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

JEFFREY W. SOUTHERS,	)	
Plaintiff,	)	**Civil Action No. 7:06cv00119**
	)	
v.	)	
	)	**By: Michael F. Urbanski**
JO ANNE B. BARNHART,	)	**United States Magistrate Judge**
COMMISSIONER OF SOCIAL	)	
SECURITY,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Jeffrey W. Southers ("Southers") brought this action pursuant to 42 U.S.C. § 405(g) for review of the decision of the Commissioner of Social Security denying Southers' claim for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 ("Act"). This case was referred to the undersigned Magistrate Judge on May 30, 2006, for report and recommendation. Following the filing of the administrative record and briefing, oral argument was held on November 15, 2006. As such, the case is now ripe for decision.

The undersigned finds that substantial evidence supports the Commissioner's credibility assessment and determination that Southers retains the residual functional capacity to do a limited range of work at the light exertional level. However, the undersigned finds that at step five of the sequential evaluation for disability determination the Vocational Expert failed to identify any jobs in the national economy for a person with Southers' noted physical and educational limitations. Accordingly, it is recommended that the ALJ's decision be reversed and remanded for identification of jobs which meet the limitations found by the ALJ.

I.

Southers was born on August 13, 1955 and completed the twelfth grade. (Administrative Record [hereinafter R.] at 50, 110, 301-02) Southers' previous work includes that of an industrial machine mechanic. (R. 55-56, 97-98, 302) Southers filed an application for DIB on or about March 31, 2004, alleging that he became disabled on July 18, 2003, due to a torn rotator cuff injury, gout, high blood pressure, osteoarthritis, elbow injury, and bilateral knee and foot pain. (R. 17, 63, 74, 305-07) Southers' claims were denied at both the initial and reconsideration levels of administrative review, (R. 15), and a hearing was held before an administrative law judge ("ALJ") on December 6, 2005. (R. 15, 297-326) On January 17, 2006, the ALJ issued a decision denying Southers' claims for DIB, finding that Southers retained the residual functional capacity ("RFC") to perform a limited range of light exertional work and that the VE identified several categories of jobs which Southers can perform. (R. 21-24)

The ALJ's decision became final for the purposes of judicial review under 42 U.S.C. § 405(g) on February 13, 2006, when the Appeals Council denied Southers' request for review. (R. 7-9) Southers then filed this action challenging the Commissioner's decision.

II.

Southers argues that the ALJ erred in finding his testimony was not wholly credible, that he retained the RFC for a limited range of light exertional work, and that there were jobs available in the national economy for a person with his limitations. (Pl. Summ. J. at 14-17) Accordingly, he requests that the decision of the Commissioner be reversed or, in the alternative, remanded for reconsideration in light of new evidence. (Pl. Summ. J. at 17)

The Commissioner counters that substantial evidence supports the ALJ's determination that Southers was not disabled. (Def. Summ. J. at 11-20) The Commissioner claims that the ALJ properly determined that Southers' complaints of pain lacked credibility and that the record establishes that Southers retained the RFC to do some range of light work. (Def. Summ. J. at 10-11, 14-17) Additionally, the Commissioner argues that the ALJ's finding that Southers could engage in substantial gainful employment is supported by testimony from the Vocational Expert ("VE") establishing that there are significant jobs in the national economy for a person with Southers' limitations. (Def. Summ. J. at 11-14) However, during oral argument the Commissioner conceded that two of the three jobs identified by the VE, namely airline security clerk and information clerk, required physical exertion inconsistent with the ALJ's finding of Southers' actual functional capacity. Nonetheless, the Commissioner argues the remaining occupation identified by the VE, maintenance mechanic supervisor, meets all limitations assessed and that such positions are available in significant number in the national economy. (Def. Summ. J. at 12-14)

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.

First, Southers argues that the ALJ erred in finding his complaints of disabling pain were not totally credible and that he retained the capacity to do some light exertional work. Southers testified that because of pain in his right shoulder and knees he is only able to stand or sit for about thirty minutes before needing an opportunity to change position, he can only walk a block or less without resting, he can only carry limited amounts of weight with his right hand, and he cannot lift his right arm to shoulder level or above. (R. 305-10) However, he also testified that he took water exercise classes two days a week at the YMCA, drove daily, and that he had gone fishing at least three times in the three months preceding his disability determination hearing. (R. 312-15) The ALJ considered Southers' conflicting testimony as well as the record as a whole in determining that Southers' statements of disabling pain were not wholly credible and that he retained the capacity to do some light work. (R. 19-21)

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 Southers' subjective allegation that he is disabled by pain, 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 Southers’ statements about his symptoms are credible in light of the entire record. (R. 286-291) 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).

The ALJ determined that the objective medical evidence establishes that Southers suffers from right shoulder pain, bilateral knee pain, and pain in both his feet. (R. 20) While these conditions can reasonably be expected to produce some pain, the ALJ concluded that they could not reasonably be expected to produce pain in the amount and degree alleged by Southers. (R. 29)

Southers’ medical records indicate that despite needing surgical repair for a rotator cuff injury in July 2003, his condition steadily improved. In January 2004, Dr. Johnson stated that Southers was “doing much better . . . [and] his strength is improving.” (R. 159) By April 2004, Southers advised Dr. Johnson that he had significantly increased his daily exercise and continued to participate in physical therapy as well. (R. 153-54) In November 2004, Dr. Johnson noted that Southers had only mild pain on rotation of the shoulder joint, no swelling, and that his scar was well healed. (R. 150) Additionally, despite noting that Southers’ shoulder may be “worsening slightly,” Dr. Johnson determined that no further pain management or treatment was necessary, and he did not advise Southers to limit his physical activity. (R. 150-51)

Similarly, Southers’ knee condition required minimal medical intervention. Although Southers began complaining of a flare up of his chronic knee pain in May 2004, Southers advised Dr. Johnson in November 2004 that his pain was only intermittent and that he did not

desire further treatment at that time. (R. 150-53, 209) In May 2005, an MRI of his knees did not show any evidence of a meniscal tear and x-rays showed only mild degenerative changes. (R. 262) Accordingly, Dr. Johnson noted that Southers complaints of knee pain were "out of proportion" to the test results and further treatment was not warranted. (R. 262)

Further, even if there was objective medical evidence establishing Southers suffered from conditions that could reasonably be expected to produce the pain alleged, the record supports the ALJ's conclusion that the intensity and persistency of Southers' pain does not significantly impact his ability to work. See Craig, 76 F.3d at 595. In his daily activities questionnaire, Southers indicated that he takes daily walks, does daily stretching exercises, does household chores including cleaning, vacuuming, and laundry several times a week, and grocery shops at least once a week. (R. 65-71) Additionally, he indicated that he also goes camping about one weekend a month, he spends time outside his home visiting with family and friends regularly, and he goes to church activities and ball games several times a month. (R. 65-71) In March 2004, during a work capacity evaluation, Southers reported that he had no problems standing, sitting, driving, and/or walking and that although his shoulder pain varied, it never was more severe than a five-out-of-ten. (R. 125)

Southers' inconsistent testimony, his disability applications, and his medical records certainly raise an issue as to the veracity of his testimony that his pain has resulted in total disability. See Mickles v. Shalala, 29 F.3d 918, 921 (4th Cir. 1994) (holding that a claimant's daily activities can suggest he is not disabled). And, as the ALJ's credibility determinations are entitled to great deference, the undersigned finds no reason to disturb his determination. See Shively v. Heckler, 739 F.2d 987, 989-90 (4th Cir. 1984) (finding that because the ALJ had the

opportunity to observe the demeanor and to determine the credibility of the claimant, the ALJ's observations concerning these questions are to be given great weight).

Further, the court finds there is substantial evidence to support the ALJ's determination that Southers retains the physical capacity for a limited range of light exertional work. See Johnson v. Barnhart, 434 F.3d 650, 658 (4th Cir. 2005) (upholding finding of no disability where plaintiff testified that she suffers from severe pain and hand problems where plaintiff was able to attend church twice a week, read books, watch television, clean the house, wash clothes, visit relatives, feed pets, manage household finances, and perform exercises recommended by her chiropractor); Gross v. Heckler, 785 F.2d 1163, 1166 (4th Cir. 1986) (upholding a finding of no disability where plaintiff was able to cook, shop, wash dishes, and walk to town every day).

IV.

Second, Southers argues that ALJ erred in finding that a person with Southers' physical limitations and education could work as a maintenance mechanic supervisor, Dictionary of Occupational Titles ("DOT") # 184-167.050.[1] Southers contends he is not qualified to work as a maintenance mechanic supervisor because that is a skilled position with a specific vocational preparation level of 7,[2] it requires management and coordination of the activities of other

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[1] The VE testified that Southers could also perform work as an airline security guard, DOT # 372.667-010, or an information clerk, DOT # 237.376-018. However, during oral argument the Commissioner conceded that as both of these positions require frequent reaching and the ALJ determined that Southers could not perform work which required more than occasional reaching with the right arm, these jobs were not properly identified.

[2]The SVP rating for each job is used to determine the amount of time required by a typical worker to learn the techniques, acquire the information, and develop the skills needed for average performance in a specific job-worker situation. Dictionary of Occupational Titles app. C (4th ed. 1991). An SVP of 7 indicates that a job is skilled work and that it takes between two and four years of vocational training and related experience to learn the necessary skills to

workers which his past employment did not require and for which he has no previous experience or training, and requires a higher level of aptitude, verbal, and communication skills than that required in his previous work as a maintenance mechanic. The Commissioner counters that Southers past work as a maintenance mechanic also had an SVP of 7, thus, he is qualified to do some skilled work, and that his thirty years experience as a maintenance mechanic necessarily provided him with transferrable skills necessary to do the work of a maintenance mechanic supervisor.

The VE testified that Southers' previous employment as a maintenance mechanic would have provided him with some transferable skills which would be applicable to work as a maintenance mechanic supervisor. (R. 320) However, the VE did not address the facts that in his prior employment Southers did not have any supervisory duties, that the supervisory position requires greater aptitude, verbal, and communication skills than those required of a maintenance mechanic, nor that the supervisory position requires skill and experience with installing and maintaining electric power utility, neither of which are required of a maintenance mechanic. In fact, the VE testified only that Southers is physically capable of working as a maintenance mechanic supervisor because that position did not require frequent reaching, unlike his prior work as a maintenance mechanic. (R. 320-21)

Moreover, although there are gaps in the transcript of the testimony on the following issue, it appears that when asked if educational and psychological limits may impact a claimant's ability to do supervisory work, the VE testified that those limitations would hinder a claimant's ability to do such work due to the higher levels of stress and other skilled job requirements

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properly do that job. Social Security Ruling 00-4p.

related to supervisory appointments. (R. 323-24) The VE then stated that such considerations accounted for why he limited the jobs Southers could perform to "very low level unskilled jobs." (R. 323) The ALJ failed to square this testimony with the DOT maintenance mechanic supervisor job description which states that such employees may have duties, including, among other things, reviewing technical papers and reference materials and preparing annual departmental budgets, which appear to the court to be beyond the "very low level unskilled" job duty level. Further, neither the VE nor the ALJ addressed the apparent contrast between the educational, skill, and experience requirements of a maintenance mechanic supervisor and Southers' testimony that he had only a twelfth grade education and on-the-job training for his past employment as a maintenance mechanic, (R. 302, 318-19), nor that the skills required of a maintenance mechanic supervisor include several skills not required of a maintenance mechanic.

As the ALJ failed to address conflicts between Southers' educational and transferable skills and the skill and experience requirements of a maintenance mechanic supervisor, the undersigned cannot find that there is substantial evidence to support the finding that Southers can work as a maintenance mechanic supervisor. See Social Security Ruling 00-4p. Thus, the undersigned recommends that this case be remanded to the Commissioner for further development of the record on this issue.

VI.

Based on the foregoing, it is recommended that defendant's motion for summary judgment be denied and this case remanded under sentence four of 42 U.S.C. § 405(g) to the Commissioner for further development of the record as outlined in this opinion. 42 U.S.C. § 405(g) ("The court shall have the power to enter, upon the pleadings and transcript of the record,

a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for rehearing.”).

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 21st day of December, 2006.

/s/ Michael F. Urbanski
United States Magistrate Judge