

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT HARRISONBURG, VA
FILED

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ALBERT E. SOUTHERLY,)	Case No. 5:07cv00033
)	
<i>Plaintiff</i>)	REPORT AND
v.)	RECOMMENDATION
)	
MICHAEL J. ASTRUE,)	By: Hon. James G. Welsh
Commissioner of Social Security,)	U. S. Magistrate Judge
)	
<i>Defendant</i>)	
)	

The plaintiff, Albert E. Southerly, brings this action pursuant to 42 U.S.C. § 1383(c)(3) challenging the final decision of the Commissioner of the Social Security Administration (“the agency”) denying his claims for disability insurance benefits (“DIB”) under Title II and for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, as amended (“the Act”), 42 U.S.C. §§ 416, 423 and 1381-1383f. Jurisdiction of the court is pursuant to 42 U.S.C. 405(g).

The Commissioner’s Answer was filed on August 1, 2007 along with a certified copy of the administrative record (“R.”) containing the evidentiary basis for the findings and conclusions set forth in the Commissioner’s final decision. By order of referral entered two days later, this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Addressing the reasons why he believes the final decision of the Commissioner ought to be either reversed or remanded, the plaintiff's motion for summary judgment was filed on September 4, 2007. Therein, he contends that the administrative law judge ("ALJ") erred in concluding that he did not have a "severe" medical condition upon which to base a claim for DIB or SSI. No written request was made for oral argument.¹ On October 5, 2007, the Commissioner filed his summary judgment motion and supporting memorandum. After making a thorough review of the administrative record, the following report and recommended disposition are submitted.

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 conditions for entitlement to DIB or SSI pursuant to the Act. "Under the . . . Act, [a reviewing court] must uphold the factual findings of the [Commissioner], if they are 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

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

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

The record shows that the plaintiff protectively filed his applications for DIB and for SSI on or about May 31, 2005, claiming a February 1, 2005 disability onset date. (R.15,67-71,74,380-382.) In his applications the plaintiff alleged that he was functionally unable to work due to the debilitating effects of chronic acute migraine headaches and from sleep apnea (transient periods of cessation of breathing during sleep). (R.85-124,126-140.) After his applications were denied, both initially and on reconsideration, a hearing was held on August 17, 2006 before an administrative law judge ("ALJ"). (R.21-66,360-374,377-379.) At the hearing the plaintiff was present, testified, and was represented by counsel. (R.21-40,375-376.) Utilizing the agency's sequential decisional inquiry,² the plaintiff's claim was subsequently denied by written administrative decision on November 16, 2006. (R.15-20.)

² 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).

After finding that the plaintiff had not engaged in substantial gainful work activity at any decisionally relevant time, the ALJ found that he had no “severe” impairments.³ (R.17-18.) In the ALJ’s opinion, neither the plaintiff’s migraine headache syndrome nor his sleep apnea was sufficiently severe to interfere with his ability to perform basic work activities. (R.18.) After issuance of this unfavorable decision, the plaintiff made a timely request for Appeals Council review. (R.10-11.) His request was denied, and the ALJ’s decision now stands as the Commissioner’s final decision. (R.6-9.) *See* 20 C.F.R. § 404.981.

III. Facts and Analysis

The plaintiff was born in 1965 (R.24), which classifies him as a “younger” worker under 20 C.F.R. §§ 404.1563(c) and 416.963(c). He has only a sixth grade education (R.24-25), which classifies him as a person with a “marginal education”⁴ under 20 C.F.R. §§ 404.1564(b)(2) and 416.964(b)(2). His past relevant work experience was as a commercial truck driver. (R.26-27,144.)

At the administrative hearing, the plaintiff testified that he experiences frequent severe migraine headaches and chronic sleep apnea. (R.27-28,30-34,145-152.) He stated that he is chronically tired and experiences unexpected drowsiness due to the sleep apnea and that his migraine

³ 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).

⁴ A marginal education means an ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs, and the agency generally considers formal schooling at a 6th grade level or less to be a marginal education. 20 C.F.R. §§ 404.1564(b)(2) and 416.964(b)(2).

headaches cause severe pain, stomach upset, and blurred vision. (R.29-31.) He testified that the intensity and frequency of his migraine headaches along with the drowsiness and chronic tiredness related to his sleep apnea made it unsafe for him to drive. (R.26-35.) In addition, he testified that he became unable to work on any sustained basis after February 1, 2005, although he continued to do some part-time work until November of the same year. (R.27-28.)

Relevant to his appeal, the plaintiff's medical records document his treatment for severe sleep apnea, primarily by Dr. William Cale (RMH Pulmonary Associates),⁵ and his treatment for chronic recurrent migraine headaches by Dr. Glenn Deputy (Harrisonburg Medical Associates).⁶

At the time of his initial clinical examination and his review of the plaintiff's two-week sleep log in February 2005, Dr. Cale concluded that a full evaluation of the plaintiff's sleep disorder required a sleep study. (R.223-227,228-232,318-322.) On the basis of his clinical findings and pending the results of the sleep study, Dr. Cale "warned" the plaintiff, both orally and in writing, not to drive or operate machinery. (R.225,230,320.) This warning was subsequently reiterated by telephone following the initial sleep study in March and again in person by Dr. Cale when he saw the plaintiff in his office later the same month. (R.215-218,222,316-317.)

⁵ Dr. Cale is a Fellow of the American College of Chest Physicians and a Fellow of the American Academy of Sleep Medicine. (*E.g.*, R.225.) The plaintiff was referred to Dr. Cale by his primary care physician in February 2005. (R.223.)

⁶ Dr. Deputy is board certified in Neurology. (*E.g.*, R.193.) In addition to the plaintiff's testimony that he began to experience migraine headaches at age twelve, the plaintiff's medical records variously dated between 2001 and 2004 show a history of migraine headaches which began to increase in frequency in 2002 and which were treated conservatively with various medications, including beta blockers, anti-depressants, and headache medicines. (R.30,153-164,193,262,268,275.)

The sleep studies at RMH Cardiopulmonary Sleep Laboratory in March and April 2005 objectively demonstrated the plaintiff's "severe" obstructive sleep apnea syndrome with "markedly" fragmented cycles of sleep, "prolonged episodes of wake," and "markedly under represented" periods of REM sleep.⁷ (R.205-207,220-222,259,338-355.) It was recommended that the plaintiff use a CPAP⁸ mask. (R.222,259,338.)

When the plaintiff experienced difficulties using a full face CPAP mask, Dr. Cale elected to try an "active" nasal mask and to continue sleep monitoring, which resulted in some sleep improvement over time. (R.197-204,310-315.) However, despite the plaintiff's compliance with this treatment modality, it did not produce the "the results [Dr. Cale] would [have liked] to see." (R.303.)

When initially seen in February 2004 for treatment of his migraine headaches, Dr. Deputy adjusted the plaintiff's previous migraine treatment regime and advised the plaintiff not to use any anti-depressants when he was on the road due to its sedative side effects. (R.193-196.) Over the course of the ensuing two years, the plaintiff saw Dr. Deputy six times. His records show that the plaintiff continued to exhibit a chronic migraine headache syndrome which both increased and decreased in intensity from time to time and which required ongoing adjustment of medication regime. (R.184-192,357-359.)

⁷ The "rapid eye movement" cycle of sleep

⁸ CPAP is an abbreviation for "continuous positive airway pressure."

In connection with the treatment of his significant sleep disturbance syndrome, the plaintiff also continued to see Dr. Cale. As part of this regular follow-up care and consistent with the results of additional testing, the plaintiff was re-warned on multiple occasions about the danger created by his continuing to drive in the face of significant day time drowsiness. (R.197-198,303-311,335-337, 383-390.) *Inter alia*, the “sever[ity]” of this daytime drowsiness was objectively confirmed by the results of a MSLT⁹ in August 2005 and a polysomnogram in July 2006. (R.324-334,389-390.)

Succinctly summarizing the plaintiff’s condition, one of Dr. Cale’s partners wrote in an August 31, 2005 treatment note, “I certainly would not want to have an eighteen-wheeler driving behind me with a driver whose vision, concentration and attention were seriously impaired by recurrent migraine attacks . . . [and] . . . pathological sleepiness.” (R.307.)

The ALJ, however, found that these functional problems related to the plaintiff’s migraine headache syndrome and his sleep deprivation syndrome, neither individually nor in combination, constituted an impairment that “significantly limited his ability to perform basic work activities.” (R.18.) Consequently, he concluded that the plaintiff “[had] no severe impairments” and “[was] not . . . under a ‘disability’ as defined in the . . . Act.” (R.19.)

On appeal, the plaintiff contends that the ALJ erred in making this adverse step-two finding and in concluding that he was not disabled. In addition, the plaintiff argues that this erroneous step-

⁹ MSLT is an abbreviation for “multiple sleep latency test.”

two finding was based, at least in part, on the ALJ's expressed disdain¹⁰ for the idea that his sleep apnea would significantly interfere with his ability to do work activity.

In *Evans v. Heckler*,¹¹ the Fourth Circuit held that, "[a]n 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" 734 F.2d d 1012, 1014 (4th Cir. 1984) (quoting *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984)) (emphasis in the original; citations omitted). Not inconsistent with this holding, the agency's regulations define a non-severe impairment as an impairment, or combination of impairments, that does not significantly limit a claimant's ability to do basic work activities. See 20 C.F.R. § 416.921(a) (2005). Illustratively, basic work activities are deemed to include activities such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering job instructions, use of judgment, responding appropriately to supervision, co-workers and usual work situations and dealing with changes in a routine work setting. See 20 C.F.R. §§ 404.1521(b) and 416.921(b).

Aside from the opinions of his physicians, the plaintiff's medical history documents his serious problems both with chronic migraine headaches and with an acute sleep disturbance condition. Multiple sleep latent testing and polysomnography objectively demonstrated the

¹⁰ During the administrative hearing, the ALJ made the following statement, ". . . just so there's no misunderstanding about . . . where I'll go with apnea, you can pursue this as far as you wish, but we're not talking about narcolepsy here. I find very little credibility and minimal impact on an individual's capacity, just because they've got apnea. So that's my position. And until otherwise informed, it will remain my position . . ." (R.30.)

¹¹ See footnote 4.

plaintiff's severe daytime drowsiness. Thus, even without considering the opinions of his physicians concerning how dangerous it was for him to drive or operate machinery, it is difficult to believe that the plaintiff's severe obstructive sleep apnea syndrome would ever permit him to perform his past relevant work, or to perform any job requiring the use of machinery, or to perform any job requiring sustained attention or concentration.

Similarly, the longitudinal record of the plaintiff's frequent, intense and long-lasting migraine headaches make it difficult to believe that the plaintiff's chronic migraine headache syndrome would ever permit him to perform his past relevant work or to perform any job requiring sustained attention or concentration. Without question, migraine headaches can be reasonably expected to produce the pain and other symptoms alleged; likewise it can be reasonably expected to diminish his capacity to work. *See* 20 C.F.R. §§ 404.1529(b) and 416.929(b); 20 C.F.R. §§ 404.1529(c)(4) and 416.929(c)(4). *See also* *Mickles v. Shalala*, 29 F.3^d 918, 919 (4th Cir. 1994) (complaints of pain "may not be rejected merely because the severity of pain cannot be proved by objective medical evidence.")

Assuming solely for purposes of discussion that the "slight abnormality" test set forth in *Evans v. Heckler* is less stringent than the agency's test set forth in 20 C.F.R. §§ 404.1521(b) and 416.921(b), application of either standard compels the conclusion that both the plaintiff's sleep deprivation and migraine headache syndromes are "severe" impairments within the meaning of the Act and that the Commissioner's final decision is not supported by substantial evidence.

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 undersigned submits the following formal findings, conclusions and recommendations:

1. The plaintiff's sleep deprivation syndrome is a "severe" impairment within the meaning of the Act;
2. The plaintiff's migraine headache syndrome is a "severe" impairment within the meaning of the Act;
3. The Commissioner's final decision to deny benefits in this case fails to consider adequately all of the evidence relevant to the plaintiff's impairments;
4. The Commissioner's final decision to deny benefits in this case is not supported by substantial evidence;
5. 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
6. On remand, the parties should have 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 the Commissioner's motion for summary judgment, VACATING the Commissioner's final decision, REMANDING the case to the Commissioner for further proceedings and reconsideration in a manner consistent with this report and recommendation and with the parties having the opportunity

to introduce such additional evidence as they may desire, and DISMISSING this case from the docket of the court.

The clerk is directed to transmit the record in this case immediately to the presiding United States district judge.

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 a copy of this Report and Recommendation to all counsel of record.

DATED: 17th day of April 2008.

/s/ James G. Welsh
James G. Welsh
United States Magistrate Judge