

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

WILLIAM LAMBERT,) CASE NO. 5:04CV00082
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 July 1, 2002 claim for a period of disability, disability insurance income and supplemental security income benefits 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 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 the case for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an Order enter REVERSING the Commissioner's final decision but REMANDING the case for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (Law Judge) found that plaintiff met the special earnings requirements of the Act through the date of his decision. (R. 28.) He found that plaintiff suffered chronic venous insufficiency and low back pain which were severe but not severe enough to meet or equal any listed impairment, and that plaintiff's allegations about the effects of his condition were not entirely credible. (*Id.*) Without making a finding with respect to plaintiff's ability to perform his past relevant work, the Law Judge determined that plaintiff "retains the residual functional capacity to perform a wide range of sedentary exertional activity which affords him the option to stand and sit at will." (R. 28.) By the application of the Medical-Vocational Guidelines ("grids") and reference to some of the testimony of a vocational expert (VE), the Law Judge found that jobs were available to plaintiff in the economy and denied the claim. (R. 29.) Accordingly, he concluded that plaintiff was not disabled under the Act.

While the case was on administrative appeal to the Appeals Council, plaintiff submitted a letter by counsel arguing that the Law Judge's decision was in error. (R. 9-13.) The Appeals Council found that neither the record nor the reasons plaintiff advanced on appeal provided a basis upon which to review the Law Judge's decision. (R. 5-7.) Accordingly, it denied review, and adopted the Law Judge's decision as the final agency decision. This action ensued.

In the instant case, it is somewhat unclear whether the Law Judge ever made a finding that plaintiff's severe impairment prevented him from performing his past relevant work. Although the Law Judge did not clearly state that he found that plaintiff carried his initial burden in the sequential evaluation process by demonstrating that his severe impairment prevented him from performing his past relevant work, he certainly proceeded to the next step in the sequential evaluation process by referring to the

“grids” and the vocational evidence relevant to whether alternate jobs are available to him. Social Security Acquiescence Ruling (SSAR) 90-3(4) (recognizing that whenever vocational evidence is adduced, the inquiry has reached the final level); *See also*, 20 C.F.R. § 404.1520; *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992).

Thus, the burden shifted to the Commissioner to demonstrate that alternate gainful activity was available to plaintiff, which the Commissioner could discharge in this case only by the presentation of vocational evidence because there were non-exertional limitations on plaintiff’s ability to perform work-related functions. *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). Moreover, for the testimony of a VE to be relevant, the VE must have considered all the evidence in the record material to plaintiff’s limitations and their effects on his work-related capacity. *Walker v. Bowen*, 889 F.2d 47 (4th Cir. 1989). Otherwise, the Commissioner cannot be viewed as having properly discharged her sequential burden.

The Commissioner also is charged with making the initial evaluation of the medical evidence, assessing symptoms, signs and findings, and, in the end, determining the functional capacity of the claimant. 20 C.F.R. §§ 404.1527-404.1545; *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The court should not substitute its judgment for that of the Commissioner in these matters, but must determine whether there is substantial evidence to support his conclusions. On the other hand, it is axiomatic that courts may remand a case to the Commissioner for the further development of the evidence where “good cause” has been shown. 42 U.S.C. § 405(g). What constitutes “good cause” draws beyond the boundaries of the substantive

merits of the claim as presented in the record and is not constrained by whether the Commissioner's decision might have been supported by substantial evidence at the time of judicial review. *Walker v. Harris*, 642 F.2d 712, 714 (4th Cir. 1981). Failure to provide "a full and fair hearing... and the failure to have such a hearing may constitute good cause sufficient to remand to the [Commissioner] under 42 U.S.C. § 405(g) for the taking of additional evidence." *Sims v. Harris*, 631 F.2d 26, 27 (4th Cir. 1980).

The key inquiry here is whether the vocational evidence was sufficient to discharge Commissioner's burden to demonstrate that alternate gainful activity was available to plaintiff. The Law Judge found that "the vocational expert testified that assuming the hypothetical individual's specific work restrictions, he is capable of making a vocational adjustment to other work." (R. 27.) Plaintiff, by counsel, challenged the decision on the basis that the hypothetical questions the Law Judge relied upon in his decision failed to include relevant and material information about the effects of plaintiff's limitations. Although plaintiff conceded that the Law Judge's questions to the VE properly took into account his back impairments, he contended that the Law Judge failed to consider additional limitations caused by his chronic venous insufficiency, in particular, the need for plaintiff to elevate his legs. Although plaintiff's attorney posed the question to the VE including the limitation that someone were "to three times a day at least be required to elevate his lower extremities for at least 30 minutes," the Law Judge discounted the VE's response that no jobs would be available. (R. 319, 27-28.) The Law Judge found the question too vague because the hypothetical also included inability to bend, lift, carry, or squat, restrictions the Law Judge did not find applicable to plaintiff. However, there is medical evidence in the record supporting plaintiff's need to elevate his legs. B. Gail Macik, M.D., one of

plaintiff's treating doctors, specifically recommended "at least three times a day elevation of the extremities for at least 30 minutes at a time," further noting that "longer elevations and more frequent elevations are even better." (R. 236.) Indeed, although he discounted such requirement in the questions to the VE, the Law Judge later acknowledged that plaintiff currently has "need for leg elevation." (R. 28.) The Law Judge did not question the VE in regard to the impact such limitation would by itself have on the ability to obtain employment, nor did he proffer any reason why plaintiff would not require such restriction while working. Thus, while the undersigned expresses no view on whether jobs are available to a person with plaintiff's maladies and their limitations, it does appear that the Law Judge and Commissioner erred in failing to fully and fairly address plaintiff's specific physical limitations in attaining vocational evidence.

Accordingly, it is RECOMMENDED that an Order enter REVERSING the Commissioner's final decision, but REMANDING the case for further proceedings at the final sequential level. The order of remand should direct that in the event the Commissioner is unable to grant benefits on the current record, she is to forthwith recommit the case to a Law Judge to conduct supplemental evidentiary proceedings in which vocational evidence is to be taken and in which both sides may introduce additional evidence.

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)(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