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

GEORGE N. COLEVAS,	)	CIVIL ACTION NO. 3:02CV00021
	)	
Plaintiff,	)	
	)	
v.	)	
	)	MEMORANDUM OPINION
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

This case comes before the court on the Commissioner of Social Security's objections to the November 26, 2002 Report and Recommendation of the presiding United States Magistrate Judge. The Magistrate Judge recommended that the court reverse the final decision of the Commissioner to deny the plaintiff benefits. For the reasons set forth below, the Commissioner's objections shall be OVERRULED**,** the Magistrate Judge's Report and Recommendation shall be ACCEPTED**,** and the Commissioner's decision shall be REMANDED to the Commissioner solely for the calculation of benefits.

I.

On December 20, 1996, the plaintiff applied to the Social Security Administration for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C.A. §§ 401-33 (West 1994 & Supp. 2002), alleging he became disabled and unable to work on

September 8, 1983, due to a work-related back injury. The plaintiff's application was denied initially and upon reconsideration. (R. at 371.) The plaintiff requested an administrative hearing, which was held on December 6, 1999. (R. at 372.)

The ALJ heard the testimony of the plaintiff, medical expert ("ME") Dr. Greg S. Pudhorodsky, and vocational expert ("VE") Dr. Gerald K Wells. Believing that it was in the opinion of the ME that the plaintiff retained residual functional capacity, the ALJ, consistent with his burden, called upon the testimony of the VE to determine whether there were other jobs existing in significant numbers in the national economy which the plaintiff could perform given his residual functional capacity, age, education and work experience. *See Smith v. Schweiker*, 719 F.2d 723, 725 (4th Cir. 1984); *Grant v. Schweiker*, 699 F.2d 189,192 (4th Cir. 1983).

The ALJ posed two hypothetical questions to the VE to determine whether there were jobs existing in significant numbers in the national economy which the plaintiff could perform. In his first hypothetical question, he asked what exertion level the plaintiff could exert given the plaintiff's specified limitations. (R. 362.) The VE testified that such a person would be limited to sedentary work with a need for a sitting and standing option. Id. Apparently wanting to go in a different direction, in his second hypothetical question the ALJ asked the VE to identify occupations that were available in significant numbers for a person who could only perform light work. (R. at 363-364.) This produced a number of jobs the VE believed would be available.

On December 15, 1999, the Administrative Law Judge ("ALJ") determined, based upon the work limitations that he inferred from the medical reports of the plaintiff's primary treatment source, Dr. Larry Stephenson, and the testimonial evidence of the VE and ME at the hearing, that while the plaintiff's injury was sufficient to satisfy the requirements of a severe impairment, it did not meet or equal the requirements of a listed impairment. (R. at 373.) The ALJ further determined that the plaintiff retained the residual functional capacity to perform sedentary and light jobs that existed in significant numbers in the national economy. These included work as a security guard, light cashier, and counter attendant. (R. at 377.) Therefore, the ALJ concluded that the plaintiff was "not disabled" under the Act and denied the Social Security benefits sought.

II.

The specific issue before the ALJ was whether the plaintiff was under a disability, as defined in the Social Security Act. *See* 42 U.S.C.A. § 423(d)(1)(A) (West 1994 & Supp. 2002); (R. at 372.) The Social Security Administration has developed a five-step sequential evaluation process to determine whether a claimant has a disability. *See* 20 C.F.R. §§ 404.1520, 416.920 (2003). Accordingly, an ALJ must consider, in sequence, whether a claimant: (1) is working; (2) has a severe impairment; (3) has an impairment that makes him disabled as a matter of law; (4) can return to his past work; and (5) if not, whether he retains the capacity to perform specific jobs that exist in significant numbers in the national economy. *See id.* at §§ 404.1520, 416.920. The claimant bears the burden of production and proof during the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir.

1992) (per curiam). At the fifth step, the burden shifts to the Commissioner to prove that jobs exist in significant numbers in the national economy that the claimant can perform. *See id.*

The parties do not dispute the instant plaintiff's *prima facie* showing of disability. Thus, the burden rests with the Commissioner to establish the availability of work that the plaintiff is capable of performing. The issue before the court is whether the Commissioner carried that burden on the fifth step of the sequential inquiry.

The matter was referred to the Magistrate Judge to set forth findings, conclusions, and recommendations for its disposition. *See* 28 U.S.C.A. § 636(b)(1)(B) (West 1994 & Supp. 2002). On November 26, 2002, the Magistrate Judge found that the Commissioner's decision was not supported by substantial evidence. He reasoned that the VE's affirmative answer to the ALJ's hypothetical questions did not constitute substantial evidence in support of the Commissioner's decision because the hypothetical questions failed to conform to the facts in accordance with *Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989). The Magistrate Judge recommended that the court reverse the final decision of the Commissioner, grant judgment to the defendant and recommit the case to the Commissioner for the sole purpose of calculating and paying proper benefits.

The Commissioner filed a timely objection to the Magistrate Judge's Report and Recommendation on December 11, 2002. In the objection, the Commissioner stressed that contrary to the Magistrate Judge's Report and Recommendation, the ALJ did not improperly "tailor" his examination of the VE, but based his hypothetical questions on the

evidence of the record. The Commissioner therefore asserts that her decision was based upon substantial evidence in the record.

The court reviews *de novo* those portions of the report or specified proposed findings or recommendations to which objection was made. *See* 28 U.S.C.A. § 636(b)(1) (West 1994 & Supp. 2002). The court must determine whether the Commissioner's findings are supported by substantial evidence, and whether the correct legal standards were applied. *See* 42 U.S.C.A. § 405(g) (West 1994 & Supp. 2002); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). As the presiding officer at the administrative hearing, the ALJ makes factual determinations and resolves evidentiary conflicts, including inconsistencies in the medical evidence. *See Hines v. Bowen*, 872 F.2d 56 (4th Cir. 1989). The court gives great deference to the ALJ's factual determinations and reviews them only for clear error. *See Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972). Nonetheless, the court is not restrained by deference to the administrative decision in determining whether the correct legal standards were applied—a *de novo* determination of legal issues is obligatory. *See Hines*, 872 F.2d at 58; *Meyers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980). Determining whether the evidence presented by the ALJ to support his decision amounts to substantial evidence is a question of law and therefore will be considered anew.

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "consists of more than a

mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is 'substantial evidence.'" *Hays*, 907 F.2d at 1456 (quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966)). The court must consider evidence that both supports and detracts from the Commissioner's conclusion; it may not affirm by isolating a specific quantum of supporting evidence. *See NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1021 (4th Cir. 1972). The Commissioner's decision, "if supported by substantial evidence [in the record as a whole], must be affirmed even though the reviewing court believes that substantial evidence also supports a contrary result." *Estep*, 459 F.2d at 1017. When reached by means of an improper standard or misapplication of the law or in the event that substantial evidence does not support the Commissioner's decision, factual findings made by the ALJ are neither conclusive nor binding. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987); *Meyers*, 611 F.2d at 982.

Bearing the aforementioned in mind, the court turns to the application of the law to the facts of the instant case.

III.

To determine whether the ALJ's decision is supported by substantial evidence, the court must determine whether the ALJ's hypothetical questions to the VE were proper. An ALJ has discretion in framing hypothetical questions as long as they are supported by substantial evidence in the record. However, an affirmative answer to a hypothetical question does not constitute substantial evidence in support of the Commissioner's

decision when the hypothesis fails to conform to the facts. *See Swaim v. Califano*, 599 F.2d 1309, 1312 (4th Cir. 1979). Furthermore, "for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all other evidence in the record . . . and it must be in response to proper hypothetical questions which fairly set out all of claimant's impairments." *See Walker*, 889 F.2d at 50. The Magistrate Judge did not conclude that the first hypothetical question deviated from the record. Thus, the only question before this court is whether there is substantial evidence to support the ALJ's assumption in the second hypothetical question that the plaintiff could perform light work.

The Commissioner argues that, contrary to the recommendation of the Magistrate Judge, the ALJ's hypothetical questions were not deficient. She claims that the ALJ's first hypothetical question was based on Dr. Stephenson's assessment of the plaintiff's abilities and the second hypothetical question, which assumes that the plaintiff could perform light work, was based on the ME's (Dr. Pudhorodsky) assessment of the plaintiff. Moreover, she asserts that the ALJ's finding, that the opinion of the ME is more consistent with the record than the opinion of the plaintiff's primary physician, was proper and in accordance with regulations.

Contrary to the Commissioner's suggestion, the record does not reflect that it was in the opinion of the ME that the plaintiff could perform light work. The Commissioner refers to two instances in her objection in which the ME allegedly asserted that the plaintiff was limited to light work. First, she refers to a "Physical Work Related Limitation" form that was filled out by the ME. The ME indicated in the form that the

plaintiff could stand and sit and also that he could frequently balance, stoop, crouch, kneel, crawl, and push/pull.[1] (R. at 275.) Noticeably absent in this form, however, is any representation about the ability of the plaintiff to lift, when the ability of the plaintiff to lift was at crux of the ALJ's assessment that the plaintiff was able to perform light work. (R. at 375.) The ME also failed to fill out any specific level of work that he thought the plaintiff was able to perform. (R. at 278.) It is unclear to this court how the ALJ could gather from this evidence that it was in the opinion of the ME that the plaintiff could perform light work.

Second, the Commissioner refers to ME's testimony during the administrative hearing that the plaintiff had the ability to stand and to sit. (R. at 341.) When questioned about the limit of 10 to 20 pounds of occasional lifting that Dr. Stephenson placed upon the plaintiff, the ME revealed that he "could not comment" on how it came to be that Dr. Stephenson imposed limits on the plaintiff's lifting. Upon further questioning, the ME asserted that he thought the restrictions came from the subjective data, mainly the plaintiff's statement to Dr. Stephenson that he had difficulty lifting his 16 pound grandson. However, as the ME proceeded to explain further, the ALJ cut off his testimony with another question. Once again, there is no substantial evidence that it was indeed the opinion of the ME that the plaintiff was able to perform light work.

[1] Frequently is defined in the form as 1/3 to 2/3 of an 8 hour day.

Even if it was in the opinion of the ME that the plaintiff was able to perform light work, which this court does not believe to be true, there is no substantial evidence supporting the ALJ's decision to give controlling weight to the alleged opinion of the ME. According to the Commissioner's own regulations directing how opinions shall be considered, the Commissioner should give "more weight to opinions from . . . treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of . . . medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings or from reports of individual examinations." *See* 20 C.F.R. § 404.1527 (d)(2) (2002). The ALJ stipulated in his decision that Dr. Stephenson was one of the plaintiff's "primary treatment sources and maintained relatively good treatments records." (R. at 374.) Therefore, the ALJ should have given Dr. Stephenson's opinion more weight. The ME, on the other hand, was a non-examining, non-treating physician. (R. at 333.) The "report of a non-examining, non-treating physician should be discounted and is not substantial evidence when contradicted by all other evidence in the record." *Millner v. Schweiker*, 725 F.2d 243, 245 (4th Cir. 1984). *See also Hall v. Harris*, 658 F.2d 260, 265-266 (4th Cir. 1981) (discounting opinion of doctor who never examined or treated the claimant); *Hayes v. Gardner*, 376 F.2d 517, 521 (4th Cir. 1967) (same). However, the ALJ selected the ME's supposed assessment, which is at best equivocal, over Dr. Stephenson's clear assessment imposing lifting limitations on the plaintiff. (R. at 273.) This preference is unsubstantiated by the record and contrary to the legal standard aforementioned.

The ALJ's requirement that the VE assume that the plaintiff could perform light work in the second hypothetical question posed to the VE makes the VE's conclusion in response to the hypothetical question unsupported by substantial evidence. Once again, an affirmative answer to a hypothetical question does not constitute substantial evidence in support of the Commissioner's decision when the hypothesis fails to conform to the facts. *See Swaim* 599 F.2d at 1312. The Commissioner's objection accordingly shall be overruled.

III.

In conclusion, the ALJ erred by rejecting Dr. Stephenson's opinion, which was entitled to controlling weight, and by basing his decision on the ME's opinion, which should have been discounted, because it was unclear and equivocal. The only other evidence in the record supporting the ALJ's ultimate conclusion was the VE's response to a deficient hypothetical question. The Fourth Circuit has stated clearly the appropriate disposition of cases like the case at bar:

> Since the only report in the record purporting to support the ALJ's finding that [the claimant] was capable of light work is that of a non-examining, non-treating physician and that report is contradicted by direct testimony by the claimant and by medical diagnoses made by [an] examining and treating physician[], a finding based on so slender a reed was simply not supported by substantial evidence . . . We reverse . . . and remand with instructions that an order should be entered awarding disability benefits to the claimant.

Miller v. Schweiker, 725 F.2d 243, 246 (4th Cir. 1984) (footnote omitted). The court accordingly finds that the Commissioner's decision was not supported by substantial evidence. The court affirms and adopts the Magistrate Judge's Report and Recommendation with respect to the conclusion that the plaintiff established a *prima facie* case of disability which the Commissioner failed to rebut. The ALJ should have found that the plaintiff was disabled within the meaning of the Act. Therefore, the Commissioner's decision shall be reversed and remanded for the sole purpose of calculating and awarding benefits. *See* 42 U.S.C.A. § 405(g) (West 1994 & Supp. 2002).

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

_____
Date

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

GEORGE N. COLEVAS,	)	CIVIL ACTION NO. 3:02CV00021
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
JO ANNE B. BARHNART, Commissioner of Social Security,	)	
	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

By order dated March 25, 2002, the court referred the above-captioned case to the presiding United States Magistrate Judge for proposed findings of fact and a recommendation disposition. On November 26, 2002, the Magistrate Judge filed his Report and Recommendation. He recommended that the court reverse the final decision of the Commissioner of Social Security, and remand the case solely for the calculation and award of benefits. The defendant filed timely objections to the Report and Recommendation, and the plaintiff responded. The court subjects the proposed findings and recommendations of the

Magistrate Judge to *de novo* review. *See* 28 U.S.C.A. § 636(b)(1) (West 1994 & Supp. 2002); Fed. R. Civ. P. 72(b). Having thoroughly considered the Report and Recommendation, the Commissioner's objections and the response thereto, the applicable law, and the documented record, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The Commissioner's objections to the Report and Recommendation shall be, and they hereby are, OVERRULED;
2. The decision recommended in the Magistrate Judge's November 26, 2002 Report and Recommendation shall be, and it hereby is, ACCEPTED;
3. The Commissioner's May 15, 2002 and October 25, 2002 Motion for Summary Judgment shall be, and they hereby are, OVERRULED;
4. The final decision of the Commissioner, shall be, and it hereby is, REVERSED.
5. This case shall be, and hereby is, REMANDED to the Commissioner solely to calculate benefits and award them to the plaintiff;
6. This case shall be, and it hereby is, STRICKEN from the docket of the court.

The Clerk of Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date