

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

DONALD HODGSON,)	CIVIL ACTION NO. 5:01CV00029
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
SHENANDOAH'S PRIDE DAIRY,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's motion for partial summary judgment, filed September 17, 2001. This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. §636(b)(1)(B). In his December 14, 2001 Report and Recommendation, the Magistrate Judge recommended that the court grant the defendant's motion. The plaintiff filed timely objections to the Magistrate Judge's recommendation. Having reviewed *de novo* those portions of the report as to which objections were made, see 28 U.S.C. §636(b)(1)(B) (West 1993 & Supp. 2000); Fed. R. Civ. P. 72(b), the court shall grant the defendant's motion for partial summary judgment for the reasons stated herein.

I.

The following facts are undisputed, unless otherwise indicated. The plaintiff, Donald Hodgson, began working as a warehouseman for the defendant, Shenandoah's Pride Dairy, at the defendant's Winchester, Virginia location, between 1987 and 1989.¹ As a warehouseman, his work primarily involved loading and unloading delivery trucks into and from refrigerated

¹In his complaint, the plaintiff states that he began work for the defendant on or about May 1989, (Compl. at ¶ 9), while in later submissions to the court, the plaintiff gives 1987 as his starting date. (Pl.'s Memo. in Opp. to Def.'s Mot. for Partial Summ. J. at 2.) The defendant, meanwhile, provides May 23, 1988 as the date on which the plaintiff became an employee. (Answer at ¶ 2.)

coolers maintained at temperatures between 36 and 38 degrees Fahrenheit. In November 1998, plaintiff began to experience bronchitis type symptoms that were eventually diagnosed as cold air induced asthma by his physician, Dr. Gary W. Wake. In February 1999, Dr. Wake restricted the plaintiff from working in the cooler for two weeks. The defendant provided the plaintiff with temporary alternate duties during this time. On March 3, 1999, after the plaintiff complained of a return of his symptoms when he worked in the cooler, Dr. Wake provided the plaintiff with a note indicating that the plaintiff was suffering from cold air induced asthma and should no longer work in the refrigerated cooler.

The plaintiff continued performing temporary duties to maintain his employment with the defendant. From March until June 1999, the plaintiff drove a box truck to make emergency deliveries, for which no commercial driver's license ("CDL") was required. The defendant attempted to reassign the plaintiff permanently to the position of delivery truck driver, for which a CDL would have been required. However, the plaintiff's history of black outs and lightheadedness, including one episode during which the plaintiff ran his vehicle into the back of another vehicle, prevented him from passing the physical exam required to obtain a CDL.

Upon learning that plaintiff could not pass the physical required for a CDL, the defendant sent a letter to the plaintiff informing him that no other work was available for him at the Winchester location and that he was being placed on up to six months of medical leave as of June 16, 1999. (Pl.'s Ex. H.) In the letter, the defendant requested that the plaintiff should advise his employer as to when he might return to work and if any significant change in his condition occurred. The letter also explained that the plaintiff's temporary duties had been makeshift and were only assigned to him to keep him employed until alternate employment could be found. Plaintiff continuously sought treatment for his asthma. Dr. Wake prescribed several drugs for the plaintiff. In April 1999, plaintiff was referred to pulmonary specialist Dr.

Thomas Murphy, who, in conjunction with Dr. H. Nelson Gustin, expanded his drug regimen and also advised plaintiff to stay out of the cooler and to discontinue all tobacco use. This new drug regimen seemed to alleviate at least some of plaintiff's symptoms. (Pl.'s Ex. B, Plaintiff's Medical Records from Winchester Pulmonary and Internal Medicine dated September 7, 1999.)

The plaintiff sought a second opinion from Larry Borish, M.D., a pulmonary specialist. Dr. Borish again expanded the plaintiff's drug regimen, and the plaintiff's symptoms were greatly reduced. By April, 2000, the plaintiff's asthma symptoms were "quite well-controlled," and the plaintiff had "no problems whatsoever with his asthma." (Pl. Ex. B, Letter from Dr. Borish and Dr. Hunt dated April 4, 2000.)

The plaintiff remained on medical leave for six months. On December 20, 1999, the plaintiff was informed by letter from the defendant that he had exhausted his leave and was accordingly terminated as of December 21, 1999. The defendant noted in the letter that neither the plaintiff nor his doctors had communicated with the defendant regarding the plaintiff's medical status as requested. The defendant explained that the plaintiff was being terminated because his return to work did not appear "imminent" as there had been no indication that he would soon be able to return to work in the cooler. (Def.'s Ex. D.)

The plaintiff filed suit on April 3, 2001, alleging discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.*, and breach of contract. The plaintiff is seeking, *inter alia*, compensatory and punitive damages in the amount of \$300,000.00, back pay including loss of benefits and attorney's fees. After the case was referred to Magistrate Judge Crigler, the parties agreed to stay the discovery process after completion of discovery on the issue of whether the plaintiff's asthma constituted a disability under the ADA. The defendant moved for partial summary judgment on this issue. In his December 14, 2001 Report and Recommendation, the Magistrate Judge recommended that the court find that the plaintiff was

not disabled under the ADA, and therefore, that the defendant's motion for partial summary judgment be granted.

II.

A party is entitled to summary judgment when the pleadings and discovery show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. See 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. See *Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

III.

Title I of the Americans with Disabilities Act of 1990 ("ADA") provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... discharge of employees ... and other terms, conditions, and privileges of employment." 42 U.S.C.A. §12112(a) (West 1995 & Supp. 2001). Under the ADA, a person is disabled if he meets any of three criteria: 1) a physical or mental impairment that substantially limits one or more of the major life activities; 2) a record of such an impairment; or 3) being regarded as having such an impairment. 42 U.S.C.A. §12102(2) (West 1995 & Supp. 2001); see also 29 C.F.R. §1630.2(g) (EEOC regulations implementing Title I of the ADA). The Magistrate Judge found that the plaintiff met none of the criteria. The plaintiff objects to the Magistrate Judge's findings concerning the first and third criterion listed

above.² Specifically, the plaintiff maintains that his asthma is a physical impairment which substantially limits a major life activity and that he was regarded by his employer as having such an impairment.

A. Substantially Limited in a Major Life Activity

“In order to demonstrate that an impairment is substantially limiting, an individual must show that [he] is significantly restricted in a major life activity.” *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 467 (4th Cir. 2002). Under the ADA regulations, a person who is substantially limited in a major life activity is “(i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared ... [to] the average person...” 29 C.F.R. §1630.2(j)(1). Breathing is one type of major life activity. See 29 C.F.R. §1630.2(h)(2)(i). Among the factors for the court to consider in determining whether a substantial limitation exists are the nature and severity of the impairment, the duration or expected duration of the impairment; and the permanent or long term impact of the impairment. *Id.* at §1630.2(j)(2); see also *Pollard*, 281 F.3d at 467-68. Furthermore, the court must consider the impairment as it is corrected by medication or other measures. See *Sutton v. United Airlines Inc.*, 527 U.S. 471, 489 (1999).

In his opposition to the defendant’s motion, the plaintiff asserts that he was substantially limited in the major life activities of breathing and working. The Magistrate Judge rejected both contentions in his Report and Recommendation. The plaintiff only filed objections to the

²The plaintiff did not object to the Magistrate Judge’s finding that the plaintiff had no record of disability on which the defendant relied in terminating his employment. Judge Crigler noted that the plaintiff failed to challenge the defendant’s belief, supported by documentation in the discovery record, that they viewed the plaintiff’s condition as merely temporary. Finding no clear error in this statement, the court adopts the Magistrate Judge’s recommendation that the plaintiff failed to show the existence of a genuine issue of material fact as to whether he had a “record of disability.”

Magistrate Judge's finding concerning the major life activity of breathing. No objection having been filed to Judge Crigler's conclusion that the plaintiff's asthma did not limit him in the major life activity of working, and finding no clear error in such a conclusion, the court adopts it and shall therefore only address whether the plaintiff was substantially limited in the major life activity of breathing.

A court must conduct the inquiry into whether an individual's impairment constitutes a disability on a case-by-case basis. *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999). The plaintiff is required to prove that his asthma is a disability "by offering evidence that the extent of the limitation in terms of [his] own experience ... is substantial." *Id.* at 567. Here, the plaintiff objects that the Magistrate Judge disregarded the findings of his physicians who conducted tests that indicated the plaintiff's lung capacity, even following medication, had been reduced to no more than 70% that of a healthy individual. (Pl. Ex. B.) The plaintiff concludes that because of this reduced lung capacity, he was substantially limited in the major life activity of breathing.

While the medical test results proffered by the plaintiff are certainly evidence on which the court may rely, they do not provide the court with a full picture of the extent to which the plaintiff's life is limited. It is not enough for the plaintiff to rest solely on the fact that his lung capacity was reduced. *See Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (finding where plaintiff had 50% reduced lung capacity that "this may be evidence of an impairment, the fact of a lower lung capacity is not evidence of a disability"). Instead, the plaintiff must explain how his life has been substantially limited by the fact that he has 70% lung capacity. The plaintiff states that he has blacked out and that he was found to be an increased candidate to suffer a terminal asthmatic attack.

It is undisputed that early on in the plaintiff's diagnosis and treatment, he suffered serious

problems with wheezing and blacking out. (Pl.'s Ex. A.) However, it is also undisputed that as the plaintiff's treatment progressed, his problems diminished. One of the plaintiff's physicians, Dr. Borish, stated that the plaintiff's asthma was under control and that he could live a "completely normal life" with medication. (Def.'s Ex. F, Dr. Borish's Dep. at 22.) Indeed, Dr. Borish asserted that by April 2000, the plaintiff's "asthma was not in any way interfering with his ability to have a perfectly normal, healthy life." *Id.* at 18. The plaintiff indicated to Dr. Borish that he was "able to mow the grass and work in the fields and get a reasonable amount of exercise without any problems." (Pl.'s Ex. C, April 4, 2000 Letter from Dr. Borish to Dr. Nelson Gustin.) The plaintiff himself testified in his deposition that since May 1999, he has had no breathing difficulties at all. (Def.'s Ex. A, Hodgson Dep. at 35.)

Keeping in mind that the court must assess the plaintiff's condition taking into consideration whether it is corrected by medication or other measures, *Sutton*, 527 U.S. at 489, statements made by both the plaintiff's doctor and the plaintiff indicate that with the proper medication, the plaintiff's asthma is controllable. In this case, no genuine issue of material fact exists with regard to whether the plaintiff's asthma has been brought under control. While the asthma has certainly had an impact on the plaintiff's life, as evidenced by his earlier breathing difficulties and current reduced lung capacity, the court does not find that it has imposed a substantial limitation on his breathing. The facts, taken in a light favorable to the plaintiff, demonstrate that the plaintiff can perform daily tasks despite the impact on his breathing. Thus, the plaintiff has not demonstrated that he is significantly restricted in his breathing, as is required under this criterion of the ADA. See *Pollard*, 281 F.3d at 467.

Accordingly, the court finds that the plaintiff has not established that he is substantially limited in a major life activity, and is therefore, not disabled under the first criterion of the ADA.

B. Regarded as having a disability

Under the “regarded as” criterion of the ADA, the plaintiff must show that either (1) his employer mistakenly believed that he had a physical impairment that substantially limited one or more major life activities, or (2) the employer mistakenly believed that an actual, non-limiting impairment substantially limited one or more major life activities of the plaintiff. *Rhoads v. FDIC*, 257 F.3d 373, 390 (4th Cir. 2001)(citing, *inter alia*, *Sutton*, 527 U.S. at 489); *see also* 29 C.F.R. § 1630.2(l). In recommending that the court reject this criterion as a basis for finding the plaintiff disabled, the Magistrate Judge concluded that the defendant considered the plaintiff’s condition to be temporary and expected the plaintiff to return to work. The plaintiff, in his objections, states that the defendant placed him on leave and ultimately terminated him because of the belief that he suffered from a serious health condition and his return to work was not imminent.

To show that an employer regarded an employee as disabled, the employee must show that the employer “entertained a misperception about [his] condition.” *Pollard*, 281 F.3d at 471 n. 5. In *Pollard*, the Fourth Circuit held that the plaintiff failed to show a “faulty perception that she would never return to [her] position,” as the record indicated the employer believed her condition [back injury] was only temporary. *Id.* Likewise, the plaintiff in the *Rhoads* case failed to make a proper showing of being regarded as disabled because her employer believed the plaintiff, who suffered asthma and migraines exacerbated by cigarette smoke, could continue to perform her job. 257 F.3d at 390 (finding no belief on the part of defendant that the plaintiff was substantially limited in her ability to work because employer believed she could do her job in a smoke-free environment). On the issue of whether the *Rhoads* plaintiff was regarded as substantially limited in her ability to breathe, the Fourth Circuit noted that an expression of

uncertainty by the defendant about the plaintiff's condition does not rise to the level of showing that the plaintiff was regarded as disabled. *See id.* (citing *Haulbrook v. Michelin North America, Inc.*, 252 F.3d, 696, 704 (4th Cir. 2001).

The plaintiff points out that in deposition testimony, Linda Miller, division manager of the defendant's Winchester facility, stated that the plaintiff was put on medical leave because it was believed he suffered from a "serious health condition." (Pl.'s Ex. F.) The plaintiff also brings to the court's attention the December 20, 1999 termination memorandum, in which Miller stated that "[i]t does not appear that your return to work is imminent; we have not received any indication from you or your medical providers that you will soon be able to work in the cooler." (Def.'s Ex. D.) According to the plaintiff, this statement and the language of the December 20, 1999 termination memo establish that the defendant considered him disabled within the meaning of the ADA. (Def.'s Ex. D.)

The record also contains the June 16, 1999 memorandum to the plaintiff which notified him that he was being placed on medical leave. In that memorandum, Miller expressed the understanding of the defendant that the plaintiff could "return to the cooler in a few months if [his] doctor release[d] him." (Def.'s Ex. C.) The memorandum clearly states that the defendant considered the plaintiff's medical problems to be of a temporary nature. *Id.* Furthermore, the plaintiff was advised to notify the defendants promptly "of any significant changes in [his] medical condition that might affect [his] return to work status." *Id.*

Based on these documents, the court does not find any misperception on the part of the defendant with regard to the plaintiff's condition. In the earlier memorandum, the defendant stated clearly that they considered the plaintiff's condition to be temporary. Temporary medical conditions are not disabilities under the ADA. *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997), *abrogated on other grounds by Baird ex. Rel. Baird v. Rose*, 192 F.3d 462

(4th Cir. 1999)(noting that even temporary disabilities that require extended absences from work are not disabilities); see also *Pollard*, 281 F.3d at 471 n. 5 (finding that because employer believed the plaintiff's condition to be temporary, no misperception of disability existed). Moreover, the statement that the defendant did not consider the plaintiff's return to work imminent cannot be construed in and of itself to be an indication that the defendant considered the plaintiff disabled. In particular, when that statement is read in the context of the entire December 20, 1999 memorandum, it is apparent that the defendant stated that the plaintiff's return to work was not imminent because the plaintiff had failed to update or notify them of his medical condition, and not because they considered him disabled. The employer here was uncertain of the plaintiff's current medical condition. This uncertainty, which resulted from the plaintiff's failure to apprise them of his condition, is insufficient to show the existence a genuine issue of material fact over whether the defendant regarded the plaintiff as disabled. See *Rhoads*, 257 F.3d at 390 and *Haulbrook*, 252 F.3d at 704.

Finally, the court does not consider Miller's statement that the plaintiff was initially put on medical leave because he had a serious health condition to reflect a misperception of the plaintiff's medical condition. As discussed previously in this Opinion, when the plaintiff first sought a diagnosis and treatment for his medical problems, the record reflects that his asthma was a serious health condition. However, the plaintiff requires more than this statement to establish that Miller, as a representative of the defendant, regarded him as disabled. The correspondence indicates that even if the defendant considered the plaintiff to have a serious health condition, they still believed it to be temporary. In addition, the plaintiff's termination was not attributed to a serious health condition but to the absence of any information on the plaintiff's current health. Therefore, even viewing the facts in the light most favorable to the plaintiff, as the court must do on the defendant's motion for summary judgment, the plaintiff

falls far short of presenting a case for being regarded as disabled by the defendant.

IV.

In conclusion, the court finds that the plaintiff has failed to establish that he was disabled within the meaning of the ADA, either because of being substantially limited in a major life activity, being regarded as disabled, or having a record of disability. Accordingly, the court accepts the Magistrate Judge's Report and Recommendation and grants the defendant's motion for partial summary judgment as to Count One of the plaintiff's complaint. The court shall order that the plaintiff's claim under the Americans with Disabilities Act be dismissed with prejudice.

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
HARRISONBURG DIVISION

DONALD HODGSON,)	CIVIL ACTION NO. 5:01CV00029
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
SHENANDOAH'S PRIDE DAIRY,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly

ADJUDGED, ORDERED AND DECREED

as follows:

(1) The December 14, 2001 Report and Recommendation of the Magistrate Judge shall be, and it hereby is, ACCEPTED.

(2) The defendant's September 7, 2001 "Motion for Partial Summary Judgment" shall be, and it hereby is, GRANTED.

(3) Count One of the plaintiff's complaint shall be, and it hereby is, DISMISSED WITH PREJUDICE;

(4) The plaintiff's objections to the Report and Recommendation shall be, and they hereby are, OVERRULED.

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

ENTERED: _____
Senior United States District Judge

Date