IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

OTIS F. MYERS,	)	CASE NO. 4:04CV00091
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
	)	
JO ANNE B. BARNHART, Commissioner of Social Security,	)	By: B. Waugh Crigler U. S. Magistrate Judge
	)	
Defendant.	)	

This challenge to a final decision of the Commissioner which denied plaintiff's July 14, 1998 claim for a period of disability and disability income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, prior to the expiration of his insured status on December 31, 1993, once more is before the undersigned under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. For the reasons that follow, the court will recommend that an order enter REVERSING the Commissioner's final decision, GRANTING judgment to the plaintiff and RECOMMITTING the case to the Commissioner for the sole purpose of calculating and paying proper benefits.

Plaintiff's quest for an award of disability benefits, which began with his application on July 14, 1998 alleging disability since April 18, 1988 and culminated the first time with a remand of the case to the Commissioner by the District Court in accordance with a mandate entered by the Fourth Circuit Court of Appeals on April 15, 2003. *Myers v. Commissioner*, Case No. 4:02cv00002 (W.D.Va. April 16, 2003). Further proceedings were conducted before a

second Administrative Law Judge (Law Judge) with respect to whether plaintiff was disabled prior to the expiration of his insured status on December 31, 1993. In a decision dated January 30, 2004, the Law Judge agreed with the first Law Judge's statement and narrative concerning the weight he gave to the evidence and, in many respects essentially adopted the findings of fact and conclusions of law earlier made. The Law Judge found that plaintiff, who was 45 years old with past relevant work as a heavy equipment operator at the time his insured status expired, suffered a severe back impairment which did not meet or equal any listed impairment. (R. 356.) He further found plaintiff's allegations about the effects of his impairment not to be "totally credible" and concluded that plaintiff was disabled from his past relevant work because that work involved "more than light exertion." (R. 357.) Finding that plaintiff possessed the residual functional capacity to perform light work, further being of the view that plaintiff suffered no non-exertional limitations on his ability to perform work-related activities, and notwithstanding the presence of a vocational expert at the hearing who fielded questions concerning jobs available to a person with plaintiff's limitations, the Law Judge applied the Medical-Vocational Guidelines ("grids") to compel a finding that plaintiff was not disabled under the Act. (R. 353-355, 357, 692-694.)

On November 9, 2004, the Appeals Council issued a decision adopting, in part, and rejecting, in part, the Law Judge's decision. (R. 321-329.) While adopting the conclusion reached by the Law Judge concerning plaintiff's ability to perform light work, the Council made specific "function-by-function" findings, which included finding plaintiff able to stoop/walk and sit for up to six hours in an eight-hour work day. (R. 326.) The Council further rejected any inference that could be drawn from the first/second Law Judge's decision that plaintiff's past

relevant work fell in the light exertional category under the Dictionary of Occupational Titles (DOT), finding instead that the DOT categorized his job as medium. (*Id.*) Thus, although the Council was of the view that plaintiff could perform light exertional work-related activities, it concluded that plaintiff was unable to perform his past relevant work. (R. 327.) The Council then found that plaintiff was 45 years old during the relevant period of inquiry with a 7th grade education, and that he had "alleged being illiterate." (*Id.*) The Council acknowledged that the argument advanced by plaintiff's attorney that plaintiff in fact was illiterate, and the Council observed that the VE had addressed its effects on the availability of work, but, nevertheless the Council adopted the Law Judge's use of the "grids" in lieu of vocational testimony and found that "neither literacy nor transferability of skills is material to this decision" (*Id.*)[1] The Council ultimately found that plaintiff was unable to perform his past relevant work, that he was a younger person with a "7th grade (limited) education, that he had the ability to perform light exertional work, and that his illiteracy was "not material." The Council applied the "grids" and found plaintiff not disabled prior to the expiration of his insured status. (R. 328-329.) This action ensued.

Plaintiff, by counsel, presents a fairly straightforward argument. He believes that, because the substantial evidence in the record shows: 1) he was unable perform his past relevant work; 2) he is illiterate with no transferable skills; 3) he experiences pain in his back with numbness and weakness in his leg; 4) he is unable to perform more than sedentary work, then he is disabled as a matter of law under § 201(h)(1) of the Commissioner's grids. 20 C.F.R. §

[1]In his August 13, 1999 decision which the Appeals Council adopted by denying review, the first Law Judge found that plaintiff "has a marginal education and is functionally illiterate." (R. 16.)

404.1569, Appendix 2, § 201(h)(1). The Commissioner, on the other hand, cites the evidence related to plaintiff's acquisition of worker's compensation benefits as substantially supporting her conclusion that plaintiff is able to perform light work. Her counsel argues that plaintiff was able to perform his past relevant work, "as that work was performed in the national economy," but that even if that were not the case, either under the "grids" or in view of the VE's testimony, there were light jobs available to the plaintiff. Defendant's Brief, at 15.

There can be no dispute on this record that the Commissioner found plaintiff unable to perform his past relevant work as a heavy equipment operator. (R. 328.) Consequently, the undersigned cannot accept the Commissioner's contention before this court that he could not return to his past relevant work "as performed." Def.'s Brief at 9. Because the plaintiff carried his initial burden in the sequential evaluation process by demonstrating the presence of severe impairments that prevented him from performing his past relevant work, the burden shifted to the Commissioner to demonstrate there were jobs available to his in the economy, given his impairments and their limitations. 20 C.F.R. § 404.1520; *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992). If plaintiff suffered both exertional and non-exertional limitations, this could be done only by the presentation of a vocational expert (VE), who would be required to consider all the evidence relevant to plaintiff's limitations. *Hall v. Harris*, 658 F.2d 260 (4th Cir. 1981); *McLain v. Schweiker*, 715 F.2d 866 (4th Cir. 1983); *Coffman v. Bowen*,829 F.2d 514 (4th Cir. 1987)*; Walker v. Bowen*, 889 F.2d 47 (4th Cir. 1989).

There are three matters the undersigned believes need to be addressed. First is the manner in which the Appeals Council addressed, or rather failed to address, plaintiff's claim he suffered non-exertional limitations, rather its failure to address the subject. The Law Judge made it clear

during the hearing, when plaintiff's counsel asked whether the Law Judge was intending to call a VE, that he did not consider plaintiff's pain, or any pain for that matter, as a non-exertional limitation. (R. 692-693.) When the VE was examined by plaintiff's counsel, he acknowledged that both pain and medication for pain, could have vocational effects which could keep individuals from performing any of the jobs he had identified in response to the Law Judge's earlier questions. (R. 699-700.) Neither the Law Judge nor the Appeals Council made findings on the issue of pain, though, as mentioned, the Council expressly excluded plaintiff's illiteracy as a vocational factor in the case, when applying the grids to compel a conclusion that plaintiff was not disabled.[2]

A non-exertional limitation is one which generally affects a person's ability to meet certain strength requirements of a job, and pain usually is considered non-exertional, unless it manifests only upon exertion. *Wilson v. Heckler*, 743 F. 2d 218 (4th Cir. 1984). Non-exertional pain must be taken into account by a VE in determining whether there are jobs available to a claimant who is unable to perform his/her past relevant work. *Walker v. Bowen*, 889 F.2d at 49.

Illiteracy is a vocational limitation which occupies a special place in the Commissioner's regulations.[3] As mentioned, if a person, like the plaintiff is between 45 and 49 years old and is limited to sedentary work, the girds, themselves would call for a finding that the person is disabled. 20 C.F.R. § 404.1569, Appendix 2, § 201.00(h)(1). Here, of course, the Council found

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[2]The grids account for the education of a claimant. Plaintiff's position here is that, if illiterate and limited to sedentary work, plaintiff is entitled to an award of benefits under the grids, Appendix 2, §201(h)(1). Curiously, the Law Judge appears to have conceded that plaintiff would be entitled to benefits under the grids if "one accepts the claimant's allegations that he is illiterate." (R. 356.)

[3]It is defined as the inability to read or write. 20 C.F.R. §1564(b)(1).

plaintiff's illiteracy not to be material because it concluded he was able to perform light work for which the grids compelled a conclusion that plaintiff was not disabled.

That leaves the question of whether the Council's resolution of plaintiff's credibility, in that the Council adopted the Law Judge's determination that plaintiff's subjective complaints were not fully credible, is supported by substantial evidence. (R. 326, 328.) This is important here because the Council essentially rested its determination that plaintiff could perform light work on the Law Judge's adopted findings of the first Law Judge concerning plaintiff's credibility and, the undersigned believes, on the Law Judge's rejection of the treating source evidence from 1991-1992 which reflects that plaintiff was unable to work at any occupation. (*See* R. 326; *see also* R. 197-229.)

The undisputed evidence in the case is that plaintiff's impairments resulted from a job related accident for which he was entitled to worker's compensation. During the period he was considered temporarily disabled for compensation benefits, plaintiff was seen regularly by Elizabeth Bullit, M.D., a portion of whose reports are cited above. Her evidence reveals that during a portion of plaintiff's treatment, she was of the view that plaintiff was disabled from his job but not necessarily all work. (R. 197-198.) In 1991, it is clear that she thought plaintiff was exaggerating his symptoms, but believed he should be re-examined to ascertain whether any changes had occurred. (R. 199.) All the while, Dr. Bullit was of the view that plaintiff's ability to find any work would be "difficult" because of his functional illiteracy, and because vocational rehabilitation had not been successful. (R. 198.)

By June 22, 1992, and in a report Dr. Bullit submitted to the worker's compensation insurance carrier, the treating doctor reported that not only was plaintiff unable to perform his

occupation. (R. 214-16.) As a result, plaintiff eventually was granted permanent disability status and, under Virginia law, awarded 500 weeks of benefits. The undisputed evidence also reveals that plaintiff was advised by the attorney representing him at that time that he would not be able to apply for both worker's compensation benefits and Social Security benefits, so plaintiff did not pursue a claim until the 500 weeks of compensation expired. (R. 666-670.)

During the interim, plaintiff did not seek or obtain additional medical opinions related to whether he was disabled. Of course, the advice was erroneous, and evidence which would have better informed any decision in this case was not gathered.[4] Suffice it to say, there is a gap in any treatment, other than maintenance treatment, for a significant period. His treatment resumed sometime in the late 1990's, when it was clear plaintiff experienced pain due to degenerative disc at L3-4, L4-5 and L-5/S-1, but with normal myelographies. (R. 232-240.) Certainly by 2001 it was determined that plaintiff continued "to have chronic low back pain..., [and] stable though pain control appears inadequate at this time." (R. 476.)

The Law Judge's determination that plaintiff's pain was not a non-exertional limitation was erroneous. The substantial evidence reveals that plaintiff did experience limitations produced by non-exertional pain prior to the expiration of his insurance status. The Council elected to avoid the issue altogether, and it was error, to that extent, for the Council to have relied on the grids to compel a conclusion that plaintiff was not disabled. The question, then, becomes whether the case should be remanded for further proceedings.

Certainly the Commissioner has had every opportunity to consider every aspect of this

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[4]There is no prohibition against applying for concurrent benefits, though, under the Act, any Social Security benefits would be offset by worker's compensation benefits. 42 U.S.C. §423a(a)(2)(B); *Allen v. Apfel*, 65 F. Supp. 2d 391 (W.D. Va. 1999).

claim. In reviewing the record, the undersigned has noticed that both the Law Judge , and subsequently the Commissioner, demonstrated their unwillingness to squarely face of all the elements of the plaintiff's claim. First, it was his credibility, then that of his treating doctor based upon the speculation of the Commissioner's medical expert that there was some collusion back in 1991-1992 to make a record that would be relevant only in 1998 when plaintiff applied for benefits well after his insured status expired. Then, when plaintiff's pain became relevant, the Law Judge somehow concluded that his pain did not constitute a non-exertional limitation, and the Council did nothing to correct that conclusion. Then, the Council sidestepped both the pain and literacy issues simply by concluding plaintiff was able to perform light work and by applying the grids to deny the claim, when, in fact, if plaintiff was found to be limited to sedentary work, the grids would have compelled a finding he was disabled. Yet, even then, the Commissioner declined to consider the evidence offered by the VE raising serious doubts about the availability of light work to a person with plaintiff's impairments and limitations. In other words, it appears that the Commissioner did not wish to address the final sequential inquiry on the facts as they exist, and as a result, failed to discharge her sequential burden.

Accordingly, it hereby is RECOMMENDED that an order enter REVERSING the Commissioner's final decision, GRANTING judgment to the plaintiff and RECOMMITTING the case to the Commissioner to calculated an pay proper benefits.

The Clerk is directed to immediately transmit the record in this case to the presiding District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically

objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(l)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

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Date