

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

ROBERT MANN,
Plaintiff,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF
SOCIAL SECURITY,
Defendant.

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CIVIL ACTION NO. 6:04cv00066

By: Michael F. Urbanski
United States Magistrate Judge

REPORT AND RECOMMENDATION

Plaintiff Robert Mann (“Mann”) brought this action pursuant to 42 U.S.C. § 405(g) for review of the final decision of the Commissioner of Social Security denying his claim for disability insurance benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383f. On December 28, 2004, this case was referred to the undersigned for report and recommendation as to any dispositive motions.

The major thrust of plaintiff’s argument is that the ALJ failed to properly credit the opinion of his treating physician because that opinion consisted of a “Yes” or “No” checklist prepared by claimant’s counsel and completed by the treating physician without explanation or accompanying examination. Plaintiff’s argument fails because the opinion reflected in the checklist is not supported by clinical or diagnostic evidence in the record nor explained at all by the doctor who completed it. In contrast, the limitations found by the ALJ are supported both by medical evidence and evidence of plaintiff’s daily activities. Having reviewed the record and after briefing and oral argument, it is recommended that the Commissioner’s motion for summary judgment be granted as there is substantial evidence to support her decision.

FACTUAL AND ADMINISTRATIVE RECORD

Plaintiff is a thirty-seven year old male who dropped out of school two weeks into the ninth grade at the age of fifteen. (Administrative Record, hereinafter "R.", at 56, 70, 140.) Plaintiff previously worked as a construction worker. (R. 65) Plaintiff alleges that he was injured in a car accident in 1983 and that pain in his back originating from this accident has worsened, particularly in the last three years. (R. 91) Plaintiff alleges that he became disabled on August 3, 2001 after having been laid off from his last job. (R. 64)

Medical evidence in the record shows that plaintiff visited George A. Hurt, M.D., on October 31, 2000 with complaints of back pain. (R. 91) Upon examination, Dr. Hurt found that plaintiff could walk on his heels and toes and that his gait was normal. (R. 91) Dr. Hurt found that plaintiff's forward and lateral bending were limited, that he experienced tenderness in the paraspinal muscles, that his straight leg raising was negative, and that his reflexes were intact. (R. 91) He also found that plaintiff had no weakness to direct testing. (R. 91)

On November 6, 2002, plaintiff visited chiropractor Rick J. Jaminet, D.C., regarding his back pain. (R. 92) Upon examination, the chiropractor found that plaintiff had palpable muscle spasms, limited range of motion, and palpable edema in the lumbar region. (R. 92) Jaminet diagnosed plaintiff with acute lumbar strains accompanied by ligamentous instability, myofascitis, and localized evidence of nerve root irritation. (R. 92) He reported that plaintiff's symptoms were going to be permanent, that he treated him with conservative chiropractic care, and that he had reached maximum medical improvement. (R. 93) Jaminet indicated that, to work, plaintiff would need to be able to change positions once an hour and that he should not lift objects weighing more than forty pounds, or those weighing more than twenty pounds repetitively. (R. 93)

In December 2002, plaintiff underwent a lumbar spine MRI which revealed no disc herniation and moderately advanced degenerative disc disease which included generalized annular bulging and marginal spurring that did not cause spinal stenosis. (R. 101)

Three months later, on March 9, 2003, plaintiff saw Thomas Dobyms, M.D., for a consultative evaluation. (R. 103) Dr. Dobyms reported that plaintiff related his back pain as his main problem and that he used no medication whatsoever at the time. (R. 103) Upon examination, Dr. Dobyms found that plaintiff was in no acute distress. (R. 103) He noted that although plaintiff's dorsolumbar range of motion was decreased, motor and sensory function of plaintiff's extremities were totally normal, and that he had relatively well-preserved motor functions. (R. 104) Dr. Dobyms also found that plaintiff could stand on each foot independently, walk on heels and toes, had a tandem gait showing stiffness, and a slight straightening of the spine bent forward though otherwise relatively normal. (R. 104-05) He diagnosed plaintiff with mild lumbrosacral disc disease, but stated that he was probably capable of sedentary to light-duty work. (R. 105)

On August 11, 2003, plaintiff first saw Donald P.K. Chan, M.D., for complaints of low back pain. (R. 119) Dr. Chan reported that plaintiff was in no apparent acute distress. He found that examination of plaintiff's back showed some loss of lordosis and that he had diffuse lower back tenderness. (R. 119) He also found that plaintiff had intact sensation, normal strength, a negative straight leg raising, and that he was able to heel and toe walk without any significant difficulty. (R. 119) Dr. Chan noted that plaintiff's MRI showed lumbrosacral nerve root compression and diagnosed him with low back pain resulting from lumbrosacral degenerative arthritis with nerve root compression. (R. 119) He urged plaintiff to stop smoking, advising that

doing so would affect his management of his low back pain. (R. 120) Dr. Chan also offered plaintiff facet injections and discussed the possibility of surgery. (R. 120)

On September 29, 2003, plaintiff saw Dr. Chan again about the pain in his back. Dr. Chan reported that plaintiff had flattening of his lumbar spine, very limited motion, and frequent muscle spasms. (R. 117) Dr. Chan noted that straight leg raising bothered plaintiff but that he had good strength and symmetrical reflexes. (R. 117) Dr. Chan diagnosed plaintiff with lumbrosacral disc protrusion pursuant to a prior MRI and indicated that plaintiff would not be able to return to performing manual labor so long as his symptoms and diagnoses continued. (R. 117)

Plaintiff visited Dr. Chan on February 23, 2004 and sought medication. (R. 122) Dr. Chan reported that plaintiff had previously been advised to have surgery but plaintiff indicated that he was not interested.¹ (R. 122) Upon examination, Dr. Chan found that plaintiff's straight leg raising was negative, that he had good strength in his legs, and normal knee and ankle jerks. (R. 122) Dr. Chan advised plaintiff that he would not give him prescription drugs, and that if plaintiff is in pain, he should consider having surgery to have the segment of his back that hurts decompressed and fused. (R. 122) Although Dr. Chan noted that heavy manual labor was out of the question, plaintiff should attend vocational rehabilitation in an effort to get a sedentary job. (R. 122)

Three months later, on May 23, 2004, and without an intervening examination, Dr. Chan completed a checklist questionnaire provided by plaintiff. In response to "Yes" or "No" questions, Dr. Chan indicated that plaintiff suffered from low back pain resulting from

¹ At the administrative hearing, plaintiff indicated that he declined back surgery because it provided only an eighty-five percent chance of relieving the pain from which he suffers. (R. 149)

degenerative arthritis with nerve root compression, and that, as such, plaintiff was limited to a sedentary level of exertion, i.e., standing no more than two hours in an eight-hour day and lifting no more than ten pounds with frequent bending, twisting, climbing. As a result of his impairment, that plaintiff would need to be able to get up from a seated position after about thirty minutes and walk around for approximately five minutes to relieve his pain. (R. 132) The checklist questionnaire did not provide any commentary or explanation for the responses provided. (R. 132)

Regarding daily activities, plaintiff indicates that he lives with his girlfriend and three children and that he takes care of the youngest child, who is 30 months old, while the girlfriend works around the house or when she is gone. (R. 81, 142) Plaintiff performs yard work including mowing the lawn with a riding mower and blowing leaves, and house work including doing laundry occasionally and taking out trash. (R. 82, 143, 147) Regarding recreation, plaintiff indicates that he goes hunting and fishing a few times a year and needs assistance dragging the deer from the woods and cleaning it. (R. 83) Plaintiff also reads hunting and fishing magazines, watches television, visits with friends and family, and plays cards. (R. 83-84, 154)

A vocational expert (“VE”) testified at the administrative hearing that an individual with plaintiff’s age and educational background, who could perform sedentary-type jobs (defined as lifting less than twenty-five pounds, ability to move around as necessary, with a sit/stand option to move about once every hour) could perform unskilled, sedentary work such as order clerk, other unskilled clerk positions, and assembly-type jobs at the unskilled, sedentary level. (R. 165) The VE also testified that such an individual could also perform unskilled, sedentary

labor (non-construction) jobs in the food and beverage industry, and that these positions allowed a sit-stand option. (R. 167)

STANDARD OF REVIEW

The court's review is limited to a determination as to whether there is a substantial evidence to support the Commissioner's conclusion that plaintiff failed to meet the conditions for entitlement established by and pursuant to the Act. If such substantial evidence exists, the final decision of the Commissioner must be affirmed. Hays v. Sullivan; 907 F.2d 1453, 1456 (4th Cir. 1990); Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966). Stated briefly, substantial evidence has been defined as such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971).

ANALYSIS

Plaintiff contends the ALJ erred on two grounds. First, plaintiff argues that the ALJ failed to give the appropriate weight to Dr. Chan's written checklist opinion that plaintiff would need to be able to get up from a seated position after about thirty minutes and walk around for about five minutes to relieve his pain. Next, the ALJ argues that the Commissioner erred in finding that plaintiff could do work that existed in significant numbers in the national economy by disregarding the limitations imposed by Dr. Chan.

I. The ALJ Appropriately Considered Dr. Chan's Opinions in Light of the Entire Record.

The ALJ acted properly in discounting Dr. Chan's checklist opinion because it was not supported by objective medical findings and was inconsistent with the remainder of the evidence in the record. (R. 19-20); see also 20 C.F.R. § 404.1527(e)(1). Physical impairments must be

established not just by a claimant's statement of his symptoms, but by medical evidence consisting of signs, symptoms, and laboratory findings. Impairments must result from anatomical, physiological, and psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1508. It is well-established that it is a claimant's responsibility to provide not only medical evidence of an impairment, but also medical evidence showing how severe his impairment is during the time which he alleges he was disabled. Bowen v. Yuckert, 482 U.S. 137, 162-63 (1987); 20 C.F.R. §§ 404.1512, 404.1513.

Here, the objective medical evidence supports the ALJ's determination that plaintiff retained the residual functional capacity ("RFC") to perform sedentary work that did not involve lifting more than ten pounds occasionally and five pounds frequently, standing and walking for two hours, sitting for six hours in an eight hour workday, and also having a sit/stand option that allows for a period of standing every hour. (R. 22)

Prior to the date plaintiff stopped working, Dr. Hunt found that plaintiff's straight-leg raising was negative, that he walked normally, that he had no problems with his reflexes, and that he exhibited no weakness. (R. 91) The core of Dr. Hunt's findings – that plaintiff could still perform sedentary work – mirror those of every other doctor who has examined plaintiff.

Dr. Jaminet treated plaintiff conservatively and reported that plaintiff's impairment only precluded him from lifting objects weighing more than forty pounds or twenty pounds repetitively. (R. 93) He noted that as a result of plaintiff's impairment, he should be allowed to change positions once an hour. (R. 93) Plaintiff can read a book for an hour and can drive or ride in a car for an hour. (R. 83, 148)

Dr. Dobyms found that plaintiff's claimed impairment did not result in acute distress. He noted that plaintiff's sensory and motor functions were totally normal, that plaintiff could stand and walk without problems, and that plaintiff could work. (R. 105) Specifically, he found that plaintiff could perform sedentary to light duty work. (R. 104-05)

At the time he last saw plaintiff on February 23, 2004, Dr. Chan, plaintiff's treating physician, opined plaintiff's impairments did not preclude his ability to perform sedentary work. (R. 122) Similar to Dr. Dobyms, Dr. Chan found that plaintiff's impairment did not result in acute distress. (R. 122) He found no problems with plaintiff's sensation and strength, found that plaintiff's straight-leg raising was negative, and reported that plaintiff could walk without any significant difficulty. (R. 117, 119, 122) He recommended that plaintiff partake of vocational rehabilitation, but there is no record of plaintiff having done so. (R. 122) Similarly, Dr. Chan recommended that plaintiff have surgery – which plaintiff testified would have an eighty-five percent chance of success – but plaintiff chose not to do so. (R. 120, 122, 149) The ALJ is allowed to consider these refusals in assessing whether plaintiff is disabled. See, e.g., Houston v. Sec'y of Health & Human Servs., 736 F.2d 365, 367 (6th Cir. 1984); Schmidt v. Barnhart, 2005 U.S. App. LEXIS 674 at **19-20 (7th Cir. Jan. 14, 2005); Roth v. Shalala, 45 F.3d 279, 282 (8th Cir. 1995) (“If an impairment can be controlled by treatment or medication, it cannot be considered disabling.”).

Plaintiff's refusal to undergo numerous pain relief alternatives, when combined with evidence that he took no pain medication, belies his allegations of totally disabling pain. (R. 103) Similarly, plaintiff's daily activities are not consistent with a finding of totally disabling pain. Plaintiff occasionally took care of his child, hunted and fished, mowed his lawn

and performed other yard work. (R. 81, 84, 142) Such activities are inconsistent with a finding of disability.

The crux of plaintiff's first argument is that the ALJ is bound to follow Dr. Chan's responses to the checklist questionnaire provided by plaintiff. However, this argument is without merit. First, medical source's opinion as to the ultimate conclusion of disability is not dispositive. See 20 C.F.R. § 404.1527(e)(1). Second, although 20 C.F.R. § 404.1527 dictates that the opinions of a treating physician are generally entitled to more weight than those of a non-treating physician, the regulations do not require the ALJ to accept such opinions in every situation. A treating physician's opinion is only entitled to controlling weight so far as it is supported by objective medical findings and is consistent with other substantial evidence in the record. Id. § 404.1527(d)(2); Craig v. Chater, 76 F.3d 585, 590 (4th Cir. 1996). Generally, the more consistent an opinion is with the remainder of the record, the more weight the Commissioner gives the opinion. Id. § 404.1527(d)(4).

Dr. Chan's checklist opinion does not merit more than minimal weight because it is both inconsistent with the remainder of the record (including those portions of the record generated by Dr. Chan) and because it is not supported by other medical and clinical findings. There is no explanation on the checklist of why Dr. Chan chose to place a check on a particular line, or, for instance, whether this opinion would change if plaintiff pursued the other options for treatment that Dr. Chan had previously suggested. Significantly, Dr. Chan last saw plaintiff on February 23, 2004, at which time he opined that "he should be able to do a sedentary type of job with lifting less than 25 lbs. and ability to move around as necessary." (R. 122) This opinion is consistent with the ALJ's RFC determination. There is no evidence in the record that Dr. Chan saw plaintiff after February 23, 2004 which would justify the more restrictive limitations set

forth on the May 20, 2004 checklist. As there is no clinical basis to support the increased limitations in the May, 2004 checklist opinion, the ALJ acted properly when he discounted the evidence contained on this form in favor of the other evidence in the record – including the other evidence produced by Dr. Chan himself.

II. The ALJ Acted Properly in Composing His Hypothetical Question to the Vocational Expert.

It is clear that the ALJ need not include a limitation, lacking any objective medical findings or support, in a hypothetical question to a VE. See Walker v. Bowen, 889 F.2d 47, 50-51 (4th Cir. 1989)(stating that hypothetical questions must include those impairments supported by the evidence). Here, the ALJ found, when considering the entirety of the record, that the claimant retained the RFC to perform sedentary work, occasionally lifting ten pounds, frequently lifting five pounds, standing or walking for two hours, and sitting for six hours, in an eight hour day. (R. 19) The ALJ also found that plaintiff needed a sit/stand option, which would allow him to stand every hour. (R. 19)

At oral argument, plaintiff stated that Dr. Chan required plaintiff to be able to “move around.” The ALJ’s opinion allowed plaintiff to move around the work station, but not around the entirety of plaintiff’s place of work. (R. 167) The ALJ’s limitation is consistent with Dr. Chan’s February 23, 2004 assessment that plaintiff needed to “move around.” As such, the ALJ did not err in discounting plaintiff’s more expansive interpretation. Even if the court may disagree with these limitations, if the ALJ’s decision was supported by substantial evidence, it must be affirmed. See Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1980).

In reaching his conclusion, the ALJ relied on Dr. Chan’s opinions that were supported by evidence in the record as well as those of consultative physicians. (R. 20) He did not rely on Dr.

Chan's opinion contained on the checklist questionnaire insofar as it was not supported by the evidence in the record, and similarly discounted the opinions of the consultative physicians who believed plaintiff was capable of light work as he was directed to do under Social Security Ruling 96-9p. (R. 20) In doing so, the ALJ achieved a balance that was supported by substantial evidence.

Given the deferential standard of review provided under 42 U.S.C. § 405(g), it is recommended that the court affirm the decision of the ALJ as there is more than enough evidence to support plaintiff's RFC as defined under the Social Security Act, and as such, the ALJ's conclusion that plaintiff was not disabled. See Pierce v. Underwood, 407 U.S. 552, 565 (1988); King v. Califano, 559 F.2d 597, 599 (4th Cir. 1979). As such, it is the recommendation of the undersigned that defendant's motion for summary judgment be granted.

In recommending that the final decision of the Commissioner be affirmed, the undersigned does not suggest that plaintiff is totally free of all pain and subjective discomfort. The objective medical record simply fails to document the existence of any condition which would reasonably be expected to result in total disability for all forms of substantial gainful employment. It appears that the ALJ properly considered all of the subjective and objective factors in adjudicating plaintiff's claim for benefits. It follows that all facets of the Commissioner's decision in this case are supported by substantial evidence.

CONCLUSION

For the reasons outlined above, it is the recommendation of the undersigned that the Commissioner's motion for summary judgment be granted. The Clerk is directed immediately to transmit the record in this case to the Hon. Norman K. Moon, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this

Report and Recommendation within ten (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 of the Court hereby is directed to send a certified copy of this Report and Recommendation to plaintiff and all counsel of record.

Enter this 18th day of August, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge