

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

DOUGLAS M. PRESGRAVES,) CASE NO. 5:12CV00052
)
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, in part, plaintiff's January 12, 2010 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. Both sides have moved for summary judgment. 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 GRANTING the Commissioner's motion for summary judgment, DENYING plaintiff's motion for summary judgment, and DISMISSING the case from the docket of the court.

In a decision dated August 26, 2011, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since October 15, 2008, his alleged date of disability onset.¹ (R. 12.) The Law Judge determined plaintiff's osteoarthritis and allied disorder were

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

severe impairments. (R. 13.) 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. 18.) Further, the Law Judge found that plaintiff possessed the residual functional capacity ("RFC") to perform sedentary work except that he was precluded from climbing ropes, ladders, and scaffolding and could perform only occasional climbing of ramps and stairs, balancing, kneeling, crawling, crouching, and stooping.² (R. 14.)

The Law Judge relied on portions of the testimony of Paula Day, a vocational expert ("VE"), which were in response to questions premised on the Law Judge's RFC finding. (R. 23-24, 61-66.) Based on this testimony, the Law Judge determined that, while plaintiff was unable to perform his past relevant work as a carpenter, he could perform a range of sedentary work which was available to him as a charge account clerk, food/beverage order clerk, or document preparer. (R. 22-24, 62-65.) The Law Judge found plaintiff not disabled under the Act.

Plaintiff appealed the Law Judge's August 26, 2011 decision to the Appeals Council. (R. 1-8.) In its March 12, 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, cross motions for summary judgment were filed together with supporting briefs, and oral argument was held by telephone before the undersigned on March 20, 2013.

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 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

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).

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.

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, and that the finding that plaintiff was capable of sedentary work is not supported by substantial evidence. (Dkt. No. 11, at 2-3.)

Plaintiff contends that there was no change in his condition after he turned fifty and therefore he should be found disabled for the entire period. Here, the Law Judge found that plaintiff's osteoarthritis and allied disorder were severe impairments and that his medically determinable impairments reasonably could be expected to produce some of his alleged symptoms. (R. 13, 18.) Although he concluded that plaintiff's statements concerning the intensity, persistence, and limiting effects generally were credible, the Law Judge found that plaintiff's statements concerning the impact of his impairments on his ability to work were not entirely credible. (R. 18, 20.) The Law Judge therefore found plaintiff capable of performing a limited range of sedentary work.

The Law Judge based his decision on the opinions of the consultative medical examiners and on plaintiff's own activities of daily living in determining his RFC. Plaintiff was injured at work in 2006 and required surgery on his right knee, which occurred prior to his alleged date of disability onset. (R. 21.) A consultative medical examiner, Christopher Newell, M.D., examined plaintiff on May 27, 2010. Dr. Newell noted that plaintiff had a mild antalgic gait, but that he did not require an assistive device. (R. 1478.) Dr. Newell opined that plaintiff could stand and walk for 2-4 hours and sit for 6-8 hours during an 8-hour workday. (R. 1479.) Plaintiff was further limited to lifting no more than ten pounds and could only bend, stoop, and squat occasionally. (*Id.*) The Law Judge gave great weight to Dr. Newell's opinion, especially noting that no treating or examining physician had opined that plaintiff had any greater limitations. (R. 20, 22.) The Law Judge also relied on the evidence that plaintiff was able to care for his animals and himself, prepare simple meals, do dishes, laundry, and indoor and outdoor chores, drive, shop, work on his car, and work around his home. (R. 18.) The Law Judge also noted that plaintiff was

told that tobacco use contributed to his inability to work and was repeatedly advised to cease tobacco use. (R. 19, 786, 797.) The Law Judge was of the view that plaintiff's decision not to cease tobacco use demonstrated that his symptoms were not as great as he claimed; else he would have utilized means prescribed to reduce them. (R. 19.) That determination is supported by substantial evidence.

The Law Judge determined that plaintiff was limited to sedentary work and was a younger individual prior to March 12, 2010. (R. 23.) Plaintiff became an individual closely approaching advanced age when he turned fifty on March 12, 2010. The Law Judge relied on 20 C.F.R. Part 404, Subpart P, Appendix 2, in determining whether the regulations required a finding of disabled. (R. 23.) Section 201(g) of the appendix provides that an individual approaching advanced age is disabled if he can no longer perform past relevant work and has no transferable job skills. 20 C.F.R. Part 404, Subpart P, Appendix 2, §201(g). However, §201(h) compels a finding of disabled for an individual between the ages of 45 and 49 only where the claimant is unable to speak English or is unable to read and write in English. 20 C.F.R. Part 404, Subpart P, Appendix 2, §201(h). Plaintiff has completed the eighth grade, he is able to read and write in English, and thus the regulations do not mandate a finding of disabled prior to his fiftieth birthday. (R. 23.) Instead, the Law Judge relied on the testimony of the VE which established that jobs were available to an individual with plaintiff's limitations. (R. 23-24.) His finding that plaintiff was not disabled prior to March 12, 2010 is supported by substantial evidence.

For all these reasons, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, DENYING plaintiff's motion for summary judgment, and DISMISSING this action 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 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: _____
U.S. Magistrate Judge

Date