

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GARY WAYNE SMITH,	:	NO. 1:11-CV-00203
	:	
Plaintiff,	:	
	:	
v.	:	OPINION AND ORDER
	:	
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
	:	
Defendant.	:	

This matter is before the Court on the Magistrate Judge's March 21, 2012 Report and Recommendation (doc. 15), and Plaintiff's Objections (doc. 22). For the reasons indicated herein, the Court ADOPTS and AFFIRMS the Magistrate Judge's Report and Recommendation in all respects, FINDS the ALJ's non-disability finding supported by substantial evidence, and DIRECTS the clerk to close this case on the Court's docket.

I. Background

This disability benefits appeal concerns Plaintiff's December 2007 applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB), alleging a disability onset date of December 30, 2006, due to degenerative disc disease, numbness in upper and lower extremities, anxiety, depression, and pain of the neck, hip, leg, and back (doc. 15). Upon denial of his application initially and upon reconsideration, Plaintiff requested and received a hearing de novo before Administrative Law Judge

(ALJ) Deborah Smith, who, on December 22, 2009, denied both of Plaintiff's applications (Id.). Plaintiff's request for review by Appeals Council was denied, making ALJ Smith's Findings the final determination of the Commissioner (Id.).

The ALJ's findings are summarized in the record (Id.). Essentially, Plaintiff has not engaged in substantial gainful activity since December 30, 2006, due to the severe impairment of degenerative disc disease of the cervical spine (Id.). As a result of his condition, Plaintiff underwent surgery, an anterior cervical discectomy and fusion (ACDF), in May 2007. Despite Plaintiff's surgery and condition, the ALJ found Plaintiff did not have an impairment or combination of impairments meeting or medically equaling one of the impairments in the Listings (Id.). The ALJ considered the entire record and found that Plaintiff had a residual functional capacity ("RFC") to perform light work; he must avoid overhead bilateral reaching, climbing ladders, scaffolds, and ropes; and engage in no more than occasional stooping, crouching, and crawling (Id.).

After considering that Plaintiff could not perform any past relevant work, the ALJ considered Plaintiff's age, background and, residual functional capacity and concluded there are nonetheless jobs in the national economy that Plaintiff could perform since December 30, 2006 (Id.). As such, the ALJ found Plaintiff not under disability, and not entitled to SSI or DIB

contends at minimum remand is required for a proper evaluation of his ability to function in the workplace (Id.).

IV. Discussion

The Court rejects Plaintiff's contentions that the ALJ erred in evaluating his RFC, accessing his credibility, and in applying the Grids. Plaintiff is correct in his view that the Magistrate Judge supported and reiterated the findings of the ALJ. However, the Court finds no issue with this as Plaintiff presented no objective evidence to the Magistrate Judge to refute that the ALJ's original findings were indeed reasonable and substantially supported by evidence in the record.

First, Plaintiff's contention that the ALJ rejected "longitudinal records" in favor of notations when determining his RFC is contrary to the record (Id.). Plaintiff underwent extensive cervical surgery to address, what was at the time, a degenerative cervical disease. Pre-surgical findings of Dr. DeGreg and Dr. McPherson explain well the extent of Plaintiff's spinal issues and functional limitations. Both the ALJ and the Magistrate Judge made note of these findings when considering the record as a whole. However, longitudinal records include post-surgical findings, like those from Dr. DeGreg, Dr. McPherson, and pain management physician Dr. Khan. All records were made available to the two non-examining medical consultants in the course of this case. Dr. McPherson and both medical consultants arrived at the same conclusion regarding

Plaintiff's functional assessment. Compared with pre-surgical findings, significant improvements were made within six weeks of the surgery. Within seven months of the surgery, Dr. McPherson noted that x-rays showed normal spinal alignment, and he opined that Plaintiff had "reached maximum medical improvement" (doc. 15). It is clear to this court that the ALJ considered longitudinal records when determining Plaintiff's RFC.

Similarly, it appears to this Court that Plaintiff is actually arguing that the ALJ and Magistrate Judge erred by basing his RFC on longitudinal records, spanning pre and post-surgical, instead of the inconsistent post-surgical functional assessments of Dr. DeGreg. Plaintiff's view overstates the ALJ's responsibility in evaluating medical evidence. The regulations provide a framework for evaluation of all evidence, clearly favoring the opinions of treating physicians over those of non-examining medical sources and experts. 20 C.F.R. 404.1527(d). The opinions of non-examining consultants are only given weight insofar as they are supported by evidence in the case record. Social Security Ruling 96-p. When a treating physician's opinion is rejected, as here, as unsupported, it is only proper for the ALJ to consider and weigh the opinions of other medical sources. The ALJ did not weigh the post-surgical "notations" of the treating physician as favorable as Dr. McPherson or the two non-examining medical consultants' opinions. Dr. DeGreg's functional assessment was objectively

inconsistent with her own previous treatment records, and the findings of the other three medical professionals on the record. Therefore, this Court affirms the ALJ and Magistrate Judge's RFC decision as they are supported by substantial evidence.

Next, Plaintiff objects to the findings on his credibility (doc. 22). Plaintiff contends the ALJ discredited his own functional assessment testimony because of an alleged medical noncompliance (Id.). To address the allegation, Plaintiff argues that "there is ample evidence throughout the record that medicines did not alleviate the functional limitation described" (Id.). Furthermore, the Plaintiff suggests the Court take into consideration that the limitations he testified to are consistent with his documented medical condition unless there is documentation to the contrary (Id.). The Court is inclined to agree with both findings articulated by the ALJ and Magistrate Judge. First, as stated above, the findings of Dr. McPherson and the two medical consultants are contrary to Plaintiff's testimony. Objective medical evidence in the record show near normal alignment and rotation post surgery. Contrary to Plaintiff's objection, he bears the burden of proof in regards to disproving this evidence.

Second, Plaintiff's own treatment noncompliance raises serious questions in regards to his credibility. Both the ALJ and the Magistrate Judge found issue with Plaintiff's alleged prescription noncompliance in light of his testimony regarding the

severity of his pain. However, nowhere does the ALJ state medicine compliance would automatically or unquestionably alleviate functional limitations, thus changing his RFC assessment from sedentary to light work. Instead noncompliance coupled with the continued negative drug screenings left the ALJ and Magistrate Judge with doubt as to whether Plaintiff was following through with his treatment plan. As noted above, records show that Dr. McPherson found Plaintiff's surgery to be a success and referred Plaintiff to physical therapy to improve upon these results. It was also suggested he see a pain management specialist. Plaintiff failed to see a physical therapist until 2009, and began seeing a pain management physician eleven months after Dr. McPherson's suggestion, but only after Dr. DeGreg refused to provide additional pain medication. Again, based on the record, this Court finds no error in the ALJ's reasoning for discrediting Plaintiff and affirms the decision.

Finally, Plaintiff argues the ALJ erred in applying medical-vocational guidelines, the Grids, when determining his RFC (Id.). Plaintiff contends that if his testimony or Dr. DeGreg's RFC assignment were controlling, he would have been assigned the RFC for sedentary work (Id.). The Court agrees with Plaintiff's contention, but again finds the ALJ decision substantially supported. The Court has already addressed the Grids issue in addressing the issues of RFC and credibility. As stated previously,

Plaintiff's testimony and Dr. DeGreg's RFC assessment are unsupported and contrary to objective medical findings on record. The Grids were applied using the objective medical findings and the RFC for light work was assigned. Therefore, Plaintiff is not entitled to a more favorable RFC and the ALJ's decision will be affirmed.

V. Conclusion

The Court finds the Magistrate Judge's Report complete, thorough and persuasive. Having reviewed the record, the Court finds well-taken the Magistrate Judge's conclusion that the ALJ's finding of non-disability is supported by substantial evidence. The Court rejects Plaintiff's argument that the ALJ erred in formulating Plaintiff's RFC, in weighing and evaluating the medical evidence, or in applying the Grids. The ALJ's findings in this case were therefore supported by substantial evidence and his conclusion denying benefits fell properly within his "zone of choice." Felisky v. Bowen, 35 F.3d 1027, 1035 (6th Cir. 1994). Finally, the Court sees no basis for a remand, as it is clear from the evidence that Plaintiff has the ability to function in the workplace, limited to a reduced range of light work.

Proper notice was provided to the Parties under Title 28 U.S.C. § 636(b)(1)(c), including the notice that they would waive further appeal if they failed to file an objection to the Magistrate Judge's Report and Recommendation in a timely manner.

See United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981).

Accordingly, having reviewed this matter de novo, pursuant to Title 28 U.S.C. § 636, the Court concludes that the Magistrate Judge's findings, as outlined in her Report and Recommendation, are correct. Therefore, the Court hereby ADOPTS the Report and Recommendation in its entirety (doc. 17), FINDS the decision of the Commissioner that Plaintiff was not entitled to a period of disability and disability income benefits SUPPORTED BY SUBSTANTIAL EVIDENCE, AFFIRMS such decision, and as no further matters remain pending for the Court's review, the Court DIRECTS the Clerk to CLOSE this case on the Court's docket.

SO ORDERED.

Date: September 20, 2012

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge