

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

DONALD L. HINES,)
) CASE NO. 4:12CV00013-JLK
)
) Plaintiff,)
)
 v.) REPORT AND RECOMMENDATION
)
)
 MICHAEL J. ASTRUE,)
)
 Commissioner of Social Security,)
)
)
 Defendant.) By: B. Waugh Crigler
) U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's August 11, 2009 protectively-filed applications for a period of disability, disability insurance benefits, and supplemental security income 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 question presented is whether the Commissioner's final decision is supported by substantial evidence. 42 U.S.C. §405(g). For the reasons that follow, the undersigned will RECOMMEND that an Order enter DENYING plaintiff's motion for summary judgment, and GRANTING the Commissioner's motion for summary judgment.

In a decision dated October 29, 2010, an Administrative Law Judge ('Law Judge') found that plaintiff had not engaged in substantial gainful activity since July 6, 2009, his alleged date of disability onset.¹ (R. 19-20.) The Law Judge determined plaintiff's cardiac disorder was a severe

¹ Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §1382c(a)(3)(A). In order to qualify for a period of disability and disability insurance benefits, plaintiff must establish that he

impairment, but that his hypertension, hyperlipidemia, sleep apnea, and mental impairment were not severe impairments. (R. 21-22.) He also concluded that, through the date of the hearing, plaintiff did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 23-24.) Further, the Law Judge found that plaintiff possessed the residual functional capacity ("RFC") to perform unskilled sedentary work which includes a clean work environment and provides a sit/stand option.² (R. 24.)

The Law Judge relied on portions of the testimony of Robert Jackson, a vocational expert ("VE"), which was in response to questions premised on the Law Judge's RFC finding. (R. 26-28, 52-54.) Based on this testimony, the Law Judge determined that while plaintiff was unable to perform his past relevant work as a pipefitter or cloth packer, he could perform the full range of unskilled, sedentary work which was available to him as a general production worker or material handler. (R. 26-28, 52-53.) The Law Judge found plaintiff not disabled under the Act.

Plaintiff appealed the Law Judge's October 29, 2010 decision to the Appeals Council. (R. 1-13.) In its February 15, 2012 decision, the Appeals Council found no basis to review the Law Judge's decision. (R. 1.) The Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. *Id.* This action ensued and briefs were filed.

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, 1456 (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

became disabled prior to the expiration of his insured status, which is December 31, 2014. *See* 20 C.F.R. §404.131(a); (R. 19.) Supplemental security income is payable the month following the month in which the application was filed. 20 C.F.R. §416.335.

² Sedentary work is defined in 20 C.F.R. §404.1567(a) as involving lifting no more than 10 pounds at a time with occasional lifting or carrying of objects such as files or small tools. A job in this category involves sitting, though a certain amount of walking or standing is often necessary.

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, 589-590 (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, 642 (4th Cir. 1966). Substantial evidence is defined as evidence, "which reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than preponderance." *Id.* at 642.

Plaintiff asserts that the Law Judge improperly assessed his credibility, including his complaints of pain, and that the finding that plaintiff was capable of unskilled, sedentary work is not supported by substantial evidence. (Dkt. No. 11, at 4-6.)

Plaintiff offers that the medical evidence of record corroborates his contention that his cardiac disorder causes significant functional limitations, thus rendering erroneous the Law Judge's finding that plaintiff's allegations were less than credible. Here, the Law Judge found that plaintiff's cardiac disorder was a severe impairment and that his medically determinable impairments reasonably could be expected to cause some of his alleged symptoms. (R. 20, 25.) However, he concluded that plaintiff's statements concerning the intensity, persistence, and limiting effects were not credible to the extent they were inconsistent with his RFC assessment. (R. 25.)

This finding is supported by substantial evidence for several reasons. In reviewing a claimant's subjective allegations of the intensity and limiting effects of his condition, the Law Judge may consider all evidence of record, including the claimant's testimony, medical records, the claimant's daily activities, the nature of his treatment, etc. 20 C.F.R. §404.1529(c). While a claimant need not provide objective evidence in support of his subjective allegations, the

presence or absence of objective medical evidence is important to establishing whether plaintiff's allegations were credible. *Hines v. Barnhart*, 453 F.3d 559, 564-565 (4th Cir. 2006). Here, the Law Judge pointed out that no treating physician revealed plaintiff's functional restrictions or opined that he was as limited as he alleges. (R. 26.) He noted further that plaintiff's treatment had been relatively limited and conservative, with significant gaps in follow-ups and with issues of noncompliance.³ (R. 25.) The Law Judge also pointed out that plaintiff was able to drive an automobile (R. 26, 38, 169.), reported no problems with personal care (R. 26, 167.), and walked around outside every day, weather permitting (R. 26, 166.). None of these factors, alone, would be sufficient to sustain a Law Judge's credibility determination, but together they provide substantial non-medical evidentiary support for the instant Law Judge's determination.

Furthermore, the Law Judge expressed concern with plaintiff's credibility in other respects. Plaintiff alleged disabling edema, but the Law Judge pointed out that none of plaintiff's treating physicians found signs of edema. (R. 25.) Plaintiff alleged that he became unable to work in July 2009, but he did not report that he had any swelling in his hands until September 28, 2010. (R. 17, 427.) Prior to this visit, there is no evidence in the record revealing that plaintiff ever claimed or was found to have swelling in his hands. In July 2009, plaintiff did not indicate that he had swelling in his hands and was found to have no edema in his extremities.⁴ (R. 274-275, 374.) In an August 2009 emergency room visit, there was no sign of edema on the plaintiff's extremities. (R. 334.) During his follow-up visits in September through December

³ Plaintiff did indicate that a nine-month gap in treatment was due to his loss of health insurance. (R. 47.) Inability to pay for services may excuse noncompliance with prescribed treatment. 20 C.F.R. §404.1530, 416.930; *Nunley v. Barnhart*, 296 F. Supp. 2d 702, 704 (W.D.Va. 2003).

⁴ Plaintiff claimed throughout the relevant period to have swelling in his ankles, but no evidence of edema was ever recorded. The Law Judge allowed for a sit/stand option to accommodate this possible limitation. (R. 24-25.)

2009, plaintiff did not report any swelling in his hands, and the physician's record states there was no edema in the plaintiff's extremities. (R. 358, 366, 405.)

Additional evidence shows that plaintiff did not seek any medical treatment from December 2009 through September of 2010, and, therefore, there is no medical evidence to corroborate plaintiff's alleged symptoms during this period. (R. 25.) At plaintiff's September 28, 2010 cardiovascular follow-up, he claimed to have swelling in his hands at times, but the record of this visit shows that there still was no edema in his extremities. (R. 427, 429.) The doctor made no changes to his medications and simply scheduled him for another appointment in six months. (R. 430.) All this provides substantial evidentiary support for the Law Judge's findings regarding the extent, intensity, and effects of plaintiff's alleged pain as well as his credibility as a whole.

Plaintiff asserts that the Law Judge erred in finding that he was capable of performing unskilled, sedentary work because he believes that this finding conflicts with the testimony of the Vocational Expert (VE). At the hearing on October 6, 2010, the VE testified that there were a substantial number of unskilled, sedentary jobs which could be performed by a person with plaintiff's limitations so long as the employee worked in a clean environment with a sit/stand option. (R.52-53.) In response to a question from plaintiff's counsel, the VE clarified that these jobs required good use of both upper extremities. (R. 53-54.) In his decision, the Law Judge specifically addressed whether these jobs would be available if the plaintiff had difficulty gripping and grasping with both hands. (R. 27.) Because the Law Judge's finding that plaintiff's complaints about swelling in his hands were not credible is supported by the evidence, then his rejection of any hypothetical premised on swelling in plaintiff's hands likewise has substantial evidentiary support. (R. 27-28.)

For all these reasons, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment and DENYING plaintiff's motion.

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 fourteen (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)(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 transmit a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: s/ B. Waugh Crigler
U.S. Magistrate Judge

December 12, 2012
Date