

find any cause for left-eye deterioration. Additionally, plaintiff complains of leg cramps and argues that he is disabled by depression.

The decision of the Commissioner does not analyze all of the evidence and does not specifically explain the weight given to obviously probative exhibits. In particular, although the decision of the Administrative Law Judge (“ALJ”) states that the opinion of the consultative psychological examiner, Lee Booher, M.A., was “given significant weight,”(R. 410), certain aspects of the Booher evaluation which are not consistent with the ALJ’s decision were not explained. Of significance, the ALJ’s decision contains no reference to Booher’s assessment of Sumner’s Global Assessment of Functioning (“GAF”) at 45. Given the fact that two treating physicians opined that the combination of Sumner’s physical and mental impairments rendered him disabled and the fact that the Booher evaluation is decidedly mixed, there is no way for the court to determine whether the ALJ’s decision is supported by substantial evidence without some indication that the ALJ analyzed the totality of the Booher report, including Sumner’s GAF score. Further, reliance by the ALJ on a dated medical record review by a state agency psychologist conducted in 1996, some five years before Booher’s evaluation and assessment, is questionable.

FACTUAL AND ADMINISTRATIVE BACKGROUND

Sumner, born on November 18, 1945, testified at the hearing that he was 56 years of age and had completed the seventh grade. (Record, “R.” 470) Sumner has past relevant work experience as a truck mechanic and driver. (R. 409) In March, 1993, Sumner lost vision in his right eye in a job-related accident when he was hit with a screwdriver. (R. 33)

Plaintiff filed an application for DIB and SSI on February 14, 1996 (R. 293-96, 384-87), alleging disability as of June 10, 1993, due to blindness in his right eye and poor vision in his left eye. (R. 117) The application was denied initially, (R. 270-71), and upon reconsideration by the Social Security Administration. (R. 274-76, 392-94) Plaintiff requested a hearing which was conducted on January 13, 1998, at which time he was represented by counsel and testified before an Administrative Law Judge (“ALJ”). (R. 27-64) On June 22, 1998, the ALJ found that Sumner was not under a disability. (R.12-23) On March 27, 2000, the Appeals Council of the Social Security Administration denied Sumner’s request for review. (R. 7-8) Suit was filed in district court, but on motion by the Commissioner, the case was remanded for further consideration of the opinion of a treating physician, James H. DeBoe, M.D., for a new credibility finding. (R. 421) After a second hearing on October 23, 2001, the ALJ again found Sumner not to be disabled.

Sumner argues that the ALJ erred in two respects. First, Sumner contends that the ALJ did not appropriately credit the opinions of Sumner’s treating family physicians regarding his claimed mental impairment. Second, Sumner argues that appropriate application of the Medical-Vocational Guidelines (the “grids”) mandates a finding of disability once Sumner turned 55 years of age. Sumner’s first argument implicates the ALJ’s consideration of the assessment of an examining consultative psychology associate, Lee Booher, and the ALJ’s decision does not adequately explain the consideration given to the totality of Booher’s report, particularly Sumner’s GAF rating of 45. Because the Commissioner does not adequately explain its consideration of certain aspects of Booher’s assessment and relies on a state agency psychologist evaluation which is five years old, it is recommended that this case be remanded to the Commissioner for further proceedings consistent with the Fourth Circuit’s Sterling

Smokeless decision. By the same token, Sumner's second argument regarding application of the grids cannot be decided on this record as the ALJ left unresolved certain conflicts in the evidence regarding whether Sumner met the physical exertion requirements to perform medium work under 20 C.F.R. § 404.1567(c). As a result, it is recommended that this case be reversed and remanded for further administrative proceedings.

ANALYSIS

The Social Security Act provides that disability benefits shall be available to those persons insured for benefits, who are not of retirement age, who properly apply, and who are "under a disability." 42 U.S.C. § 423(a) (2004). Disability is defined in 42 U.S.C. § 423(d)(1)(A) as:

[T]he inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for at least 12 continuous months.

The Social Security Act provides that supplemental security income (SSI) disability benefits shall be available for aged, blind, and disabled persons who have income and resources below a specific amount. 42 U.S.C. § 1381 et seq. (2004); 20 C.F.R. § 416.110 (2004). The standard for determining eligibility for SSI disability benefits is a two-part test. The claimant must show a medically determinable physical or mental impairment, and the impairment must be such as to render the claimant unable to engage in substantial gainful employment. Walker v. Harris, 642 F.2d 712, 714 (4th Cir. 1981); Blalock v. Richardson, 438 F.2d 773, 775 (4th Cir. 1972); 42 U.S.C. § 423(d) (2003); 20 C.F.R. § 404.1501(b) (2004).

The scope of judicial review by the federal courts in disability cases is narrowly tailored to determine whether the findings of the Commissioner are supported by substantial evidence and whether

the correct law was applied. Richardson v. Perales, 402 U.S. 389, 401 (1971); Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990). Consequently, the Act precludes a de novo review of the evidence and requires the court to uphold the Secretary's decision as long as it is supported by substantial evidence. See Pyles v. Bowen, 849 F.2d 846, 848 (4th Cir. 1988) (citing Smith v. Schweiker, 795 F.2d 343, 345 (4th Cir. 1986)). The phrase "substantial evidence" is defined as:

[E]vidence which a 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 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."

Shively v. Heckler, 739 F.2d 987, 989 (4th Cir. 1984) (quoting Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966)). Thus, it is the duty of this court to give careful scrutiny to the whole record to assure that there is a sound foundation for the Secretary's findings and that her conclusion is rational. Thomas v. Celebrezze, 331 F.2d 541, 543 (4th Cir. 1964). If there is substantial evidence to support the decision of the Secretary, that decision must be affirmed. Blalock v. Richardson, 483 F.2d 773, 775 (4th Cir. 1972).

The Commissioner uses a five-step process in evaluating DIB claims. See 20 C.F.R. § 404.1520 (2003); see also Heckler v. Campbell, 461 U.S. 458, 460-62 (1983); Hall v. Harris, 658 F.2d 260, 264-65 (4th Cir. 1981). This process requires the Commissioner to consider, in order, whether a claimant (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) can return to his past relevant work; and (5) if not, whether he can perform other work. See 20 C.F.R. § 404.1520 (2004). If the Commissioner finds

conclusively that a claimant is or is not disabled at any point in this process, review does not proceed to the next step. See 20 C.F.R. § 404.1520(a) (2004).

Under this analysis, a claimant has the initial burden of showing that he is unable to return to his past relevant work because of his impairments. Once the claimant establishes a prima facie case of disability, the burden shifts to the Commissioner. To satisfy this burden, the Commissioner must then establish that the claimant has the residual functional capacity, considering the claimant's age, education, work experience and impairments, to perform alternative jobs that exist in the national economy. See 42 U.S.C. § 423(d)(2) (2004); McLain v. Schweiker, 715 F.2d 866, 868-69 (4th Cir. 1983); Hall, 658 F.2d at 264-65; Wilson v. Califano, 617 F.2d 1050, 1053 (4th Cir. 1980). “In reviewing for substantial evidence, [the court should not] undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the Secretary.” Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996); Mastro v. Apfel, 270 F.3d 171 (4th Cir. 2001).

A. ALJ’s Consideration of Medical Opinions.

In this case, the first issue is whether the ALJ correctly assessed the medical opinions regarding Sumner. As the ALJ’s decision does not adequately explain certain aspects of the medical record, this case must be reversed and remanded for further consideration.

1. Physical Impairments.

Sumner injured his right eye with a screwdriver while working as a mechanic in March, 1993. (R. 153) The ALJ found that the medical evidence supported a residual functional capacity allowing him to perform a full range of medium work provided that particular jobs do not require fine visual

acuity or the performance of skilled tasks. (R. 412) Plaintiff's major argument is that the ALJ failed to accord more weight to his treating physicians' opinions.

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. For instance, the ALJ is not required to accept the opinions of a treating physician when the physician opines on an issue reserved for the Commissioner, see 20 C.F.R. § 404.1527(e), or when that opinion is inconsistent with other evidence or is not well-supported. See 20 C.F.R. § 404.1527(d)(3), (d)(4). The regulations provide that a treating physician's opinion is entitled to controlling weight only where it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record. See Craig v. Chater, 76 F.3d 585, 590 (4th Cir. 1996).

Plaintiff offers that Dr. D. B. Thorne was plaintiff's treating optometrist from August 2, 1993 through August 7, 1995. (R. 216-17, 331-33) On September 7, 1993, Dr. Thorne opined that it was not safe for plaintiff to drive or work. (R. 217) On February 28, 1996, Dr. Thorne opined that plaintiff's visual impairments would make it hard for him to perform well on a job demanding good visual performance. (R. 333) In doing so, Dr. Thorne stated that with one eye, plaintiff lacked depth perception necessary to perform most jobs. Id. Dr. Thorne also concluded that plaintiff was very depressed and worried because of his visual loss and because of his financial situation.

Dr. Thorne's notes support the ALJ's determination of plaintiff's level of residual functional capacity. Dr. Thorne believed that there was nothing wrong with plaintiff's left eye and said that it appeared normal in every way after testing. (R. 181, 216) After conducting extensive clinical

investigations of plaintiff's eye, Dr. Thorne states that he thought plaintiff might be a malingerer. (R. 181)

2. Mental Impairments.

Sumner argues that the ALJ erred in not providing controlling weight to the opinions of Dr. Lou Urmos, of Primary Care of Mt. Airy, and Dr. James DeBoe, his treating family doctor from Hillsville, as to Sumner's mental impairment. Plaintiff indicates that Dr. Urmos was his treating physician from March 25, 1993 until March 19, 1997. On October 1, 1996, Dr. Urmos completed a Medical Source Statement of Ability to do Work-Related Activities (Mental) regarding plaintiff in which he stated that plaintiff's ability to function was seriously limited, but not precluded, in the areas of following work rules, relating to coworkers, dealing with the public, using judgment, interacting with supervisors, dealing with work stress, functioning independently, maintaining attention and concentration, understanding, remembering and carrying out simple, detailed and complex job instructions, maintaining personal appearance, behaving in a emotionally stable manner, relating predictably in social situations, and demonstrating reliability. (R. 366).

Plaintiff indicates that Dr. DeBoe was his treating physician from July 10, 1997 through August 13, 2001. (R. 396-371, 395-96, 431-38, 450-58) On October 27, 1997, Dr. DeBoe completed a similar questionnaire, stating that plaintiff had no useful ability to function in dealing with the public, using judgment with the public, interacting with supervisors, dealing with work stresses, maintaining attention and concentration, understanding, remembering and carrying out complex job instructions, relating predictably in social situations, and demonstrating reliability. (R. 369-71) Dr. DeBoe notes that plaintiff's ability was seriously limited, but not precluded, in the areas of following work rules, relating to

coworkers, functioning independently, understanding, remembering and carrying out detailed job instructions, and behaving in an emotionally stable manner. Id. Dr. DeBoe notes that plaintiff had a two-year history of chronic depression, was blind in his right eye, and suffered from phobias caused by the trauma to his eye. The ALJ discounted the views of these two treating physicians because they were not supported by objective medical evidence and because these doctors did not specialize in psychology. (R. 410) While both of these reasons appear to be supported by the record, the ALJ's decision is rendered suspect by his failure to consider the negative aspects of the assessment of the psychological associate, Lee Booher, and by the fact that the review of the state agency psychologist was so old and did not consider important information in Booher's 2001 assessment, particularly regarding Sumner's GAF score of 45.

The ALJ indicated that he accorded Booher's consultative examination "significant weight," (R. 410), but the decision does not contain a complete picture of Booher's December 10, 2001 examination report. From the information about the Booher consultation reported in the decision, the Booher evaluation appears entirely favorable, which is not the case. The only discussion in the ALJ's decision of Booher's assessment is as follows:

The claimant was seen for consultative examination by Lee Booher, a Licensed Psychological Associate, in October 1994, and again in December, 2001. In both examinations, the psychologist advised that the claimant suffered from depression or dysthymic disorder, without psychotic features, and that the medication the claimant is taking helps to control the depressive features. The psychologist submitted a Medical Assessment of Ability to do Work-Related Activities in January 2002 that assessed the claimant was able to make occupational, performance and personal-social adjustments generally in the good to fair range, indicating that there is some limitation to his ability, but that his ability is at least satisfactory.

(R. 410) (internal citations omitted)

While this summary is accurate as far as it goes, it is not entirely reflective of the Booher evaluation. Nor does it appear to deal with the inconsistencies in Booher's December, 2001 examination and January, 2002 assessment form. The ALJ's decision focuses exclusively on the fact that Sumner's depression improved somewhat with medication. But this one point, while reflected in Booher's examination report, does not paint the whole picture of Booher's examination. Booher's conclusion noted:

He describes symptoms that would be consistent with depression including feeling sad, crying spells, feelings of worthlessness, loss of interest, appetite problems and sleep difficulties. His problems with depression appeared to have begun well before his physical injury. There were no significant memory concentration problems noted during this evaluation, although he does report problems on both of these areas. Mr. Sumner should continue receiving his medication. It appears that his medication does help to control his depressive features. His emotional difficulties, however, do appear to be chronic and may be resistant to change.

(R. 462)

Importantly, Booher's clinical diagnoses included a GAF score of 45 on AXIS V. A GAF score of 41-50 indicates that an individual has serious symptoms or serious impairments in social, occupational or school functioning. DSM-IV at 32. Despite Booher's indication that Sumner's emotional difficulties were chronic and resistant to change, and, significantly, that Sumner had a GAF of 45, indicating a serious impairment in occupational functioning, the ALJ's decision appears not to consider these aspects of Booher's evaluation. For this reason, it is recommended that this case be reversed and remanded for further administrative proceedings consistent with this opinion.

A full analysis of Booher's opinion is important to this case. Only three health care providers who examined Sumner weighed in on the impact of his depression on his ability to work. As noted above, his two family doctors indicated that Sumner's physical and mental impairments render him totally disabled. The only other health care professional to examine Sumner and provide any assessment of his mental capacity is Lee Booher, whose examination report is decidedly a mixed review. Given that the ALJ did not do any analysis of those aspects of Booher's examination report which reflect adversely on Sumner's mental state, this case should be remanded to the Commissioner for consideration and explanation of all of the aspects of Booher's report, rather than consideration of just the one facet of his examination which weighed against a finding of disability.

On remand, three other points are worth noting. The ALJ gave credence as well to the 1996 assessment of the state agency psychologist, Linda O'Neil, Ph.D., but this medical records review obviously does not consider the more recent treatment and opinions of Drs. Urmos and DeBoe, nor does it consider the 2001 examination of Sumner by Booher and the GAF score of 45. Further, it is difficult to square certain of the concerns reflected in Booher's December 10, 2001 examination report with Booher's January 4, 2002 Medical Assessment to do Work-Related Activities (Mental). It is, in short, difficult to understand how a person with a GAF of 45 could perform as well in the workplace as Booher's January 4, 2002 form appears to suggest. Finally, while the ALJ refers to the 1996 assessment by state agency psychologist Linda O'Neil, there is no reference in the decision to the assessment done on January 13, 1998 by Dr. Jerome L. Nichols. (R. 377-79)

It is difficult, at best, for the court to determine whether the Commissioner's decision is supported by substantial evidence in a case such as this where the Commissioner does not address all of the relevant evidence, much less resolve the conflicts such evidence presents.

B. Commissioner's Decision at Step Five

At Step Five of the sequential evaluation process, the ALJ must determine whether the claimant's impairments, when combined with his residual functional capacity, age, education, and work experience prevent the performance of work other than work the claimant previously performed. 20 C.F.R. § 404.1520(f). At this stage of evaluation, the burden shifts to the Commissioner to prove that there are other jobs the claimant can perform given his limitations. See Pass v. Chater, 63 F.3d 1200, 1203 (4th Cir. 2000). To meet this burden, the Commissioner must make a finding supported by substantial evidence that the claimant has the vocational qualifications to perform specific jobs.

Sumner contends that the Medical-Vocational Guidelines found at 20 C.F.R. § 404, subpt. P, appx. 2, compel a finding of disability in this case. Sumner argues that as he is now 55 years old, has a limited education and no transferable skills, under Grid Rule 202.02, a finding of disability is warranted if his residual functional capacity is limited to light work. If, on the other hand, Sumner is capable of performing medium work, Grid Rule 203.19 calls for a finding of not disabled. The ALJ found that Sumner was able to perform medium work, albeit limited to tasks that do not require fine visual acuity or the performance of skilled tasks. (R. 412)

As the vocational expert only identified jobs in the light work category that a hypothetical person with Sumner's capacity could perform, Sumner argues that the evidence only supports a finding of light work and that application of Grid Rule 202.02 mandates a finding of disability. The

Commissioner argues that while Sumner was correct that the 2001 administrative hearing contained no vocational expert testimony that Sumner could perform medium work, the earlier 1998 hearing contained such vocational expert testimony. On this point, both Sumner and the Commissioner are wrong.

As to Sumner's argument, a finding that Sumner can perform medium work can be supported by evidence other than the testimony of a vocational expert. For Grid Rule 202.02 purposes, the salient question is not whether the vocational expert testified to the availability any medium work jobs, but rather whether there is substantial evidence to support the ALJ's finding that Sumner possessed the residual functional capacity to perform the physical exertion requirements of medium work set forth in 20 C.F.R. § 404.1567(c). On this issue, the ALJ concluded that Sumner had unlimited capability to stand, walk, lift and carry.¹

In her supplemental brief, the Commissioner argues that the 1998 administrative hearing contained vocational expert testimony that Sumner could perform medium work. Def. Supp. Brief at 4. That is not the case. While the vocational expert testified that Sumner's past work was both medium and heavy, (R. 55), the only job identified by the VE involved light work. (R. 56-57)

As to the ultimate question of whether Sumner is capable of performing medium work, the record again is conflicting, but the Commissioner does not acknowledge, much less deal with, that conflict. The 1996 state agency physician assessing physical impairments found no limitation from a physical exertion standpoint, (R. 343-50), except those relating to blindness in his right eye such as

¹As support for this conclusion, the ALJ's decision cites Sumner's 1996 mental evaluation, (R. 327-330), which, of course, does not pertain to those issues. It is assumed that the ALJ intended to refer to the 1996 state agency physical assessment. (R. 343-50)

climbing and hazards posed by machinery and heights. (R. 345, 347). Dr. Duboe's 2001 medical assessment contains limitations consistent with right eye blindness, but also states that Sumner can only lift 10 pounds, noting "subjective- weakness in back." (R. 428). As the ALJ does not account for, much less explain, this divergence in the evidence as to Sumner's physical exertion capabilities, this case must be remanded for further consideration by the Commissioner. See 20 C.F.R § 1527(d)(2)(where the regulations on weighing medical opinions state "[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.") Finally, the ALJ's determination that Sumner was capable of performing medium work is further called into question by the fact that the vocational expert could identify no medium duty jobs that Sumner can do. This absence of any available medium duty jobs is yet another aspect of the relevant evidence not considered in the ALJ's opinion, providing yet another reason for remand to allow the Commissioner to discharge its duty to consider all relevant evidence. See Sterling Smokeless, 131 F.3d at 439.

CONCLUSION

For the reasons outlined above, it is the recommendation of the undersigned that both Sumner's and the Commissioner's motions for summary judgment be denied and that this case be reversed and remanded for further administrative determination. It is recommended that this be a sentence four (4) remand under 42 U.S.C. §§ 405(g) and 1383(c)(3). See Melkonyan v. Sullivan, 501 U.S. 89 (1991). The Clerk is directed immediately to transmit the record in this case to the Hon. James C. Turk, Senior 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.

Enter this 8th day of March, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge