UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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KENNETH G. WILLIAMS,

Plaintiff,

-v- 7:07-CV-908

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

- -

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

This matter is brought pursuant to § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), to review a final determination of the Commissioner of Social Security denying plaintiff's claim for Social Security Disability benefits. The parties have filed their briefs, including the Administrative Record on Appeal, and the matter has been submitted for decision without oral argument.

II. BACKGROUND

Plaintiff Kenneth G. Williams ("plaintiff" or "Williams") filed an application for social security disability benefits on October 15, 2004, claiming a period of disability beginning on December 20, 2003.[1] His claims were denied on March 25, 2005. He filed a request for a hearing on May 2, 2005, and a hearing was held before an Administrative Law Judge ("ALJ") on May 15, 2006. The ALJ rendered a decision on August 14, 2006, denying plaintiff's claim. Plaintiff appealed the ALJ's decision and submitted additional evidence to the Appeals Council. On July 12, 2007, the Appeals Council declined further review of the ALJ's decision. Thus, the ALJ's decision became the final decision of the Commissioner.

III. DISCUSSION

A. Standard of Review

The scope of a court's review of the Commissioner's final decision is limited to determinating whether the decision is supported by substantial evidence and the correct legal standards were applied. Poupore v. Astrue, 566 F.3d 303, 305 (2d Cir. 2009) (per curiam) (citing Machadio v. Apfel, 276 F.3d 103, 108 (2d Cir. 2002); Martone v. Apfel, 70 F. Supp. 2d 145, 148 (N.D.N.Y. 1999) (citing Johnson v. Bowen, 817 F.2d 983, 985 (2d Cir. 1987)). "Substantial evidence means 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Poupore, 566 F.3d at 305 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938)). "To determine on appeal whether an ALJ's findings are supported by substantial

[1] Plaintiff, a sheriff's deputy, sustained an on-the-job injury to his thoracic spine in October 2002. He returned to work two weeks later in November 2002. On May 13, 2003, plaintiff sustained another work-related injury, to his neck and shoulder. He returned to work with no restrictions on October 20, 2003. He has been out on workers compensation since December 20, 2003.

evidence, a reviewing court considers the whole record, examining the evidence from both sides, because an analysis of the substantiality of the evidence must also include that which detracts from its weight." Williams v. Bowen, 859 F.2d 255, 258 (2d Cir. 1988) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 464 (1951)). If the Commissioner's disability determination is supported by substantial evidence, that determination is conclusive. Id.

However, "where there is a reasonable basis for doubting whether the Commissioner applied the appropriate legal standards," the decision should not be affirmed even though the ultimate conclusion reached is arguably supported by substantial evidence. Martone, 70 F. Supp. 2d at 148 (citing Johnson, 817 F.2d at 986).

A reviewing court may enter "a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g); see Martone, 70 F. Supp. 2d at 148. "Remand is appropriate where there are gaps in the record or further development of the evidence is needed," such as where new, material evidence has become available. 42 U.S.C. § 405(g); Martone, 70 F. Supp. 2d at 148 (citing Parker v. Harris, 626 F.2d 225, 235 (2d Cir. 1980)). A remand for rehearing directing the taking of additional evidence is warranted only if it is shown that there is new, material evidence "'and that there is good cause for the failure to incorporate such evidence into the record'" at the administrative hearing. Carroll v. Sec'y of Health & Human Servs., 705 F.2d 638, 643-44 (2d Cir. 1983) (quoting 42 U.S.C. § 405(g), as amended in 1980)). Remand may also be appropriate if the Commissioner "misapplies the law or failed to provide a fair hearing." Id. at 644. However, where the underlying administrative decision is not supported by substantial evidence, reversal is appropriate

because there would be no useful purpose in remanding the matter for further proceedings. Id. (reversing and remanding solely for calculation of benefits, subject to determination by the district court of any motion by the agency to remand to consider new evidence); Parker, 626 F.2d at 235 (reversing and remanding solely for calculation and payment of benefits); Simmons v. United States R.R. Ret. Bd., 982 F.2d 49, 57 (2d Cir. 1992) (same); Williams, 859 F.2d at 261 (same).

B. Disability Determination - The Five Step Evaluation Process

The Social Security Act defines "disability" to include the "inability to engage in 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. § 423(d)(1)(A). In addition, the Act requires that a claimant's

> physical or mental impairment or impairments [must be] 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, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

Id. § 423(d)(2)(A).

The Administrative Law Judge ("ALJ") must follow a five step evaluative process in determining whether an individual is disabled. See 20 C.F.R. §§ 404.1520, 416.920. In the first step the ALJ must determine whether the claimant is engaging in substantial gainful activity. If the claimant is engaging in substantial gainful activity he is not disabled and he is not entitled to benefits. Id. §§ 404.1520(b), 416.920(b).

If the claimant is not engaged is substantial gainful employment, then step two requires the ALJ to determine whether the claimant has a severe impairment or combination of impairments which significantly restricts his or her physical or mental ability to perform basic work activities. Id. §§ 404.1520(c), 416.920(c). If the claimant is found to suffer from a severe impairment, then step three requires that the ALJ determine whether the impairment meets or equals an impairment listed in Appendix 1 of the regulations. Id. §§ 404.1520(d), 416.920(d); see also id. Part 404, Subpt. P, App. 1. If so, then the claimant is "presumptively disabled." Martone, 70 F. Supp. 2d at 149 (citing Ferraris v. Heckler, 728 F.2d 582, 584 (2d Cir. 1984)); 20 C.F.R. §§ 404.1520(d), 416.920(d).

If the claimant is not presumptively disabled, step four requires the ALJ to assess whether the claimant's residual functional capacity ("RFC") precludes the performance of his or her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f).

If the opinion of a treating physician is "'well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record'" it is given significant weight. Poupore, 566 F.3d at 307 (quoting 20 C.F.R. § 404.1527(d)(2)). However, where the treating physician's opinion is not supported by medical evidence, it is not entitled to significant weight. Id.

The burden of proof with regard to the first four steps is on the claimant. Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996); Ferraris, 728 F.2d at 584.

If it is determined that claimant cannot perform past relevant work, the burden shifts to the agency for the fifth and final step. Perez, 77 F.3d at 46. This step requires the agency to examine whether the claimant can do any type of work. 20 C.F.R. §§ 404.1520(g), 416.920(g). The regulations provide that "factors such as a claimant's age, education, and

previous work experience" should be evaluated to determine whether a claimant has the residual functional capacity to perform work in any of five categories of jobs: very heavy, heavy, medium, light, and sedentary." Perez, 77 F.3d at 46 (citing 20 C.F.R. § 404, Subpt. P, App. 2). "[T]he Commissioner need only show that there is work in the national economy that the claimant can do; he need not provide additional evidence of the claimant's residual functional capacity." Poupore, 566 F.3d at 306.

A claimant may seek review of an adverse decision by the ALJ from the Appeals Council. Perez, 77 F.3d at 44. If review is granted, the decision of the Appeals Council is the final decision of the Commissioner. Id. If review is denied, then the final decision is that of the ALJ. Id. The final decision is judicially reviewable pursuant to 42 U.S.C. § 405(g).

IV. ANALYSIS

First, the ALJ found that plaintiff had not engaged in substantial gainful activity since his alleged onset date of December 20, 2003. Second, she found that Williams' impairment of chronic cervical strain was severe. However, she found that plaintiff's psychiatric impairments were not severe. At the third step, the ALJ determined that plaintiff's combination of impairments did not meet or equal a listed impairment.

Accordingly, she proceeded to the fourth step, deciding that Williams had the RFC to lift and/or carry ten pounds frequently and twenty pounds occasionally, stand and/or walk for a total of about six hours in an eight-hour work day, sit for a total of about six hours in an eight-hour work day, push and/or pull ten pounds frequently and twenty pounds occasionally, and occasionally climb, balance, stoop, kneel, crouch, or crawl. The ALJ further found that plaintiff must be permitted to periodically alternate sitting and standing. Based upon these

functional limitations, as well as his impaired concentration and memory, and episodes of anger, the ALJ found that Williams could not perform any past relevant work.

Because she found that plaintiff could not perform any past relevant work, the ALJ proceeded to the fifth and final step. At this step, she determined that plaintiff had the RFC to perform light work limited by the need to alternate sitting and standing occasionally, therefore, given his age of 37, education level through high school, past work experience as police officer and truck driver, there existed jobs in significant numbers in the national economy that Williams could perform. Thus, she found him to be not disabled.

Plaintiff contends that at step two the ALJ erred in not finding his mental impairments severe. He argues that at the ALJ substituted her own judgment for competent medical opinions, and that her findings were not supported by substantial evidence. Williams also argues that the ALJ failed to properly consider and evaluate his pain, physical limitations, and other symptoms, and failed to properly assess his RFC and whether there are jobs in sufficient numbers in the national economy that he can perform.

These issues will be addressed seriatim.

A. Severity of Williams' Mental Impairment

If a claimant establishes that he has a medically determinable mental impairment, then "the symptoms, signs, and laboratory findings that substantiate the presence of the impairment" must be specified. 20 C.F.R. § 404.1520a(b)(1). Then, "the degree of functional limitation resulting from the impairment(s)" must be rated. Id. at § 404.1520a(b)(2). Functional limitation is rated in four broad areas: "Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation." Id. at § 404.1520a(c)(3). In the first three areas of functioning, limitations are rated "[n]one,

mild, moderate, marked, and extreme," with extreme being incompatible with ability to perform any gainful activity. Id. § 404.1520a(c)(4). Episodes of decompensation is rated none through four or more, with four or more incompatible with gainful activity. Id. The severity of the mental impairment is then determined based upon the functional limitation found. Id. § 404.1520a(d).

At issue is whether substantial evidence supports the ALJ's finding that plaintiff's mental impairments do not impose limitations upon his activities of daily living. The ALJ noted that plaintiff had been diagnosed with anxiety disorder, adjustment disorder, and bipolar disorder. (R.19.) Richard W. Williams, Ph.D., performed a mental status examination of plaintiff on March 11, 2005, at the behest of the New York State Department of Temporary and Disability Assistance. Dr. Williams stated that plaintiff reported that his anxiety, anger, and depressed mood were partially controlled by medication. Id. at 221. Plaintiff reported that "his current moods are fairly good and he said that his functioning problems are due to physical reasons not to emotional ones." Id. Although Dr. Williams noted that plaintiff reported trouble concentrating and some memory problems, he concluded that there was no need for additional treatment at that time. Id.

On March 21, 2005, Michelle Marks, Ph.D. completed a mental residual functional capacity assessment and psychiatric review of plaintiff. Id. at 228-45. Dr. Marks concluded that plaintiff was moderately limited in the ability to maintain attention and concentration for extended periods, to accept instructions and respond appropriately to criticism from supervisors, and to respond appropriately to changes in the work setting. Id. at 228-29. In summary, Dr. Marks stated that there did not appear to be "any significant limitation associated with a psychiatric impairment." Id. at 229.

When questioned by the ALJ about what affected his ability to work, plaintiff stated that the major part was neck pain, but mid- and lower-back pain also bothered him. Id. at 406, 417. Notably, Williams did not testify that his mental impairments affected his ability to work. See id. Finally, when questioned again if there was anything else that affected his ability to do a job, plaintiff referenced a current memory lapse which may be caused by his medication to treat bipolar. Id. at 423-24. Williams then recounted how he was diagnosed as bipolar, and stated that his medication helped. Id. at 424-25. He further testified that he still has moments of being angry that might affect his work, and that he tried to control the episodes with his medication. Id. at 426.

The foregoing substantial evidence supports the finding by the ALJ that plaintiff has no limitation of his daily activities, mild limitations on his social functioning, and no more than moderate limitations on his concentration, persistence, or pace. These determinations, combined with no evidence of any episode of decompensation led the ALJ to determine that plaintiff's mental impairments were not severe, a proper conclusion.

B. Judgment Substituted for Medical Opinion

Plaintiff first contends that there is no medical opinion in the record that his memory problems will improve within twelve months; therefore, the ALJ made this judgment on her own. There is no medical evidence to support this finding by the ALJ. However, there is ample evidence in the record to support a finding that plaintiff's mental impairment was not severe, as set forth in the previous section. For example, Dr. Marks opined that plaintiff did not suffer from a severe mental impairment, id. at 230; Dr. William's nurse practitioner found that plaintiff's mental conditions were stable with medication, from which he suffered minimal side effects, and further treatment was not required, id. at 394; and Dr. Nocilla, plaintiff's

primary care physician, concurred in the opinion of the nurse practitioner, id. at 398. Accordingly, an erroneous statement that plaintiff's memory problems would improve within twelve months had no effect on the final decision denying plaintiff disability benefits.

Plaintiff also argues that the ALJ substituted her own judgment for a competent medical opinion relating to the ALJ's statement that there is no substantial evidence regarding headaches and that plaintiff's normal strength and lack of scheduled medical treatment are inconsistent with plaintiff's claims of severe pain. Based upon these and other observations, the ALJ found that although plaintiff's chronic cervical strain could reasonably be expected to produce neck pain, most of plaintiff's other alleged symptoms were not supported by objective medical evidence of record and his subjective complaints were not fully credible. Plaintiff states that he consistently made complaints about headaches throughout the course of his treatment. However, he does not point to any evidence in the record of a medically determinable impairment that could reasonably be expected to produce headaches.

There is no objective medical evidence in the record to support plaintiff's subjective complaints other than neck pain, while there is a stated lack of medical findings to support many of plaintiff's complaints as well as evidence inconsistent with his claims. For example, in February 2004, Michael A. Horgan, M.D., a neurological surgeon, after review of plaintiff's MRI, found that there was no evidence of significant cervical pathology to which his current cervical pain could be attributed. Id. at 167. In May 2004, Edward J. Mazdzer, M.D., found plaintiff had full range of motion of the neck and shoulders, normal nerve conduction studies with the exception of a slightly delayed left ulnar SNAP, no evidence of abnormal insertional or spontaneous activity upon EMG of the upper left extremity in the shoulder and arm

muscles and the C5-6 through C8-T1 paraspinal muscles; no evidence of peripheral nerve entrapments, and no evidence of nerve root impingement. Id. at 173-74.

Moreover, the ALJ is in the best position to determine issues of credibility. Snell v. Apfel, 177 F.3d 128, 135 (2d Cir. 1999). Thus, substantial evidence in the record supports the ALJ's determination that plaintiff's subjective complaints other than neck pain are less than credible.

C. Substantial Evidence Supporting the ALJ's Determinations

Plaintiff argues that many of the ALJ's determinations were not supported by substantial evidence. First plaintiff contends that the ALJ relied mainly upon an independent medical examination chiropractor, Dr. Iles, who found plaintiff had normal strength and noted that plaintiff did not have a follow up appointment scheduled. (See R. at 21.) The ALJ made these observations in determining plaintiff's credibility as to severe pain. Second, plaintiff argues that his headaches were well documented. Similarly, however, the ALJ noted that there was no documented medical evidence to support plaintiff's assertions of severe headache pain, which was supported by substantial evidence, in determining plaintiff's credibility. As set forth in the previous section, the ALJ's determination as to plaintiff's credibility was properly made.

Third, the plaintiff argues that the ALJ gave no consideration to plaintiff's low back problem. However, Williams himself reported to Joseph E. Ortiz, M.D., during his workers compensation evaluation on August 14, 2003, that his symptoms from the back injury he suffered on October 20, 2002, had "totally subsided." Id. at 153. Moreover, the ALJ stated that she considered all symptoms and the extent to which symptoms could reasonably be accepted as consistent with the objective medical evidence and other evidence. Id. at 20.

Fourth, plaintiff argues that the Appeals Council failed to address the December 6, 2006, report from John Krawchenko, M.D., who noted cervical and shoulder tenderness as well as the possibility of disc replacement surgery. See id. at 400-02. Dr. Krawchenko recommended conservative measures, and discussed surgical options only should conservative measures fail. Id. at 402. Further, the Order of Appeals Council stated that it had received additional evidence including the report from Dr. Krawchenko and the Notice of Appeals Council Action states that the Council considered the additional evidence. There was no error of failing to consider the additional evidence.

Fifth, plaintiff argues that the ALJ picked out parts of the chiropractor's opinion and ignored the rest. According to plaintiff, the ALJ selectively ignored the statement of Dr. Joel Santy, plaintiff's chiropractor, that Williams "is significantly limited in even menial [activities of daily living]. Under no circumstance is he physically able to meet the physical demands of his job as a sheriff's deputy." Id. at 378. A chiropractor is not an accepted source whose opinions may be given controlling weight. 20 C.F.R. § 404.1513(d)(1). Moreover, it is the province of the Commissioner to determine disability, and statements from a medical source that a person is disabled or unable to work are not conclusive. Id. § 404.1527(e)(1). Thus, it was proper for the ALJ to consider Dr. Santy's opinions as to plaintiff's functional ability, while not relying upon Dr. Santy's statement that he is disabled.

In sum, each of plaintiff's arguments fails. The ALJ's decision was supported by substantial evidence.

D. Consideration of Pain, Physical Limitations, and Other Symptoms

Plaintiff's argument will be addressed only to the extent it is not repetitious of his prior arguments. He argues that the ALJ overstated his abilities leading to a mistaken finding

that his complaints of pain and other symptoms are less than credible. According to plaintiff's questionnaire of January 2005, his daily activities include personal hygiene, eating, doing household chores, going to the chiropractor and physical therapy, exercising, reaing, watching television, resting, using home traction and TENS unit, and caring for pets. R. at 73. Plaintiff reported that he feeds and transports his pets to the veterinarian with the help of his wife. Id. He reported no problem with personal care. Id. He prepared his own food or meals daily. Id. at 74. He reported being able to do cleaning, laundry, household repairs, ironing, and mowing, with the need to take frequent breaks. Id. at 75. He was able to walk, drive a car, and ride in a car. Id. He reported shopping once or twice a week. Id. at 76. He could perform only limited, controlled work outs. Id. Further, he reported that he could only perform limited, controlled lifting, standing, walking, sitting, climbing stairs, kneeling, squatting, reaching, and using hands. Id. at 77. Additionally, Williams reported trouble concentrating, and needed to take breaks in order to finish what he starts. Id. at 78.

At the May 17, 2006, hearing before the ALJ, plaintiff testified that the pain in his neck prevented him from doing many things that he enjoyed doing before, such as working out with weights, boxing, martial arts, snowmobiling, motorcycle riding, family events, going out to dinner with his wife, hunting, mowing the lawn, and doing work around the house. Id. at 419. He stated that he does not shave every day, and he has his wife shave his head so he does not have to wash, dry, and comb his hair. Id. at 421. He stated that his help around the house is very limited, such as putting clothes in the washer but not taking them out. Id. Also, he can ride the lawn mower for only about twenty minutes and then he has to stop and rest. Id. at 430. He cannot operate the snowblower. Id. He usually gets only half way

through grocery shopping with his wife when he has to go lie down in his truck. Id. at 431. Williams also stated that he now has trouble driving longer distances. Id. at 426.

The ALJ did not take issue with these limitations as described by Williams. What she did take issue with, and consider in finding him less than credible, was other statements. He stated that he could not get out of bed a minimum of two days per week. Id. at 420. He further stated that he may not be able to get out of bed all day four or five times during a bad week. Id. Williams said that he would not be able to walk consistently for six hours or more, and that if he was forced to do it "I would probably be down for a month, if I wasn't taken away by ambulance." Id. at 428. These were the statements the ALJ found less than credible. The ALJ properly considered plaintiff's complaints of pain and other symptoms.

E. Assessment of RFC and Jobs in the National Economy

Plaintiff contends that the ALJ failed to properly assess his RFC and jobs in the national economy that plaintiff can perform. Plaintiff again contends that the ALJ ignored Dr. Santy's assessment that he is significantly limited in even menial activities of daily living, that his disability is permanent and total, and that head movements preclude sedentary work such as radio dispatcher. However, the ALJ need not accept a medical source's opinion that plaintiff is disabled. See 20 C.F.R. § 404.1527(e)(1). Moreover, the ALJ accepted Dr. Santy's assessment of plaintiff's functional abilities. (R. at 20, 374-81.) More specifically, Dr. Santy opined that plaintiff could lift and carry occasionally up to twenty pounds and frequently ten pounds, stand and/or walk up to six hours per day, sit less than six hours per day, alternate positions occasionally, and could not push and/or pull repetitively or with over ten pounds. Id. at 378. This opinion is entirely consistent with the ALJ's assessment of Williams' RFC.

Additionally, Dr. Santy's comment regarding Williams not being able to do the sedentary work as a radio dispatcher related to his workers compensation claim and returning to light duty as a sheriff's deputy, not to sedentary work generally. Thus, it was not necessary for the ALJ to take that opinion into consideration.

The ALJ considered plaintiff's RFC of light work limited by need for a sit/stand option, age, education, and vocational history and applied Rule 202.21 of the Medical-Vocational Guidelines as a framework to determine that jobs existed in significant numbers in the national economy that plaintiff could do. If plaintiff were able to perform a full range of light work, Rule 202.21 would direct a finding of not disabled. Further, Rule 201.21 applicable to sedentary work would direct a finding of not disabled if Williams could perform a full range of sedentary work. The only limitation on plaintiff's ability to do a full range of light or sedentary work was the need to be able to alternate between sitting and standing positions, which would not affect the remaining occupational base of light and sedentary work available to plaintiff. See SSR 83-12, 1983 WL 31253, at *2 (S.S.A. 1983). It was not necessary to consult a vocational expert to clarify the remaining occupational base in this instance. See id. at *4.

V. CONCLUSION

The ALJ followed the correct legal standards. Moreover, her decision that plaintiff is not disabled is supported by substantial evidence.

Accordingly, it is

ORDERED that

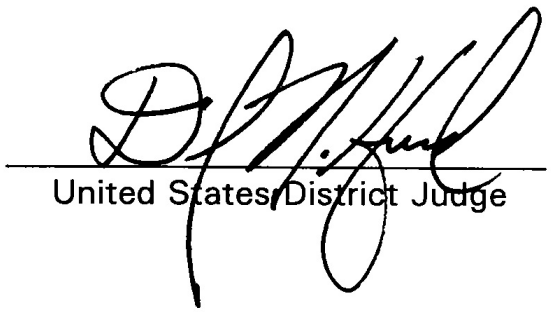
1. The Commissioner's motion for judgment on the pleadings is GRANTED;

2. The Commissioner's decision denying plaintiff disability benefits is AFFIRMED; and

3. The complaint is DISMISSED in its entirety.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.



United States District Judge

Dated: June 10, 2010
Utica, New York.