

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

DAVID S. LEWIS,)
) CASE NO. 4:06CV00021
)
 Plaintiff,)
)
 v.) REPORT AND RECOMMENDATION
)
)
)
 JO ANNE B. BARNHART, Commissioner) By: B. Waugh Crigler
 of Social Security,) U. S. Magistrate Judge
)
)
 Defendant.)

This challenge to a final decision of the Commissioner which denied plaintiff's April 19, 2004 claim for a period of disability and disability insurance benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423 is before this court 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. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will recommend that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for summary judgment, and DISMISSING this action from the docket of the court.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (Law Judge) found that plaintiff, who was 45 years old with a limited education and with past relevant work as a boiler mechanic, had not engaged in substantial gainful activity since his alleged date of disability onset, January 24, 2003, and that he was insured for benefits through at least December 31, 2008. (R. 11, 13, 17.) The Law Judge further

found that plaintiff has post cervical spinal fusion pain (failed neck syndrome), cervical radiculopathy and right shoulder adhesive capsulitis, which are severe impairments, but viewed individually or collectively, are not severe enough to meet or equal any listed impairment. (R. 13-14.) The Law Judge was of the view that although plaintiff's medically determinable impairments could reasonably be expected to produce the alleged symptoms, his allegations regarding the intensity, duration and limiting effects of these symptoms were inconsistent and not entirely credible. (R. 15-16.) The Law Judge found that plaintiff retained the residual functional capacity to perform a limited range of light work which involves only occasional use of ramps and stair climbing, never involves climbing ladders and only occasionally involves stooping, kneeling, crouching and crawling. (R. 14, 17.) The Law Judge further found that plaintiff should not lift with his arms extended away from his body and work above the shoulder level, and he should only perform limited pulling. (R. 14.) The Law Judge determined that plaintiff could not return to his skilled, heavy exertional past relevant work. (R. 17.) By application of the Medical-Vocational Guidelines ("grids") to plaintiff's exertional limitations, and by reference to testimony provided by the vocational expert (VE), the Law Judge concluded that jobs as a service station attendant, security guard, and cashier were available to plaintiff, and that he was not disabled under the Act. (R. 17-19.)

Plaintiff appealed the Law Judge's decision to the Appeals Council, which found no basis in the record, or in the reasons the plaintiff advanced on appeal, to review the Law Judge's decision. (R. 4-6.) Accordingly, the Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. This action ensued.

The Commissioner is charged with evaluating the medical evidence and assessing

symptoms, signs and medical findings to determine the functional capacity of the claimant. 20 C.F.R. §§ 404.1527- 404.1545; *Hayes v. Sullivan*, 907 F. 2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F. 2d 987 (4th Cir. 1984). The regulations grant some latitude to the Commissioner in resolving conflicts or inconsistencies in the evidence which the court is to review for clear error or lack of substantial evidentiary support. 20 C.F.R. § 404.1527; *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). In all, if the Commissioner’s resolution of the conflicts in the evidence is supported by substantial evidence, the court is to affirm the Commissioner’s final decision. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

In his brief¹, plaintiff initially argues that the Law Judge failed to give the opinions of his treating physicians proper weight in finding that he was capable of performing a limited range of light work. Plaintiff focuses this argument on the Law Judge’s reliance on the opinions provided by Murray E. Joiner, Jr., M.D., a physician who evaluated plaintiff on one occasion in connection with his workman’s compensation case. Dr. Joiner, a specialist in physical medicine and rehabilitation, evaluated plaintiff on June 24, 2004, after which he opined that plaintiff’s neck movements and the overall range of motion in his neck were self-limited. (R. 291.) Dr. Joiner found no anterior or posterior right shoulder joint line tenderness and noted that plaintiff’s right shoulder joint abduction and extension were inconsistent and “self-limited.” (*Id.*) He determined that plaintiff had experienced excellent outcomes from his surgeries and was “capable of a higher level of function than demonstrated.” (R. 292.) Dr. Joiner concluded that appropriate restrictions on plaintiff’s ability to work would include restrictions against lifting

¹The pleading filed by plaintiff is entitled “Plaintiff’s Brief Pursuant To Standing Order Number 2005-2.” (Dkt. No. 9.) The undersigned has interpreted this as a motion for and memorandum supporting summary judgment.

with his arms extended away from his body, restrictions against work performed at shoulder level, and limited pulling. (*Id.*) These conclusions were adopted by the Law Judge in his findings related to plaintiff's residual functional capacity. (R. 17.)

Plaintiff's argument that the Law Judge erred in relying solely on the opinions of Dr. Joiner and the DDS consulting record reviewers lacks merit primarily because they are not inconsistent with the opinions of plaintiff's "attending physicians," Joseph C. Campbell, M.D. and Ronald E. Hodges, M.D.² Dr. Campbell specifically addressed plaintiff's ability to perform substantial gainful activity on October 23, 2002. After an evaluation Dr. Campbell noted that, at that time, plaintiff was performing a light duty job. (R. 95.) He further reflected on plaintiff's own reports that he was capable of performing "all aspects" of the job, and Dr. Campbell recommended that plaintiff continue. (*Id.*) Dr. Hodges evaluated plaintiff on February 14, 2003. He noted that although plaintiff reported pain in his right shoulder, he exhibited a full range of motion in his right shoulder and had unremarkable x-rays. (R. 92.)

Plaintiff additionally argues that the Law Judge erred in relying on the opinions of Robert R. Chaplin, Jr., M.D. and J. Astruc, M.D. which, he contends, are heavily reliant on Dr. Campbell's October 23, 2002 findings. Specifically, plaintiff offers that the October 23, 2002 findings predate plaintiff's surgeries which, he contends, led to a significant decline in his condition. However, in his brief plaintiff concedes that none of his treating physicians have addressed or placed specific limitations on his ability to perform substantial gainful activity. (Plaintiff's Brief, p. 6.) Instead, he attempts to lay the burden of production at the

²Plaintiff refers to Drs. Hodges and Campbell as his "attending physicians." (Plaintiff's Brief, p. 3.)

Commissioner's feet by arguing, "[n]o treating physicians have been asked for limitations as to [his] work capability since none have deemed him capable of work, nor he having been offered employment." (*Id.*)

There is evidence of record, other than just Dr. Joiner's evidence, which supports the Law Judge's finding that plaintiff can perform a limited range of light work. For instance, on May 27, 2004 DDS record reviewer Dr. Chaplin evaluated plaintiff's medical records and concluded that he could perform a limited range of light work. (R. 333-339.) On October 1, 2004, DDS record reviewer Dr. Astruc reviewed plaintiff's medical records and concurred with Dr. Chaplin's assessment. (*Id.*) The undersigned concludes that the Law Judge's finding that plaintiff can perform a limited range of light work is supported by substantial evidence.

Finally, plaintiff contends that the Law Judge erred in finding he has transferrable skills without making an inquiry of the VE about whether plaintiff possessed any transferrable skills. Plaintiff's observations are correct that the Law Judge determined that he had transferrable skills without including this finding in the hypothetical presented to the VE.

The Law Judge's finding that plaintiff possessed transferrable skills was erroneous. However, the error was harmless because the VE determined that one of the jobs available to plaintiff was that of a security guard which did not require transferrable skills. According to the VE, any skills necessary for the job could be learned on the job. (R. 468.) The vocational expert also testified that the positions of service station attendant and cashier were available to plaintiff, both of which were unskilled. (*Id.*) Thus, the Law Judge's finding that there were other jobs in the national economy available to a person like the plaintiff is supported by substantial evidence.

For these reasons, it is RECOMMENDED that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for summary judgment and DISMISSING this case from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United States 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)(1)(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

Date