintiff requested review of the hearing decision (Tr. 6) by the Appeals Council, but it was denied (Tr. 1-5).

Plaintiff claims that the opinion of the ALJ is not supported by substantial evidence. Specifically, Williams alleges that: (1) The ALJ erred in giving determinative weight to the conclusions of a non-examining medical expert (hereinafter *ME*) psychologist; and (2) the ALJ failed to consider whether Plaintiff's IQ scores were medically equivalent to Listing 12.05 (Doc. 13). Defendant has responded to—and denies—these claims (Doc. 14). The relevant medical evidence of record follows.

On June 4, 1985, a report was completed by a School Psychologist which indicated that Williams had undergone examination because of poor academic performance; Plaintiff was not quite thirteen years old and was attending sixth-grade alternative classes (Tr. 174-75). On the California Achievement Test, Williams was reading at a 4.6 grade level and performing math at a 4.8 grade level; his language abilities were at a 4.9 grade level while he could spell at a 4.1 grade level. On the WISC-R, Plaintiff had a verbal IQ score of 80 while his performance IQ score was 70, placing him in the borderline

intellectual functioning level range of intelligence. Results from the Wide Range Achievement Test showed that Williams was reading at the beginning third-grade level, spelling at the beginning fifth-grade level, and performing arithmetic at the ending third-grade level. The Bender Gestalt Visual Motor Test results suggested a perceptual motor developmental age of a person between the ages of eight years, six months and eight years, eleven months.

On February 27, 1991, Dr. Harold J. Fuller examined Plaintiff and noted that he rarely made eye contact and appeared to be painfully shy; Williams admitted to being "a little depressed" (Tr. 237; *see generally* Tr. 236-38). Plaintiff admitted suicidal ideation, though he had no current plans to hurt himself; he was alert and oriented. Insight was good and intelligence was estimated to be low average. Fuller's diagnosis was severe depression, perhaps with psychotic features.

On January 26, 2005, Psychologist Annie Formwalt examined Williams who told her he could not work because of depression; his affect was normal and appropriate to content of thought and conversation (Tr. 240-42). He did not appear anxious and was of euthymic mood; he was oriented in four spheres. Thought

processes were grossly intact as there were no loose associations, tangential, or circumstantial thinking; Williams had poor insight and understanding of himself. Judgment was poor and estimated intelligence was average. Formwalt's diagnostic impression was dysthymic disorder; it was the Psychologist's impression that he would have a favorable response to treatment, including psychotherapy, within six-to-twelve months.

On July 20, 2008, Psychologist J. M. Jackson examined Williams who reported that he had been depressed for a long time; Plaintiff's mood and affect were appropriate and he did not seem anxious (Tr. 245-48). He was oriented to person, time, and place; there were no signs of confusion, loose associations, tangential, or circumstantial thinking. There were no hallucinations, delusions, or other distortions of thinking or preoccupation; he denied suicidal or homicidal ideation. Williams had limited judgment and little insight into himself and his condition. Jackson provided no diagnosis, finding that Plaintiff was only superficially cooperative and unmotivated to provide accurate, detailed information.

On December 14, 2009, Psychologist John W. Davis examined Williams who reported problems of depression, nervousness, and

arthritis (Tr. 284-291); Davis noted that Plaintiff "showed a good degree of cooperation" (Tr. 284). Williams had "some anxiety and depression about himself but [did] not have the capacity for a full range of emotional qualities;" "emotional responses [were] appropriate to the thought, content, and situation of [the] evaluation" (Tr. 285). His mood was generally depressed; he was oriented in three spheres and had no loose associations, tangential, circumstantial thinking, or confusion. Judgment and insight were fair. Plaintiff underwent testing and was cooperative, but did not put forth his best effort so the results were not felt to be reliable or valid. On the WAIS-R, Williams scored a full scale IQ of 67, which would place him in the mild mental retardation range of intelligence. Davis's overall diagnostic impression was malingering and the prognosis was guarded. It was the Psychologist's opinion that Plaintiff was moderately limited in his ability to understand, remember, carry out, and make judgments on complex instructions.

On January 14, 2010, Psychologist Jennifer Jackson again examined Williams and found him oriented in three spheres with no signs of confusion, loose associations, tangential, or circumstantial thinking; he had limited insight into himself and his condition (Tr. 292-98). Plaintiff underwent testing,

putting forth good effort, which the examiner felt produced reliable, valid, results. On the WAIS-III, Williams had a verbal IQ score of 71, a performance IQ score of 72, and a full scale IQ score of 69, placing him in the mildly retarded range of intelligence. On the Beck Depression Inventory-II, results indicated severe depression. Plaintiff underwent two objective tests used to measure effort and exaggeration of impairment/symptoms; one test indicated less than optimal effort while the other indicated that Williams put forth a valid effort without any evidence of malingering. The Psychologist's diagnostic impression was depressive disorder and mild mental retardation. Jackson completed a mental residual functional capacity form which indicated that Plaintiff had marked deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner and that he was moderately limited in the following abilities: to respond to customary work pressures; to understand, carry out, and remember instructions in a work setting; and perform repetitive tasks in a work setting.

At the evidentiary hearing, Psychologist Doug McKeown was called as an ME who testified, by telephone, that school records indicated that Plaintiff suffered from borderline intellectual

functioning; Williams, did, however, get his GED (Tr. 51-61). McKeown further summarized the medical evidence provided by Dr. Fuller, Psychologists Formwalt, Jackson, and Davis. It was the Psychologist's opinion that Plaintiff could not be evaluated under Listing 12.05C because Williams's mental retardation had not been established by the time he was twenty-two years of age; he also discounted disability under Listing 12.04 for depression because Plaintiff had not had regular ongoing treatment (Tr. 53). McKeown discounted Jackson's opinion of marked impairments for concentration, persistence, and pace (Tr. 54). When questioned by Williams's attorney, the Psychologist admitted that Davis had noted that the MMPI profile showed depression and that those results were considered valid (Tr. 56-57). McKeown also stated that Jackson administered the WAIS-III, an older scale than the WAIS-IV given by Davis; he volunteered the testimony that Jackson had probably used the older test because Williams had undergone testing with the newer test model just a month earlier. In any event, McKeown would dismiss the results Jackson got on the WAIS-III as inaccurate (Tr. 58). The Psychologist also stated that the Beck Inventory, given by Jackson, was not really a diagnostic tool and did not establish depression in and of itself (Tr. 59). After further

questioning, the ME stated that he did not dispute the full scale IQ score of 69, but that it did "not establish mental retardation prior to the age of 22" (Tr. 61).

In her decision, the ALJ summarized the evidence and found that Plaintiff suffered from the following severe impairments: dysthymic disorder, mild depression, borderline intellectual functioning, and obesity (Tr. 12). The ALJ found that Williams did not meet Listing 12.05 because "the evidence fails to establish mental retardation prior to age 22" (Tr. 14). In assessing the evidence, the ALJ gave significant weight to the opinions of Psychologist McKeown, great weight to the opinions of Psychologist Davis, and little weight to Dr. Jackson's opinions (Tr. 20-21). The ALJ also found that Williams's assertions of limitation were not credible to the extent alleged (Tr. 19). This concludes the relevant evidence of record.

Plaintiff has claimed that the ALJ erred in failing to consider whether Plaintiff's IQ scores were medically equivalent to Listing 12.05. The introductory notes to Section 12.05 state that "[m]ental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the development period; *i.e.*, the evidence demonstrates or supports onset of the

impairment before age 22." 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 12.05 (2010). Subsection C requires "[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. Part 404, Subpart P, Appendix 1, Listing 12.05C (2010).

The Court notes that when Plaintiff was in the sixth grade, he had a performance IQ score of 70 on the WISC-R (Tr. 174-75). Even though McKeown and the ALJ refer to this score as only borderline intellectual functioning, as did the school, it clearly meets the Listing requirement of an IQ score of 60 through 70.

School records also specifically state that Williams was taking alternative classes in the sixth grade (Tr. 174-75). The Court notes that although the regulations require that Plaintiff demonstrate that he suffered "deficits in adaptive behavior" before he turned twenty-two, 20 C.F.R. Part 404, Subpart P, Appendix 1, Listing 12.05 (2010), the Eleventh Circuit Court of Appeals, in *Hodges v. Barnhart*, 276 F.3d 1265, 1266 (11th Cir. 2001), has held "that there is a presumption that mental retardation is a condition that remains constant throughout life." The *Hodges* Court further held "that a claimant need not

present evidence that she manifested deficits in adaptive functioning prior to the age of twenty-two, when she presented evidence of low IQ test results after the age of twenty-two." *Hodges*, 276 F.3d at 1266.

Respondent has argued that *Hodges* is inapplicable here because, in *Hodges*, there was no IQ testing for the claimant before she turned twenty-two while, in this action, there are IQ scores from when Williams was in the sixth grade (Doc. 14, p. 13). Respondent further asserts that *Hodges* is based on the reasoning of a prior case, *Lowery v. Sullivan*, 979 F.2d 835, 837 (11th Cir. 1992), which pre-dated revisions to this section of the regulations (Doc. 14, p. 13 n.7).

The Court notes that Respondent offers no citations demonstrating that *Hodges* is not good law. That being the case, the Court understands *Hodges* to instruct the Court to find that Williams has satisfied the requirement of proving that he suffered deficits in adaptive functioning prior to the age of twenty-two. The Court further notes that even though the ME and the ALJ discounted the full scale IQ score of 69 Plaintiff obtained on the WISC-III, the score provides further support that this decision is correct.

The final requirement to meet Listing 12.05C is for

Plaintiff to demonstrate "a physical or other mental impairment imposing an additional and significant work-related limitation of function." The ALJ found that Plaintiff suffered from the following severe impairments: dysthymic disorder, mild depression, borderline intellectual functioning, and obesity (Tr. 12).

The Court notes that the Eleventh Circuit Court of Appeals has held that for purposes of § 12.05C the second prong requirement is met once there is a finding that the claimant has an additional severe impairment because the requirement of "significant work-related limitation of function" "involves something more than 'minimal' but less than 'severe.'" *Edwards by Edwards v. Heckler*, 755 F.2d 1513, 1515 (11th Cir. 1985). The *Edwards* Court specifically held that "[o]nce a claimant is found to have a 'severe impairment' within the meaning of § 404.1520(c), he is deemed disabled (he must also meet the durational requirement), and the analysis comes to an end." *Edwards*, 755 F.2d at 1515.

The Court has reviewed the record and finds evidence which suggests that Plaintiff has satisfied the requirements of Listing 12.05C. While the Court has reviewed the record carefully and realizes that there is evidence at odds with this

conclusion, the Court, nevertheless, finds that the ALJ's decision is not supported by substantial evidence as Williams has satisfied the requirements of Listing 12.05C.

Therefore, it is **ORDERED** that the action be **REVERSED** and **REMANDED** to the Social Security Administration for further administrative proceedings consistent with this opinion. Furthermore, it is **ORDERED** that a final judgment be entered ordering remand in this action pursuant to sentence four of 42 U.S.C. § 405(g). See *Melkonyan v. Sullivan*, 501 U.S. 89 (1991). For further procedures not inconsistent with this order, see *Shalala v. Schaefer*, 509 U.S. 292 (1993).

DONE this 27th day of May, 2011.

s/BERT W. MILLING, JR.
UNITED STATES MAGISTRATE JUDGE