

the initial and reconsideration levels of administrative review, (R. 15), and an administrative hearing was held before an administrative law judge (“ALJ”) on January 7, 2004. (R. 212-307) At the hearing, plaintiff changed his alleged onset date of disability to June 30, 2002. (R. 19, 237, 255-56) On August 12, 2004, the ALJ issued a decision denying plaintiff’s claims for DIB and SSI, finding plaintiff retained the residual functional capacity (“RFC”) to perform unskilled medium work, subject to avoiding hazardous heights, moving machinery, and climbing ladders, ropes and scaffolds. (R. 26-27) The ALJ found plaintiff capable of lifting no more than fifty (50) pounds at a time, with frequent lifting and carrying of objects weighing up to twenty-five (25) pounds. (R. 25)

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 plaintiff’s request for review. (R. 5-7) Plaintiff then filed this action challenging the Commissioner’s decision.

II

In support of his motion for summary judgment, Calloway argues that the ALJ erroneously found plaintiff capable of standing and/or walking for an unlimited number of hours during the workday. Plaintiff also disputes the classification of the jobs identified by the vocational expert – bagger, dining room attendant and counter supply worker – as medium work. He claims that the essential functions of these full-time positions must be performed while on one’s feet, and as a result, employees must have the ability to stand or walk for a full eight hours. Because Calloway does not have such ability, plaintiff argues the Commissioner has not met her burden at step five.

The court’s review is limited to a determination as to whether there is 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).

III

Contrary to plaintiff's assertions, the ALJ's RFC assessment is supported by substantial evidence. Notwithstanding the one sentence of the ALJ's decision in which he states "[t]here is no restriction in the number of hours per day that the claimant can walk or stand," (R. 23),¹ the ALJ clearly exhibits his intention throughout his opinion to limit Calloway to work at the medium exertional level. (R. 23, 25, 26, 27) The regulations define medium work as lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds. 20 C.F.R. §§ 404.1567(c), 416.927(c). Social Security Ruling ("SSR") 83-10 further defines medium work as requiring "standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying objects weighing up to 25 pounds."

The ALJ's RFC assessment is consistent with the medical evidence of record. William Humphries, M.D., reported plaintiff was limited to sitting, standing and walking six hours in an eight-hour workday, and lifting fifty pounds occasionally and twenty-five pounds frequently.

¹ Plaintiff points to this one line of the ALJ's opinion and argues this sentence proves the ALJ erred in his RFC assessment, as the medical evidence indicates plaintiff can stand or walk only six hours in a workday, not for an unlimited period of time. The undersigned disagrees that this one sentence renders the ALJ's decision erroneous. Calloway completely ignores the ALJ's repeated references to plaintiff's ability to perform work at the medium exertional level, defined as walking or standing six hours in an eight hour day.

(R. 143) In addition, the state agency physicians, Drs. Surrusco and Johnson, limited Calloway to lifting fifty pounds occasionally and twenty-five pounds frequently, standing and/or walking for a total of six hours in an eight hour workday, and sitting for a total of six hours. (R. 149) Both of these assessments coincide with the ALJ's finding of plaintiff's capacity for medium work. At the administrative hearing, medical expert Dr. Stevens agreed with this RFC determination, and added additional limitations which prevented Calloway from climbing ladders, ropes or scaffolds, and working around dangerous moving machinery and unprotected heights, due to the unsteadiness of his cerebellum. (R. 276)

Plaintiff does not contest his ability to work at the medium level. See Pl.'s Br. 7. Instead, he claims the Commissioner has not met her burden at step five of proving jobs exist in significant numbers in the national economy that plaintiff can perform. Calloway insists the jobs identified by the vocational expert ("VE") at the administrative hearing require more than six hours of standing and walking in a workday, and are thus inconsistent with Calloway's physical capabilities.

However, plaintiff's argument that a bagger, counter supply worker, and dining room attendant all require more than six hours of standing or walking is based completely on speculation. The VE identified these three jobs at the administrative hearing in response to the hypothetical posed by the ALJ involving a claimant who can occasionally lift or carry fifty pounds, frequently lift or carry twenty-five pounds, stand and/or walk with normal breaks for a total of about six hours in an eight hour workday, sit with normal breaks for about six hours, and who must avoid ladders, ropes, scaffolds and exposure to moving machinery and unprotected heights. (R. 285, 290-91) Dr. Gore, the VE, confirmed that these positions represented a sampling of jobs that an individual could perform at the medium exertional level. (R. 291)

Focusing on the practical requirements of the jobs identified by Dr. Gore, counsel for the plaintiff inquired as to the duties of a dining room attendant and counter supply worker. (R. 291-92) After Dr. Gore recounted the essential functions of these positions and confirmed that they are classified as medium work, counsel questioned the VE further: “Well, the hypothetical says the individual can stand about six hours in an eight-hour day. That means he can’t stand for eight hours. Can he actually do these jobs?” (R. 293) Dr. Gore at first responded:

I cannot say that I am confident that a bagger, or a counter supply worker, or a dining room attendant would have the – unless special accommodations were granted – would have the position that would require them to work from a seated position for two hours out of an eight-hour shift.

(R. 293-94) The VE conceded that he had no evidence establishing that counter supply workers, baggers and dining room attendants can work from a seated position for two hours per day. (R. 295) However, Dr. Gore explicitly stated that, while essential functions of these jobs may need to be performed in a standing position, (R. 296-97), there are periods of time during the day when the essential functions need not be performed:

I think it would not be considered an unusual or a special accommodation to permit even a counter supply worker when there’s no need to replenish the counter and the place back in the kitchen area or the food preparation area – I don’t think that the person would be disciplined or reprimanded, let alone dismissed, if the person weren’t on their feet all the time when they weren’t actually replenishing the food or equipment at the steam tables.

(R. 295-96; accord R. 298) He emphasized that employees in these positions perform as demanded by the traffic in their establishment, meaning they do not necessarily stand eight solid hours in a workday. (R. 298)

Dr. Gore repeatedly testified that the jobs he identified qualify as medium work as defined by the Social Security Administration. (R. 287, 291, 292, 297, 299, 300, 301) He stated:

I agree with the Bureau of Labor Statistics about work at the medium exertional level, and would think it would not be unprecedented or unusual – in fact, probably would be the norm for a dining room attendant or a counter supply worker not to be on their feet for significantly more than the six hours. And that would not be inconsistent with how the Bureau of Labor Statistics describes the exertional requirements in terms of standing and walking for medium work.

(R. 299) Dissecting the practical requirements of each of these positions at the behest of plaintiff, Dr. Gore testified that the jobs of bagger, counter supply worker and dining room attendant clearly fit the Administration’s definition of medium work. Therefore, these jobs fall within the contours of plaintiff’s RFC as assessed by the state agency physicians and the medical expert.

By speculating that the duties of these three jobs require more walking and standing than medium work allows for, plaintiff ignores the Dictionary of Occupational Titles (“DOT”), which contains information the Social Security Administration has deemed reliable. See 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1). The DOT classifies the jobs of bagger (retail trade), 920.687-014, counter supply worker (hotel and restaurant), 319.687-010, and dining room attendant (hotel and restaurant), 311.677-018, as medium work. See Dictionary of Occupational Titles, at <http://www.occupationalinfo.org>. Medium work is defined as that which requires exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Dictionary of Occupational Titles, Appendix C, at http://www.occupationalinfo.org/appendxc_1.html. The DOT definition states the physical demands of medium work are in excess of those required for light work; light work requires walking or standing to a significant degree. Id. The VE acknowledged that the DOT does not clarify whether the positions of bagger, counter supply worker and dining room attendant allow for sitting during the day; however, Dr. Gore also stated that the DOT fails to

state explicitly that an employee in one of these positions must remain on his feet for a total of eight hours per day. (R. 300) In testifying as to work Calloway could perform, Dr. Gore confirmed he understood Social Security's definition of medium work, which the ALJ defined at the hearing as the capacity to "stand and/or walk for a total of about six hours in an eight-hour day." (R. 301-02) The fact that the VE identified jobs classified as medium work in the DOT lends further support to the ALJ's opinion.

Plaintiff also claims the ALJ changed his interpretation of plaintiff's RFC to fit the requirements of these three jobs and place Calloway in the medium work category, in order to avoid a finding of disability as would be directed by the Medical-Vocational Guidelines.² Calloway's argument simply has no merit. Careful study of the administrative hearing testimony and the ALJ's opinion reveals the ALJ's intent to limit Calloway to medium work. The ALJ never changed his interpretation of medium work, but rather consistently defined it as the capacity to stand and/or walk for about six hours.

Plaintiff points to hearing testimony to illustrate his argument that the ALJ changed his RFC interpretation to allow for up to eight hours of standing and/or walking. Pl.'s Br. 8. A complete review of the record reveals, however, that it was actually plaintiff's counsel who insisted on discussing a new hypothetical involving an individual with the capacity to stand for five hours and walk for three hours in an eight hour workday, totaling eight hours of standing and/or walking. (R.

² If limited to anything less than medium work, the Medical-Vocational Guidelines (the "grids"), 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 202.02, would have directed a finding of disability, as plaintiff is considered an individual of advanced age with a limited education and no transferable skills. Pl.'s Br. 5. The grids consist of a matrix of four factors identified by Congress – physical ability, age, education and work experience – and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy. Heckler v. Campbell, 461 U.S. 458, 461-62 (1983).

305) In response to this new hypothetical, the VE testified that “[c]learly, the jobs [of bagger, counter supply worker and dining room attendant] could be done if that’s the case, if that’s what the hypothetical intends.” (R. 304; accord R. 305) Despite this new hypothetical, the ALJ yet again reiterated his intention to limit plaintiff to medium work, pursuant to Social Security’s definition.³ (R. 305) He acknowledged that under either hypothetical situation, plaintiff could perform the jobs identified by Dr. Gore. (R. 306) The ALJ’s written decision clearly documents his intention to limit plaintiff to six hours of standing and walking, not eight, which is evident in his references to the medical record as well as his finding that Calloway has the capacity for medium work.

The ALJ’s decision in this case is supported by substantial evidence. His finding that plaintiff has the capacity for medium work is amply supported by the medical evidence of record and is not contested by Calloway. The VE testified as to three jobs which exist in significant numbers in the national economy that plaintiff could perform at this exertional level. While plaintiff’s counsel wishes to “go beyond the DOT and look what the job exactly requires,” (R. 305), the Bureau of Labor Statistics categorizes these positions as medium work, the DOT classifies them

³ Plaintiff makes much of the fact that after noting his intention to limit plaintiff to medium work, the ALJ stated “[w]hether we’re going to have to bump it up to eight hours to satisfy your objection, then that’s what we’ll do.” (R. 305) Plaintiff argues that the ALJ, “in surprising blatant terms,” declared his intention to make the outcome of this case result-oriented. Pl.’s Br. 8. On the contrary, the ALJ does nothing of the sort. The ALJ repeatedly indicated throughout the course of the administrative hearing his belief that plaintiff has the capacity for medium work. Likewise, the ALJ’s opinion documents his finding that plaintiff has the capacity for medium work. A finding that plaintiff has the capacity for medium work is consistent with the medical evidence of record; plaintiff admits such in his brief. The ALJ’s statement at the hearing that “we’re going to have to bump it up to eight hours to satisfy your objection” was made in reference to the hypothetical question, after counsel repeatedly voiced his objection to the VE’s testimony that the jobs of bagger, counter supply worker and dining room attendant are jobs an individual could perform at the medium work level.

as medium work, and the VE testified that they qualify as medium work. The undersigned declines to engage in speculation regarding the requirements of these positions.

Calloway points to snippets of the ALJ's opinion and the hearing testimony to support his argument that the ALJ's RFC determination was contrived. On the whole, the ALJ repeatedly made clear his intention to limit plaintiff to medium work, an intention which is supported by the record. The ALJ never altered his determination or understanding that medium work involves standing and/or walking six hours in an eight hour day. Accordingly, plaintiff's arguments are without merit. Therefore, it is recommended that defendant's motion for summary judgment be granted.

IV

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. Samuel G. Wilson, 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 24th day of August, 2006.

/s/ Michael F. Urbanski
United States Magistrate Judge