

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

ROY V. ROBERTSON, ) CASE NO. 5:05CV00009  
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Plaintiff, )  
 )  
 )  
v. ) REPORT AND RECOMMENDATION  
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 )  
JO ANNE B. BARNHART, ) By: B. Waugh Crigler  
Commissioner of Social Security, ) U. S. Magistrate Judge  
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 )  
Defendant. )

This challenge to a final decision of the Commissioner which denied plaintiff's October 28, 2002 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 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, the undersigned will recommend that an order enter reversing the final decision, granting judgment to the plaintiff and recommitting the case to calculate and pay proper benefits.

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 on March 29, 2001, the alleged date of disability onset, and continued to meet those requirements through June 30, 2002, but not thereafter. (R. 19, 23.) He also found that plaintiff had engaged in substantial self-employed gainful activity as the sole owner and operator of a turkey farm during the period under inquiry. (R. 21, 23.) He determined that plaintiff's activity was significant activity for pay, and that

plaintiff was not disabled under the Act at that level of the sequential evaluation because he had not been unable to engage in substantial gainful activity (SGA) for a continuous 12 month period. (R. 23.) The Appeals Council denied review, and this action ensued. (R. 5-7.)

The Law Judge's decision essentially was two-fold, namely that plaintiff had not been unable to perform SGA for a continuous 12 month period and had engaged in such activity during the period under consideration. The Commissioner contends that this finding is amply supported both by the medical records submitted by the plaintiff as well as his tax and other income evidence. The Commissioner points to plaintiff's tax returns which reveal that plaintiff's gross income from farming was \$151, 047 for 2001, \$123, 581 for 2002, and \$144, 091 for 2003. (R. 104, 107, 110.) Moreover, she suggests that plaintiff's own family physician noted that plaintiff continued to be "very active and works on his own farm raising cattle and horses and turkeys." (R. 161; *see also* R. 196.)

Plaintiff takes the position that the Commissioner's own medical evidence reveals that plaintiff's degenerative spondylosis at L4-5 and L5-S1 meets the Listings,<sup>1</sup> and that she failed to assess whether plaintiff was engaged in SGA under the three tests established by the regulations. 20 C.F.R. § 404.1575. In particular, plaintiff claims the Commissioner failed to assess both prongs of "Test One," and her findings that plaintiff actually performed substantial services and received substantial income after March 2001 are not supported by the substantial evidence. Moreover, plaintiff contends that there is no indication in the record that the Law Judge, and subsequently the Commissioner, made an effort to assess the claim under either of the other two regulatory tests. In light of this, plaintiff seeks entry of judgment because his impairment, otherwise, meets the requirements of the Commissioner's listed impairments.

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<sup>1</sup>There also is no debate that plaintiff suffers the effects of Hepatitis C.

As plaintiff has suggested, the tax records in this case, if nothing else, confirm that the plaintiff did not receive substantial income from his farming business during the relevant periods because he neither had the requisite income from wages nor had disqualifying profits after normal business expenses were deducted from his farm operation. 20 C.F.R. §§ 404.1575(a)(1) and (c). The more crucial inquiry under Test One was whether the substantial evidence supports the Commissioner's determination that plaintiff provided such "significant services" to the farming business as to disqualify him from benefits for being engaged in substantial self-employed gainful activity. 20 C.F.R. §§ 404.1575(a)(1) and (b).

The two facts, in contrast to mere summaries of the legal requirements or conclusions, relied on by the Law Judge were that plaintiff "continued to 'handle the business end of [the farm],' through 2002," and that plaintiff "acknowledged on his Schedule F that he 'materially participate[d] in the operation'" of the farm. (R. 22.) Plaintiff takes issue with these findings on two fronts. First, he contends that, though quoted as the plaintiff's statement, plaintiff never used the phrase "handle the business end." (R. 236.) Second, plaintiff offers that the finding employs the phrase, "handle the business end," entirely out of context. (R. 236-237.) Both contentions are accurate in that the phrase "handle the business end" was framed entirely by the Law Judge's question and, when placed in the context of the entire line of questions, plaintiff's answer reveals that the so called "business end" of the farm was limited to calling in and verifying feed inventories for his poultry; ordering gas/fuel and equipment; and doing "odds and ends like that." (R. 237.) While the farm remained operational, plaintiff made clear he had not been operating it since March 2001. (R. 235, 237.) He testified that he spends only between one and two hours per day in these sorts of farming activities.

The Law Judge and Commissioner also relied on certain notations made by treating doctors

in various reports of visits found in the record, e.g. R. 161, 167, 194, 196, 206 and 209-212, to support the conclusion that plaintiff was engaged in SGA. The Commissioner offers that this evidence is sufficient to compel affirmation. Plaintiff has not addressed the issue specifically, though one can glean from the position taken in his brief that this evidence does not prove plaintiff was performing “significant services” to his farming business.

The pertinent regulation requires a contribution of more than one-half the total time required to manage the business where the farming business belongs to the claimant, and it requires material participation in its operation where the claimant is a landlord. 20 C.F.R. § 404.1575(b). This evidence consists of brief, and even isolated snippets such as: “very active,” and “works,” and “works as a full time farmer,” and “continues to work his family turkey farm,” and “has problems making a profit in his business,” and was engaged in a divorce which could “threaten his family business,” and was attempting “save his family farm.” In the undersigned’s view, these are insufficient to support a determination that plaintiff performed “significant service” under the regulations if for no other reason than no one can reasonably determine from them whether they plaintiff’s own words or simply interpretations or summaries of historical data recorded by the doctors. None reflect a context, singularly or in combination, sufficient to ascertain plaintiff’s work-related capacity or the functions he may have been performing in the farming business.

As pointed out by the Commissioner, the various Schedule F ( Form 1040) forms filed with plaintiff’s tax returns, which report profits and losses from farming operations, contain an acknowledgment of “material participation” by him in the operation of the farming business for the years reported. (R. 104,107, 110.) That acknowledgment simply begs a larger question of whether “material participation” means the same for Internal Revenue purposes as it does for determining whether a claimant has engaged in substantial gainful activity under the Social Security Act. The

decisional authorities would suggest that the meanings are not the same, in that “material participation” for tax purposes serves to identify the status of a taxpayer as an owner or principal of the farming business who possesses a right to participate in the business’ profits and losses rather than serving as an indication of the nature or amount of gainful activity performed by the person as the term gainful activity is defined by the Social Security Act and regulations. *See, e.g., Salazart v. Brown*, 1996 WL 302673 (W.D. Mich. 1996); *Bot v. Commissioner of Internal Revenue*, 199 WL 566830 (U.S. Tax Ct. 1999). Therefore, the undersigned is of the view that plaintiff’s acknowledgments of his “material participation’ in the operation of the business” in his Schedule F (Form 1040) forms does not constitute substantial evidence to support a finding that he was performing the “significant services” equivalent to SGA under 20 C.F.R. § 404.1575(a)(1).

All this leads the undersigned to find that the Commissioner’s final decision is not supported by substantial evidence, and leaves only the question of whether there is good cause to remand the case for further proceedings in light of the fact that neither the Law Judge nor the Commissioner elected to assess the claim under Test Two or Test Three of the regulations, 20 C.F.R. §§ 404.1575(a)(2) and (3). Plaintiff takes the position that good cause has not been shown because the substantial evidence reveals that plaintiff’s impairment meets the requirements of a listed impairment, and the record demonstrates the Commissioner has been afforded every opportunity to have made a complete assessment of the claim under those regulatory provisions, but elected not to do so herself or require the Law Judge to do so. The Commissioner simply responds by suggesting the burden to establish an inability to engage in substantial gainful activity for a continuous 12 month period is on the plaintiff, and that the case should be remanded to require him to do so under the alternative tests. The undersigned agrees with the plaintiff that the Commissioner has had every opportunity to have considered these legal criteria on the evidence already presented, and she

elected not to do so. The Commissioner's request for remand should be denied.

For the reasons set forth above, it is RECOMMENDED that an order enter REVERSING the Commissioner's final decision, GRANTING judgment to the plaintiff and RECOMMITTING the case to the Commissioner for the sole purpose of calculating and paying benefits.

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