

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

<b>JOSEPH MELVIN,</b>	)	
<b>Plaintiff,</b>	)	
	)	<b>Civil Action No. 6:06cv0032</b>
<b>v.</b>	)	
	)	
<b>JO ANNE B. BARNHART,</b>	)	<b>By: Hon. Michael F. Urbanski</b>
<b>COMMISSIONER OF SOCIAL SECURITY</b>	)	<b>United States Magistrate Judge</b>
<b>Defendant.</b>	)	

**REPORT AND RECOMMENDATION**

Plaintiff Joseph Melvin (“Melvin”) brought this action for review of the Commissioner of Social Security’s decision denying his claim for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383. This case was referred to the undersigned Magistrate Judge on November 27, 2006, for report and recommendation. Following the filing of the administrative record and briefing, oral argument was held on May 23, 2007. As such, the case is now ripe for decision.

The undersigned finds that substantial evidence supports the Commissioner’s credibility assessment. Accordingly, it is recommended that the ALJ’s decision be affirmed.

**I.**

Melvin is younger individual, born on March 8, 1966, and he completed the seventh grade. (Administrative Record [hereinafter R.] at 24, 80, 87) Melvin’s previous work consists only of work as a plasterer. (R. 100) Melvin filed an application for DIB and SSI on or about June 12, 2003, alleging that he became disabled on May 13, 2003, due to high blood pressure, gout, cirrhosis of the liver, and hepatitis C. (R. 13, 80, 99) Melvin’s claims were denied at both

the initial and reconsideration levels of administrative review, (R. 13), and a hearing was held before an ALJ on April 19, 2005. (R. 13, 21-42) On June 22, 2005, the ALJ issued a decision denying Melvin's claims for DIB and SSI, finding that Melvin's claims of incapacitation were not totally credible and that he retains the RFC to do a full range of medium work, and therefore, that he is not disabled. (R. 19-20)

The ALJ's decision became final for the purposes of judicial review under 42 U.S.C. § 405(g) on July 7, 2005, when the Appeals Council denied Melvin's request for review. (R. 5-7) Melvin then filed this action challenging the Commissioner's decision.

## **II.**

Judicial review of a final decision regarding disability benefits under the Act is limited to determining whether the ALJ's findings "are supported by substantial evidence and whether the correct law was applied." Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990) (citing 42 U.S.C. § 405(g)). Accordingly, the reviewing court may not substitute its judgment for that of the ALJ, but instead must defer to the ALJ's determinations if they are supported by substantial evidence. Id. Substantial evidence is such relevant evidence which, when considering the record as a whole, might be deemed adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971). If such substantial evidence exists, the final decision of the Commissioner must be affirmed. Hays, 907 F.2d at 1456; Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966).

## **III.**

Melvin argues that the ALJ erred in finding that his testimony was not totally credible, and he asks that the decision of the ALJ be reversed. Specifically, Melvin claims that the

medical record corroborates his testimony that he suffers from gout flare-ups which are so severe that several times each month he is confined to his bed for two or three days. Melvin argues that such a rate of absenteeism would not be tolerated by any employer, and, thus, that he is disabled.

Melvin testified that he suffers from high blood pressure, breathing problems, and gout which cause him to at times feel dizzy, use inhalers, and have pain and swelling in his feet. (R. 25-28) As a result of these conditions, Melvin testified that he is only able to stand for two hours at a time and that he then needs an opportunity to sit or lie down. (R. 27-28) Melvin also stated that when his gout flares-up, which happens a couple of times each month, he needs to stay in bed for at least two or three days. (R. 28-29) However, Melvin also testified that his medications generally control all his problems and, despite his complaints, he is able to help out some around the house, cook one or two meals a week for himself and his mother, and spend time each day watching television and “piddl[ing]” in the yard. (R. 26-30)

The ALJ considered Melvin’s testimony and the record as a whole, and he found that although Melvin suffers from severe impairments and that his complaints of gout related discomfort were evident in the record, Melvin is able to work because his current medications are fully controlling his symptoms. Additionally, the ALJ found that Melvin’s testimony that he was confined to his bed due to severe gout several times each month was not wholly credible because the record establishes that Melvin ignored his doctors’ instructions regarding methods to minimize his discomfort and there is no evidence in the record that his condition significantly impeded his physical activities. (R. 15-20)

In light of conflicting evidence contained in the record, it is the duty of the ALJ to fact-find and to resolve any inconsistencies between a claimant’s alleged symptoms and his ability to

work. See Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Accordingly, the ALJ is not required to accept Melvin's testimony that he is disabled by pain and confined to a bed several days each month, but rather must determine, through an examination of the objective medical record, whether he has proven an underlying impairment that could reasonably be expected to produce the symptoms alleged. Craig v. Chater, 76 F.3d 585, 592-93 (4th Cir. 1996) (stating the objective medical evidence must corroborate "not just pain, or some pain, or pain of some kind or severity, but the pain the claimant alleges she suffers."). Then, the ALJ must determine whether Melvin's statements about his symptoms are credible in light of the entire record. Credibility determinations are in the province of the ALJ, and courts normally ought not interfere with those determinations. See Hatcher v. Sec'y of Health & Human Servs., 898 F.2d 21, 23 (4th Cir. 1989).

Although Melvin was diagnosed with gout in June 2002, he did not complain of any pain or discomfort due to gout until May 2003. (R. 227) On May 7, 2003, Melvin saw Dr. Jones at Carilion Family Medicine Roanoke-Salem for severe pain in both feet due to gout, which he claimed had persisted for two days. (R. 205) Dr. Jones prescribed prednisone and advised him to return if his symptoms worsened. (R. 206) Melvin did not return until June 18, 2003, and during that exam he only complained of limited pain in his left big toe. (R. 194-96, 202-03) Following a physical exam, Dr. Jones noted that Melvin's gout had improved, and she prescribed Indocin<sup>1</sup> twice a day as needed to control his gout. (R. 194-96, 202-03) Dr. Jones also recommended that Melvin stop smoking and drinking to further control his gout. (R. 196, 203)

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<sup>1</sup>Indocin is a non-steroidal anti-inflammatory, which works by reducing the hormones which cause pain and inflammation in the body. <http://www.drugs.com/mtm/indocin.html>.

Melvin saw Dr. Weisbers for abdominal discomfort twice in the fall of 2003, in September and December. During both exams, Melvin advised Dr. Weisber that his gout was not causing him any significant discomfort and that he frequently went for a week or two without taking any of his gout medication. (R. 158, 160-61)

Also, in the fall of 2003, Melvin began seeing Dr. Schlepner at Carilion Internal Medicine Northwest. On November 11, 2003, Melvin complained to Dr. Schlepner that he had moderate pain in his left foot. (R. 167, 260) During the course of the exam, Melvin reported that he had been experiencing some pain in his left foot for about a week, and had some “gouty pain” in his right foot in the recent past. (R. 167, 260) Dr. Schlepner did not change Melvin’s gout medication, Indocin, but simply advised him to take it. (R. 168, 263) When Melvin returned on November 25, 2003, he did not complain of any gout symptoms, and Dr. Schlepner reported Melvin’s gout was stable. (R. 169-71, 257-59)

Melvin returned on December 13, 2003, again complaining of pain due to gout in his left foot; however, he stated that he had not been taking his prescribed medication. (R. 173-74, 253-54) Once again, Dr. Schlepner advised Melvin to take his gout medication as directed, and Melvin did not return for any follow-up care. (R. 173-74, 255) On January 20, 2004, Melvin returned to Dr. Schlepner, and he complained that he was suffering from a gout flare-up and that his pain ranked a three-out-of-ten. (R. 176, 249) Dr. Schlepner placed Melvin on Colchine<sup>2</sup>, another gout medication, and when he returned on February 23, 2004, Melvin reported he had no pain at all. Dr. Schlepner found Melvin’s gout had stabilized. (R. 176-82,

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<sup>2</sup>Colchine minimizes the body’s response to deposited uric acid crystals, leading to less swelling and inflammation, and therefore, decreases the frequency and severity of gout attacks. <http://www.drugs.com/mtm/colchicine.html>.

246-248) Similarly, in May, June, and August 2004 Melvin reported he was having no issues with gout and Dr. Schlepner found Melvin's gout was well controlled with Colchine. (R. 184-87, 190-91, 200, 232-34, 239-40, 245, 264-66) Similarly, in October 2004, Dr. Schlepner noted that although Melvin stated that he had suffered a gout attack the preceding week, Melvin did not complain of any contemporaneous pain, and he found that Melvin's gout was well controlled with medication and that when Melvin took his medication as directed, he did not have any flare-ups. (R. 269) In December 2004 and April 2005, Melvin reported that he had once again stopped taking his gout medication, but nonetheless had not experienced any significant gout related symptoms. (R. 272, 277)

There is no indication in Melvin's medical record that his gout pain is so severe that he is confined to a bed for several days each month. Although Melvin reported gout flare-ups off and on in 2003 and January 2004, Melvin never reported to his physicians that he was confined to a bed due to any gout related symptoms, he told his treating physicians that he went for weeks without taking his gout medication, and his physicians noted that when he took his medication as directed, his symptoms were well controlled. Additionally, the record indicates that by February 2004, Melvin's gout symptoms had largely resolved. Moreover, there is significant indication in the record that Melvin has refused to comply with his doctors' recommendations to control his symptoms. Melvin has repeatedly admitted that he does not take his medication on a consistent basis and he has refused to stop smoking and drinking.

Melvin's reported activities also indicate he is not disabled by gout. Melvin reported to Dr. Schlepner that he did regular yard work, including mowing his lawn, and he testified that he spends some time in the yard each day. (R. 29-30, 184, 189, 242, 264, 274) In his daily

activities questionnaire, Melvin indicated that he is able to take care of his personal needs, he occasionally prepares meals for himself and does some housework, he goes outside his home once a day and goes grocery shopping once a week, and he visits with friends and family in his own home and on the telephone. (R. 115-122, 126)

The ALJ's decision not to credit Melvin's testimony that he suffers gout attacks so severe he is confined to bed several days each month is supported by the record. Despite seeing his regular physician approximately twenty times between 2003 and 2005, Melvin never advised his physicians that he had suffered a gout attack so severe he was confined to his bed. None of Melvin's physicians have advised him to remain in bed to control his gout related symptoms and Melvin's self-reported daily activities indicate he is not regularly confined to bed. Further, the fact that Melvin repeatedly disregarded his physicians' advice to take his medication, stop smoking, and stop drinking to control his gout related symptoms suggests to the undersigned that his symptoms are not as severe as he alleges. Accordingly, the undersigned finds that the ALJ's conclusions regarding the extent of Melvin's gout related symptoms are supported by substantial evidence and should not be disturbed.

#### **IV.**

Based on the foregoing, it is the recommendation of the undersigned that plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted.

In making this recommendation, 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 objective and subjective evidence 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. It is recommended, therefore, that defendant'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 all counsel of record.

Entered this 25<sup>th</sup> day of May, 2007.

/s/ Michael F. Urbanski  
United States Magistrate Judge