

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

GARY T. LANDES,)	CASE NO. 5:05CV00033
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
)	
JO ANNE B. BARNHART,)	By: B. Waugh Crigler
Commissioner of Social Security,)	U. S. Magistrate Judge
)	
Defendant.)	

This challenge to a final decision of the Commissioner which ceased the claimant’s period of disability and disability insurance benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, is before the undersigned under authority of 28 U.S.C. § 636(b)(1)(B) to render a report to the presiding District Judge 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, this court will recommend that an order enter REMANDING the case to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge observed that on February 23, 2000 plaintiff had been determined disabled effective October 7, 1999, and, until July 1, 2003, he continued to suffer disability due to a liver disease because his condition was found to meet or equal the requirements of the Commissioner’s Listings. (R. 19.)¹

¹The Law Judge described plaintiff’s disabling impairments as “the residuals of alcoholic liver disease and gout controlled by medication.” (R. 23.)

However, the Law Judge further found that, commencing on July 1, 2003, plaintiff's disability ceased because he had medically improved to the point where he could engage in his past relevant work. (R. 23, 24.)

Plaintiff appealed the Law Judge's decision to the Appeals Council. The Appeals Council found no basis in the record or in the new evidence for changing the Law Judge's decision. (R. 5-7.) Thus, the Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. (*Id.*) This action ensued.

The Commissioner certainly has the right to review a claimant's disability status to determine whether the claimant's disability continues. 20 C.F.R. § 416.988- § 416.994a. The regulatory inquiry in such a case, as the Law Judge articulated, is whether the claimant has experienced a medical improvement that has restored his/her capacity to perform substantial gainful activity. 20 C.F.R. § 404.1588 *et seq.* Ordinarily, to sustain the cessation of benefits, the substantial evidence in the record must show that the plaintiff medically has improved to the extent claimed by the Commissioner. 20 C.F.R. § 404.1594(b)(5). There is no presumption that a claimant's disability continues, and the Commissioner considers whether there has been any decrease in the medical severity of the claimant's impairments, whether that medical improvement relates to the claimant's ability to work, whether the impairment met or equaled any listed impairment, whether the claimant had any prior residual functional capacity, and whether the impairment is subject to temporary remission. 20 C.F.R. §§ 404.1594 (b)(6) and (c)(1)-(3).

In the November 18, 2005 brief filed in support of his motion to remand ("Pl's Brief"), plaintiff advances two arguments. First, he asserts that it was not appropriate for the Commissioner to rely on the evidence of a vocational expert (VE) in determining whether plaintiff could return to his past relevant work. Second, plaintiff asserts that the Law judge's finding that plaintiff had

improved to the point of being able to perform his past relevant work is not supported by substantial evidence.

In her brief filed in reply to plaintiff's motion ("Def.'s Brief"), the Commissioner offers that the Law Judge complied with the regulations at the fourth level of the sequential evaluation and properly considered vocational evidence in determining whether plaintiff could perform his past relevant work. Furthermore, she contends that the Law Judge considered all aspects of plaintiff's past relevant work as a correctional officer and that there is substantial evidence to support the Law Judge's decision.

Turning first to the propriety of the Law Judge's reference to and reliance upon vocational testimony at the fourth level of the sequential evaluation, the undersigned simply will say, as the Commissioner points out in her brief, that the regulations were changed effective September 25, 2003, and it is perfectly permissible for her to adduce and rely on vocational evidence at the fourth level of the analysis. 20 C.F.R. §§ 404.1560(b) and 416.960(b). The cases cited by plaintiff to the contrary are no longer applicable. Moreover, it was permissible for the Law Judge to have made inquiry of the VE about plaintiff's past relevant work either generally as described in the *Dictionary of Occupational Titles* ("DOT") or as this past work actually was performed. *Id.*; Social Security Ruling ("SSR") 82-61; *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995). Thus, the only question is whether there is substantial evidence to support the Law Judge's findings concerning whether there has been medical improvement and, in turn, whether that improvement permits plaintiff's return to his past relevant work.

The undersigned does not believe that the plaintiff's treating record provides any patent evidence of medical improvement. After all, plaintiff had been found to suffer liver and related impairments that led the Commissioner to find that his impairment met the requirements of the

Commissioner's Listings. Plaintiff had undergone several treatment modalities, and in 1999, plaintiff's treating doctor questioned whether there had been any liver function recovery, noting that his hepatic gradient level remained "quite elevated." (R. 212.) It was reported by a treating physician at the University of Virginia Clinic, in a note of visit dated October 21, 2002, that plaintiff had become "quite stable" over the past years of his liver disease, but that he had a "subtle," but nonetheless, "clearly present" hepatic encephalopathy. (R. 202.)² The physician also noted that plaintiff had experienced symptoms related to a peripheral vascular condition, follow-up for which plaintiff was referred back to his primary care physician to explore correction. (*Id.*)

In a later Clinic note of examination dated April 21, 2003, at which Carl Berg, M.D. was present, it was again observed that plaintiff's liver condition remained stable, and it was recommended that additional induced bowel movements would help plaintiff's lethargy and sleeplessness. (R. 198.) The physician further noted that plaintiff's lower extremity pain was associated with his vascular condition, again referring plaintiff to his primary care physician for follow-up. Neither of these reports can be read to conclude that plaintiff's overall medical condition had improved. In other words, the mere fact plaintiff's impairment was seen as being stable is not, itself, any indication from plaintiff's treating sources that there had been medical improvement.

The only other medical evidence in the record is that offered by the Commissioner's consulting examiner, Roman Sachno, M.D., whose report of examination dated June 4, 2003 is cited in the Commissioner's brief as the substantial record medical evidence supporting her cessation of benefits. Dr. Sachno revealed that plaintiff's "cirrhosis has not progressed," and while he also noted

²Plaintiff had undergone the insertion of a transjugular intrahepatic portosystemic shunt procedure to treat internal bleeding secondary to his liver disease.

that the condition “has probably improved,” he went on to suggest that “[r]ecords from his gastroenterologist, Dr. Carl Berg, who still follows him, may be helpful.” (R. 215.)

As indicated above, Dr. Berg had participated in the Clinic examinations of the plaintiff, the reports of which were in the record at the time Dr. Sachno performed his consultative examination. In the context of the extant medical record, and in a light favorable to the Commissioner, Dr. Sachno’s report expresses uncertainty about whether there has been improvement, despite choosing the word “probably.” At worst, his report amounts to little more than speculation, surmise and conjecture on the subject.

In the absence of positive evidence from plaintiff’s treating sources that there has been medical improvement, and that certainly is lacking in this record, and because the undersigned does not believe that the state agency examiner possessed the necessary evidence upon which he could render a reliable opinion, to any degree of medical certainty, that plaintiff’s theretofore established disabling impairment had improved to a point where plaintiff could perform any substantial gainful work, much less his past relevant work, the undersigned finds the Commissioner’s final decision unsupported by substantial evidence. By the same token, the undersigned is of the view that the Commissioner’s consultant has raised a serious enough question concerning plaintiff’s medical improvement as to demonstrate good cause to remand this action for further proceedings in which the Commissioner would have the opportunity to secure and assess such additional or extant treating evidence as believed to be necessary by the Commissioner’s own consulting examiner for an adequate and fair evaluation of plaintiff’s continuing disability. On this record, at least, plaintiff’s functional ability seems inextricably linked to whether there has been medical improvement. Moreover, the relevance of the vocational evidence seems dependent on whether plaintiff’s condition no longer met the requirements of the Listings, and, instead permitted him to

perform work-related activities in a vocational setting as a result of which jobs would be available to a person like him in the economy.

For the above reasons, the undersigned RECOMMENDS that the presiding District Judge enter an order REMANDING the case to the Commissioner for further proceedings. The order of remand should provide that should the Commissioner be unable to grant a continuation of plaintiff's benefits on the current record, she should forthwith recommit the case to a Law Judge for supplemental evidentiary proceedings consistent herewith.

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