

In this case, the plaintiff's basic contention is that the Commissioner's determination that he could perform a limited range of sedentary work is not supported by substantial evidence. Addressing the specific reasons why he believes this decision ought to be either reversed or remanded, the plaintiff's brief was filed on October 19, 2007. Therein, he argues that the administrative law judge ("ALJ") erred by relying on flawed vocational testimony and by drawing a negative inference from his financially-driven decision to stop periodic treatment. No written request was made for oral argument.¹ On November 19, 2007, the Commissioner moved for summary judgment in his favor and filed his supporting memorandum.

Based on a thorough review of the administrative record and for the reasons herein set forth, it is recommended that the parties' respective motions for summary judgment be denied, the Commissioner's final decision be vacated, and the case be remanded for further proceedings under Sentence Four 42 U.S.C. § 405(g).

I. Standard of Review

The court's review is limited to a determination as to whether there is substantial evidence to support the Commissioner's conclusion that the plaintiff failed to meet the statutory conditions for entitlement to a period of disability insurance benefits or supplemental security income. "Under the . . . Act, [a reviewing court] must uphold the factual findings of the [Commissioner], if they are

¹ Paragraph 2 of the court's Standing Order No. 2005-2 requires that the plaintiff in a Social Security case must request oral argument in writing at the time his or her brief is filed.

supported by substantial evidence and were reached through application of the correct legal standard." *Mastro v. Apfel*, 270 F.3^d 171, 176 (4th Cir. 2001) (quoting *Craig v. Chater*, 76 F.3^d 585, 589 (4th Cir. 1996)). This standard of review is more deferential than *de novo*. "It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Mastro*, 270 F.3^d at 176 (quoting *Laws v. Celebrezze*, 368 F.2^d 640, 642 (4th Cir. 1966)). "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 [Commissioner]." *Id.* (quoting *Craig v. Chater*, 76 F.3^d at 589). The Commissioner's conclusions of law are, however, not subject to the same deferential standard and are subject to plenary review. *See Island Creek Coal Company v. Compton*, 211 F.3^d 203, 208 (4th Cir. 2000); 42 U.S.C. § 405(g).

II. Administrative History

Alleging a May 1, 2002 disability onset date, the record shows that the plaintiff protectively filed his current applications² seeking a period of disability insurance benefits and supplemental security income on or about September 2, 2003. (R.18,68,72-73,281-288.) In his applications the plaintiff stated that he was unable to work due to rheumatoid arthritis, tinnitus (a ringing or other noise that seems to originate in the ears or head and which may be due to diverse causes), and bone spurs in his knees. (R.129; *see also* R.98,108.)

² On or about October 17, 2002, the plaintiff filed an earlier application seeking both a period of disability insurance benefits and supplemental security income; both claims were denied at the initial determination level, and the plaintiff did not appeal. (R.18,69-71.)

After his application was denied, both initially and on reconsideration, a hearing was held on April 19, 2005 before an ALJ. (R.18,27-44,45,57-63,67,293-337.) The plaintiff was present, testified, and was represented by counsel. (R.18,45-56,293,296-328.) Also present was Bonnie S. Martindale, who testified as a vocational witness. (R.18,64-66,328-336.)

Utilizing the agency's sequential decision-making process,³ the ALJ concluded at step-five that the plaintiff retained the functional ability to perform a limited range of sedentary work and was insured through the decision date. (R.18-26.) After denial of his claim by written decision dated June 8, 2005, the plaintiff requested administrative review. (R.10-15) His request was denied, and the ALJ's decision now stands as the Commissioner's final decision. (R.340-342.) *See* 20 C.F.R. § 404.981.

After determining that the plaintiff met the non-disability requirements of the Act and had not engaged in substantial work activity since the alleged disability onset date, the ALJ found that the plaintiff suffered from rheumatoid arthritis, bilateral tinnitus, and a high frequency sensorineural hearing loss. (R.19,21.) He next determined that while these impairments were “‘severe’ within the

³ Determination of eligibility for social security benefits involves a five-step inquiry. *Mastro v. Apfel*, 270 F.3^d 171, 177 (4th Cir. 2001). It begins with the question of whether the individual engaged in substantial gainful employment. 20 C.F.R. § 404.1520(b). If not, step-two of the inquiry requires a determination of whether, based upon the medical evidence, the individual has a severe impairment. 20 C.F.R. § 404.1520(c). If the claimed impairment is sufficiently severe, the third-step considers the question of whether the individual has an impairment that equals or exceeds in severity one or more of the impairments listed in Appendix I of the regulations. 20 C.F.R. § 404.1520(d). If so, the person is disabled; if not, step-four is a consideration of whether the person's impairment prevents him or her from returning to any past relevant work. 20 C.F.R. § 404.1520(e); 20 C.F.R. § 404.1545(a). If the impairment prevents a return to past relevant work, the final inquiry requires consideration of whether the impairment precludes the individual from performing other work. 20 C.F.R. § 404.1520(f).

meaning of the Regulations,”⁴ they did not meet or medically equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appx. 1 See 20 C.F.R. §§ 404.1520(c)-(d) and 416.920(c)-(d).

At step-four of the decisional process, the ALJ concluded that the plaintiff lacked the residual functional ability to perform any of his past relevant work, and based on his review of the entire record he concluded at step-five that the plaintiff retained the ability to perform a limited range of sedentary work. (R.21-24.)

III. Facts and Analysis

The plaintiff was born in 1956 and was forty-eight years of age at the time of the administrative hearing.⁵ (R.19,69,72.) He completed the ninth grade⁶ in school;⁷ his past work was as a packaging line superintendent, packaging line attendant, maintenance/landscape worker, and carpenter. (R.19,99,108,299-303.)

⁴ Quoting *Brady v. Heckler*, 724 F.2^d 914, 920 (11th Cir. 1984), the Fourth Circuit held in *Evans v. Heckler*, 734 F.2^d 1012, 1014 (4th Cir. 1984), that “an impairment can be considered as ‘not severe’ only if it is a *slight abnormality* which has such a *minimal effect* on the individual that it would not be expected to interfere with the individual’s ability to work, irrespective of age, education, or work experience.” See also 20 C.F.R. § 404.1520(c).

⁵ At this age the plaintiff is classified as a “*younger person*,” and pursuant to the agency’s regulations, age is generally considered not to affect seriously a younger person’s ability to adjust to other work. 20 C.F.R. § 404.1563(c).

⁶ Based apparently on his hearing testimony (R.298), the ALJ found that the plaintiff completed the ninth grade in school. (R.19.) In his Adult Disability Report the plaintiff stated that he had completed the tenth grade in school. (R.104.) His school records (R.174-179), however, show that he made little or no academic progress in either the ninth or tenth grade.

⁷ As a vocational factor, this is classified as a “*limited education*,” which “means [an] ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs.” 20 C.F.R. §§ 404.1564(b)(3) and 416.964(b)(3).

Complaining of persistent right-hand pain and “moving pain” in his hands, shoulders, knees, and feet, the plaintiff sought treatment from Dr. David Clevenson (Stuarts Draft Family Practice) on August 5, 2002. (R.181-182.) On examination, Dr. Clevenson found the plaintiff to be “generally healthy” and in no acute distress. (*Id.*) A trial period of Feldene (a nonsteroidal anti-inflammatory drug) was initially prescribed and testing was ordered to check for evidence of rheumatoid arthritis. (*Id.*) This was followed on August 26 by a short period of treatment with Prednisone. (R.181,229,233,236,239, 241,242.)

An antinuclear antibody test was performed on August 6, and it was positive for the presence of this antibody. (R.273-274.) Following Dr. Clevenson’s referral of the plaintiff for evaluation and treatment at the University of Virginia Medical Center’s (“UVAMC”) Arthritis Clinic, a similar test seven weeks later was negative for the presence of this antibody (R.228,235,237,238,240,257). No significant abnormalities were found on physical examination. (R.228,235,237,238,240,242-244,247-249.) No trigger points characteristic of fibromyalgia were found. (R.228,238,240,243, 248.) X-rays of both hands demonstrated no “significant degenerative or erosive changes” (R.263,267), and a full range of pertinent laboratory studies were negative (R.228, 235,237,238,240,253-255,258-260). Screening for the hepatitis-C virus, however, was positive.⁸ (R.234.)

⁸ Subsequent liver sonography at UVAMC in June 2003 demonstrated “course hepatic echo without any masses.” (R.266.)

Over the next sixteen months, the medical records in this case show that the plaintiff's rheumatoid arthritis was followed by Dr. Shu-Man Fu, a rheumatologist at UVAMC. (R.204-227,229-234.) Based on the clinical signs and symptoms which he considered comparable to a rheumatoid arthritis diagnosis, Dr. Fu started the plaintiff on a treatment regime which included Plaquenel and Methotrexate. (R.225,226,227,233.)

By January 2003, the plaintiff's arthritis was "almost in control"; his muscle strength was normal, and his range of motion was normal. (R.224,230-232.) He was, however, having a ringing in his ears and bilateral shoulder pain. (*Id.*) Dr. Fu attributed the plaintiff's ear ringing sensation to a medication side effect, and it was decreased. After injecting both shoulders, Dr. Fu noted that the plaintiff's range of motion improved and that he should continue with his strengthening exercises. (*Id.*) Given the plaintiff's bilateral shoulder pain, on January 21, 2003 Dr. Fu gave the plaintiff a six-month excuse from work. (R.230.)

When seen in February at UVAMC, Clinic records note that the plaintiff was still experiencing tinnitus, but his arthritis was under control. (R.219-221.) When seen in April, the records show that he was experiencing minimal morning stiffness, but he was having right knee pain and stiffness and some hand and wrist swelling after the use of a snow blower. (R.216-217.) X-rays of both knees at that time were normal with the exception of a "small spur" on the medial aspect of the right femur. (R.266.) The plaintiff's arthritis was deemed at that time to be under control, despite some minor muscle and joint pain. (R.212).

When he was seen by an otolaryngologist in May 2003, the plaintiff reported that he had been experiencing a ringing sensation in his ears since Plaquenel was first prescribed for his rheumatoid arthritis. (R.211.) He reported, however, noticing no significant hearing loss and no sleeping difficulties. (*Id.*) On examination, the plaintiff was found to have normal hearing bilaterally, and no follow-up treatment was suggested for his tinnitus which the examiner described as “not particularly problematic at this time.” (*Id.*)

When seen during the same month in the Arthritis Clinic, the plaintiff was found to be “doing well,” to be in no acute distress, and his polyarthralgias to be stable. (R.208-298.) Naprosyn (a nonsteroidal anti-inflammatory) was prescribed for his complaint of knee pain. (*Id.*) When last seen in the Arthritis Clinic in January 2004, the plaintiff’s medication regime was determined to be keeping his arthritis under good control. (R.206-207.)

In connection with a consultive examination in November 2003, Dr. Roman Sachno noted that the plaintiff’s medical history included a positive rheumatoid arthritis test result and his prescription use of Methotrexate to decrease the severity of his arthritic symptoms. (R.190.) Dr. Sachno also noted that the plaintiff gave a history of having morning stiffness in his hands and knees, of experiencing a burning and soreness in his knees and shoulders with activity, of developing significant knee pain after standing or walking for about one hour, of having back pain when he bent-over for more than a few minutes, and of experiencing hand and shoulder pain after using a drill for only ten minutes. (*Id.*)

On examination, Dr. Sachno found no trigger points or other clinical evidence of an abnormality of the back, no obvious hearing impairment, no abnormal neurologic findings, no joint or back movement limitation, no loss of grip strength or manual dexterity, no significant degenerative or erosive changes to either hand, no coordination abnormality, no range-of-motion abnormality, and no evidence of any joint inflammation, enlargement or limitation. (R.190-191,192-194.) He did, however, note that the plaintiff's gait was "a little stiff" upon getting-up. (R.190.)

Bilateral radiographic studies of the plaintiff's hands in January 2004 demonstrated some "minimal periarticular osteopenia" but "no significant degenerative change . . . or soft tissue abnormality." (R.261-262.) Bilateral radiographic studies of the plaintiff's knees in April also demonstrated no significant degenerative abnormality. (R.271-272.)

In January, March and again in May 2004, as part of the agency's regular adjudication process, the plaintiff's then available medical records were reviewed and assessed for residual functional capacity by state agency physicians. (R.183-189,195-202.) In each instance the reviewer concluded that none of the plaintiff's diagnosed medical problems, either individually or in combination, was of sufficient severity to preclude work activity at a light exertional level, and two of the three concluded that the plaintiff's arthritic condition limited him to light work which required only occasional postural activities.⁹ (R.184,188,196,200-201.)

⁹ Postural activities include climbing, balancing, stooping, kneeling, crouching and crawling.

Inter alia, at the administrative hearing in April 2005 the plaintiff testified that he had stopped seeing the doctor in January 2004 ‘because [of] the money situation,’ that he had subsequently stopped taking Methotrexate for essentially the same reason, and that Naprosyn¹⁰ was the only medication he was continuing to use. (R.305-306.) He testified that he had done production work at ConAgra, a food products producer, for twenty-six years before being laid-off and that he has subsequently done some landscaping, maintenance and small carpentry jobs; however, by May 2002 the severity of his knee, shoulder, back and hand pain made it impossible for him to walk or to work at a task for any sustained period of time. (R.309-313,315-320,323-328.) In addition, he testified that he has only a limited ability to read and write. (R.313-314.)

Bonnie Martindale, a vocational witness was also present at the hearing and testified. (R.328-336.) After outlining the plaintiff’s vocational profile, Ms. Martindale was asked about work which could be performed by an individual with his vocational profile and functionally limited to sedentary work requiring no forceful or sustained gripping and only occasional pushing, pulling or postural activities. In Ms. Martindale’s opinion such an individual would be able to perform work which exists in significant numbers in the national economy (R.329-332.), and she then identified work as an order clerk, telephone clerk, and surveillance system monitor as representative samples of the type of work such an individual could perform on a regular and sustained basis. (R.332.) Asked to assume that such an individual could not use his hands for frequent gross manipulation and

¹⁰ The generic name for this nonsteroidal anti-inflammatory is naproxen, and it is marketed under a number of brand names, including *Aleve*, *Aleve Caplet*, *Anaprox*, *Anaprox-DS*, *EC-Naprosyn*, *Naprelan '500'*, and *Naprosyn*.

only occasional fingering, Ms. Martindale testified that these additional restrictions would eliminate the ability to perform the work of either the order clerk or telephone clerk. (R.334.)

In his brief,¹¹ the plaintiff's primary contention is that the ALJ's adverse step-five finding relied on vocational testimony which was based on a misunderstanding of *Dictionary of Occupational Titles* ("DOT ") criteria. Secondly, he argues that the ALJ erred in drawing an "improper inference" from the claimant's limited medical treatment during the fifteen months preceding the administrative hearing. These contentions will be addressed in turn.

A.

Focusing on his limited education and his limited ability either to read or to write, the plaintiff argues that he lacks the level of general educational development ("GED") required to perform the jobs identified by the vocational witness. To support this contention he cites the court to the DOT and to Ms. Martindale's testimony that the occupations she identified were "generally consistent" with the DOT (R.329).

As the plaintiff notes, the ALJ's inquiry to this witness included, among other vocational qualities, a hypothetical individual with the plaintiff's education. Without reference to any DOT job codes, communication skills or language development, Ms. Martindale identified the occupations of surveillance system monitor, telephone clerk, and order clerk as sedentary, unskilled jobs which

¹¹ Paragraph 3 of the court's Standing Order No. 2005-2 directs the parties to submit only opening briefs "unless requested by the Court." For this reason, the Reply Brief (Response) filed by the plaintiff in this case was not considered.

could be performed by an individual with the assumed imitations and the plaintiff's vocational profile.

Citing specific DOT jobs and educational development codes, the plaintiff argues that neither the telephone clerk (GED of 3, and a DOT code of 239.362-010), nor the order clerk (GED of 3, and a DOT code of 249.362.026), nor the surveillance system monitor (GED of 3, and DOT code of 379.367-010) is a job which can be performed by an individual with his very limited reading and writing ability. Each, he argues, requires a level of communication skills significantly beyond his relevant abilities.

Language development at level 3, as the plaintiff points-out, is described in the DOT as including,

[an ability to read] a variety of novels, magazines, atlases, and encyclopedias, [an ability to read] safety rules, instructions in the use and maintenance of shop tools and equipment, and methods and procedures in mechanical drawing and layout work, ... [an ability to write] reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech, . . . [and an ability to speak] before an audience with poise, voice control, and confidence, using correct English and well-modulated voice.”

Dictionary of Occupational Titles, Appx. C (4th d. 1991).

After reviewing this definition, the vocational witness' testimony, the applicable DOT job descriptions, the plaintiff's relevant testimony concerning his limited language and communication abilities, the activities and related questionnaires in the record (which were completed by a third

party) and his school records, there is an obvious conflict between the vocational testimony and the DOT information.

This conflict was never considered by the ALJ. And to the extent that they are inconsistent, the denial of benefits cannot be based on vocational testimony unless a reasonable explanation is provided by the ALJ. *See Fisher v. Barnhart*, 181 Fed. Appx. 359, 365 (4th Cir. 2006). *See also*; SSR 00-4p. For this reason, “good cause” exists to remand this case for a clarification of this issue.

B.

The plaintiff next argues that the ALJ improperly considered the plaintiff’s lack of ongoing treatment for his medical conditions after January 2004. Before drawing any inference from the fact that an individual has not sought treatment, the plaintiff argues, the agency’s regulations obligate the ALJ to consider the explanation that he offered. Pointing-out that his decision not to seek regular treatment and later not to continue to have his Methotrexate prescription refilled were driven by a distressed financial situation and an inability to qualify for financial assistance, the plaintiff contends that it was improper for the ALJ to draw a negative inference from this decision. *See* SSR 96-79; 20 C.F.R. §§ 404.1529 and 416.929. In response, the Commissioner argues that the ALJ drew no such adverse interest and that his determination of the plaintiff’s residual functional ability was based solely “on the objective clinical findings and provider statements.”

In relevant part, Social Security Ruling (“SSR”) 96-7p directs that an individual may be considered less credible “if the medical reports or records show that the individual is not following

the treatment as prescribed and there are no good reasons for this failure." At the very least, this agency's Ruling imposes an affirmative duty on the fact finder in this case to address whether he finds the plaintiff's explanation to be a "good reason" or not. The failure of the ALJ to address this issues, leaves the court and the parties to speculate as to his reasoning and as to what inference, if any, he drew. *See Cook v. Heckler*, 783 F.2^d 1168, 1174 (4th Cir. 1986) (remanded, in part, on the basis of the ALJ's failure to explain adequately his findings); *Hammond v. Heckler*, 765 F.2^d 424, 426 (4th Cir. 1985) (the "duty of explanation is always an important aspect of the administrative charge").

For this reason also, "good cause" exists to remand the case, and to provide the ALJ with an opportunity to clarify this issue.

IV. Proposed Findings of Fact

As supplemented by the above summary and analysis and on the basis of a careful examination of the full administrative record, the following formal findings, conclusions and recommendations are submitted:

1. The Commissioner's final decision to deny benefits in this case is not supported by substantial evidence;
2. This case should be remanded in order to permit the ALJ to explain the apparent conflict between the DOT and the vocational testimony and to explain in his determination how it is resolved;

3. This case should be remanded in order to permit the ALJ to address the issue as to whether the plaintiff's explanation for his failure to seek treatment was or was not a "good reason," as that phrase is used in SSR 96-7p;
4. It is proper to reverse the Commissioner's decision and to remand the case to the Commissioner, pursuant to "sentence four" of 42 U.S.C. § 405(g), for reconsideration in a manner consistent with this report and recommendation; and
5. If the Commissioner is unable to grant benefits on the current record, he should recommit the case to the ALJ to conduct a supplementary proceeding which affords the parties the opportunity to introduce such additional evidence as they may be advised is appropriate.

VI. Recommended Disposition

For the foregoing reasons, it is RECOMMENDED that an order be entered DENYING both parties' motions for summary judgment, VACATING the Commissioner's final decision, REMANDING the case to the Commissioner for further proceedings under Sentence Four of 42 U.S.C. § 405(g), PROVIDING in the event the Commissioner is unable to grant benefits on the current record for the case be recommitted to the administrative law judge for further proceedings and reconsideration in a manner consistent with this report and recommendation and for the parties to have the opportunity to introduce such additional evidence as they may desire, and DISMISSING this case from the docket of the court.

VII. Notice to the Parties

Both sides are reminded that, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, they are entitled to note objections, if any they may have, to this Report and Recommendation within

ten (10) days hereof. **Any adjudication of fact or conclusion of law rendered herein by the undersigned to which an objection is not specifically made 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) as to factual recitals or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objections.

The clerk is directed to transmit the record in this case immediately to the presiding United States district judge and to transmit a copy of this Report and Recommendation to all counsel of record.

DATED: 9th day of June 2008.

/s/ James G. Welsh
United States Magistrate Judge