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

BARNEY L. SNODDY,	)	CASE NO. 4:09CV00026
	)	
Plaintiff,	)	
v.	)	REPORT AND RECOMMENDATION
	)	
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 November 2005 applications for a period of disability, disability insurance benefits and supplemental security income ("SSI"), under the Social Security Act ("Act"), as amended, 42 U.S.C. §§ 416, 423 and 1381 et seq., 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, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision and DISMISSING this case from the docket of the court.

In a decision issued on April 27, 2007, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since his alleged disability onset date, August 30, 2002, and that he met the insured status requirements under the Act

through December 31, 2004[1]. (R. 232-233.) The Law Judge determined plaintiff suffered severe physical and mental impairments, and that but for the ongoing effects of his alcohol consumption, he would medically equal Listing § 12.05(C). (R. 233.) The Law Judge believed that if plaintiff stopped the substance abuse, he would not have an impairment or combination of impairments which meets or medically equals any of the listed impairments. (*Id.*) The Law Judge found that if plaintiff stopped his substance abuse, he maintained the residual functional capacity ("RFC") to lift twenty pounds occasionally and ten pounds frequently, but that he needs the option to work while standing or sitting and to alternate between these two positions as needed for comfort. (R. 234.) The Law Judge further found that plaintiff can only occasionally perform postural activities such as climbing, balancing, stooping, kneeling, crouching or crawling. (*Id.*) The Law Judge believed that plaintiff has mental limitations of function in that he is markedly limited in his abilities to (1) understand and remember detailed instructions, (2) carry out detailed instructions, (3) interact appropriately with the general public, and (4) set realistic goals or make plans independently of others. (*Id.*) He is moderately limited in his abilities to (1) complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number of length of rest periods, and (2) maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness. (*Id.*) He also was found not significantly limited in plaintiff's abilities to (1) remember locations and work-like procedures, (2) understand and

[1]In order to qualify for disability insurance benefits, plaintiff must establish that he became disabled prior to the expiration of his insured status, December 31, 2004. *See* 20 C.F.R. § 404.131(a). Therefore, any evaluation of the plaintiff's disability following that date relates solely to his claim for SSI benefits.

remember very short and simple instructions, (3) carry out very short and simple instructions, (4) sustain an ordinary routine without special supervision, (5) make simple work-related decisions, (6) ask simple questions or request assistance, and (7) be aware of normal hazards and take appropriate precautions. (*Id.*) The Law Judge believed that the evidence revealed no limitations in his abilities to (1) accept instructions and respond appropriately to criticism from supervisors, (2) get along with coworkers or peers without distracting them or exhibiting behavioral extremes, (3) respond appropriately to changes in the work setting, and (4) travel in unfamiliar places or use public transportation. (*Id.*) Finally, the Law Judge found that plaintiff experiences pain of sufficient severity to be noticeable to him at all times, yet he can perform those matters assigned to him with the foregoing limitations. (*Id.*) The Law Judge was of the belief that, even if plaintiff stopped drinking, his RFC precluded him from performing his past relevant work[2]. (R. 245.) However, if he stopped his substance abuse, there were other jobs existed in significant numbers in the national economy that he can perform. (*Id.*) The Law Judge ultimately found plaintiff was not disabled under the Act. (R. 246.)

Plaintiff appealed the Law Judge's April 27, 2007 decision to the Appeals Council. (R. 221-223.) The Appeals Council found no basis in the record or in the reasons advanced on appeal to review the decision, denied review, and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 221.) 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. *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984).

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[2]Plaintiff's past relevant work included that of a sheet metal worker. (R. 245.)

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. *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 motion for summary judgment, plaintiff initially argues that the Law Judge erred in finding that his disability was caused or contributed to by alcohol or drug abuse. (Pl's Brief, pp. 30-33.) Specifically, plaintiff argues that his truly disabling conditions are those involving his neck and back, conditions which are not caused or contributed to by his alcohol abuse. (Pl's Brief, p. 31.)

When the claimant is found disabled and the medical evidence demonstrates that there is an alcohol or drug addiction, the Law Judge must consider whether the addiction is a "contributing factor material to the determination of disability." 20 C.F.R. § 404.1535. If the claimant's alcohol or drug use is a contributing factor, then the claimant is not disabled and not entitled to benefits. 42 U.S.C. § 423(d)(2)(C). To determine whether alcohol or drug use is a "contributing factor," the Law Judge must examine whether the claimant would still be found disabled absent his drug or alcohol use, based upon the mental and physical impairments that would remain if the claimant abstained from alcohol and drug use. 20 C.F.R. § 404.1535(b)(1)-(2). If the remaining limitations are not disabling, the alcohol or drug use constitutes a contributing factor material to the determination of disability. 20 C.F.R. § 404.1535(b)(2)(i).

Contrary to plaintiff's argument, the Law Judge did not find that plaintiff's physical

impairments were caused by or contributed to by his substance abuse. The Law Judge evaluated plaintiff's physical impairments and found that they were severe. (R. 233.) The Law Judge specifically compared his back impairment to Listing § 1.04 and found that it was not sufficiently severe to meet or equal the requirements of the listing.[3] (R. 233-234.) The Law Judge's finding that plaintiff's physical impairments were not disabling as a matter of law and that he retained the RFC to perform light exertional work is supported by substantial evidence.

On February 6, 2006, Leon M. Grigoryev, M.D. performed a consultative musculoskeletal examination on plaintiff to evaluate his complaints of slipped disk in this back, cartilage worn out in the neck, high blood pressure and stomach ulcers.[4] (R. 430-434.) Dr. Grigoryev found that the mobility in plaintiff's neck and lumbar spine was in the functional range, and that his straight leg raising test was negative bilaterally. (R. 432.) The physician opined that plaintiff suffered with chronic nonspecific low back pain, which he attributed to truncal muscle deconditioning and "chronic tobaccoism." (*Id.*) Even so, Dr. Grigoryev believed that plaintiff could stand and walk up to six hours in an eight hour workday with normal breaks, but that he should use a cane for balance when walking on uneven terrain, and that he could sit up to six hours in and eight hour workday with normal breaks in a comfortable chair with back support. (R. 433.) Dr. Grigoryev found that plaintiff could climb stairs, bend, stoop, crouch, kneel and crawl on an occasional basis. (*Id.*) The physician ultimately opined that plaintiff's

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[3]Listing § 1.04 refers to disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04.

[4]Dr. Grigoryev noted that plaintiff appeared to be inebriated at the exam. (R. 431.)

muscle deconditioning and back pain limited him to light exertional work. (*Id.*)

The Law Judge's opinion is also consistent with the opinions offered by the State agency physicians. On April 5, 2001, a State Agency record reviewing physician evaluated plaintiff's medical records and concluded that he retained the RFC to perform medium exertional work[5]. (R. 141-147.) C. E. McKeown, M.D. concurred with this finding. (R. 147.) Later State agency opinions are consistent with these findings. On March 7, 2006, James R. Wickham, M.D. found that plaintiff was limited to light exertional work. (R. 443-449.) This decision was affirmed by William W. Martin, Jr., M.D. (R. 449.)

Next, plaintiff contends that the Law Judge erred in failing to find that the mental and physical limitations not caused or contributed to by alcohol rendered him disabled under § 12.05(C) of the Listings, 20 C.F.R. Part 4, Appendix 1. (Pl's Brief, pp. 33-35.) Specifically, plaintiff contends that his mental impairment existed prior to any use of alcohol, and that his neck and back impairments constitute impairments causing additional and significant work-related limitations on his ability to function. (Pl's Brief, p. 34.)

Section 12.05(C) of the Regulations provides:

> 12.05. Mental retardation: Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.
>
> The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
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> * * *

[5]If someone can do medium work, he also can do light work. *See* 20 C.F.R. §§ 404.1567(c), 416.967(c).

> C. 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. Pt. 404, Subpt. P, App. 1, § 12.05(C).

Plaintiff has the burden of proving that his impairments, alone or in combination, meet or equal a listed impairment. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987) (noting the claimant has the burden of showing that he has a medically severe impairment or combination of impairments and that the Act requires him to furnish medical evidence regarding his condition); *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir.1992) (stating that the burden of production and of proof is on the claimant to establish that he has an impairment that meets or equals a listing).

The Law Judge found that the two IQ tests performed by Blanche Williams, Ph.D. were not valid because they did not represent plaintiff's ability to function apart from his ongoing alcohol consumption. (R. 233.) The Law Judge further found that plaintiff had not exhibited the requisite deficits in adaptive functioning prior to age twenty-two. (*Id.*) Finally, the Law Judge noted that plaintiff had worked for several years at a skilled position after his development period. (*Id.*)

Dr. Williams, a licensed clinical psychologist, evaluated plaintiff for the first time on February 21, 2006. (R. 436-442.) At that time, Dr. Williams believed that plaintiff was minimizing his current alcohol use (R. 438), and that he presented to the evaluation smelling "quite strongly" of alcohol (R. 439). IQ tests performed on that date showed plaintiff's Verbal IQ was 62, his Performance IQ was 60, and his Full-Scale IQ was 58. (R. 440.)

Plaintiff was evaluated by Dr. Williams a second time on February 12, 2007. (R. 481-

485.) At that time, plaintiff's Verbal IQ was 79, his Performance IQ was 65, and his Full-Scale IQ was 70. (R. 484.) Dr. Williams revealed the extent to which plaintiff's heavy abuse of alcohol had suppressed his cognitive abilities was "not known." (R. 485.) The psychologist further noted that any intellectual assessment of plaintiff may under represent his cognitive abilities to some extent due to his persistent alcohol abuse, but that she believed her test results adequately assessed his "current" cognitive capacity. (R. 483.) In other words, while Dr. Williams believed the IQ scores were accurate, she could not say that alcohol abuse was not a contributing factor. By the same token, she did opine that plaintiff's alcohol abuse impaired his ability to use judgment and manage his money effectively. (R. 485.)

Although the IQ scores in the record fall within the range provided for in Listing § 12.05C, the undersigned cannot find that the Law Judge erred in rejecting the two IQ test scores. Even Dr. Williams was of the view that plaintiff's persistent alcohol abuse could cause the scores to under represent his cognitive capacity. Moreover, Dr. Williams' concession that the IQ test results likely portrayed only a snapshot of plaintiff's current IQ is especially significant because mental retardation normally is life-long, not an acquired disability deficit.

For these reasons, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision 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 (14) 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