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

GREGORY M. TERRY, SR.)

Plaintiff)

v.)

MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
_____)

Civil Action No. 5:10cv00015

**REPORT AND
RECOMMENDATION**

By: Hon. James G. Welsh
U. S. Magistrate Judge

Plaintiff, Gregory M. Terry, brings this action pursuant to 42 U.S.C. § 405(g) challenging a final decision of the Commissioner of the Social Security Administration ("the agency") denying his claims for a period of disability insurance benefits ("DIB") under Title II of the Social Security Act, as amended, ("the Act") and for Supplemental Security Income ("SSI") under Title XVI of the Act. 42 U.S.C. §§ 416 and 423 and 42 U.S.C. §§ 1381 *et seq.* respectively. Jurisdiction of this court is pursuant to 42 U.S.C. § 405(g).

On June 17, 2010 the Commissioner filed his Answer along with a certified copy of the Administrative Record ("R."), which included the evidentiary basis for the findings and conclusions set forth in the Commissioner's final decision. By an order of referral entered on June 30, 2010 this case is before the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Both parties have moved for summary judgment and each has filed a supporting memorandum of points and authorities. No request was made for oral argument. ¹

I. Summary

¹ WDVa Gen. R. 4(c)(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.

The plaintiff in this case was forty-five years of age ² at the time of his alleged disability onset date. (R.10,61,73,129,137,140,149,154,233,251.) He dropped out of school in the eighth grade; he is 5' 7" in height; his weigh varies from approximately 280 to 300 lbs., and his past relevant work included jobs as a door maker and as a drywall hanger/finisher. ³ (R.25,27,153, 155,159,221-226,264-265,289,333,541,546,548,550,553,559.) As outlined in the disability reports, in his hearing testimony and in the medical record, the plaintiff's basic contention is that he became disabled due to the combined effects of several chronic medical problems, including the residuals of a back injury, asthma, emphysema, sleep apnea, arthritis in his shoulder, depression and bone spurs in his "feet and legs." (R.28-37,154.204.) A careful review of the medical record supports his claim that these conditions and their attendant pain are of disabling intensity. ⁴

II. 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 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.2^d 1453, 1456 (4th Cir. 1990); *Laws v. Celebrezze*, 368 F.2^d 640, 642 (4th Cir. 1966). "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)

²At 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) and 416.963(c).

³As described by the vocational witness, door making is unskilled work that is exertionally "medium," and drywall installation work is exertionally "very heavy" and without any transferable skills. (R.45-46.)

⁴A disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable impairment which can be expected to last for a continuous period of not less than 12 months . . ." 42 U.S.C. § 423(d)(1)(A).

(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 preponderance." *Mastro*, 270 F.3^d at 176 (quoting *Laws v. Celebrezze*, 368 F.2^d 640, 642). "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." *Id.* (quoting *Craig*, 76 F.3^d at 589). The ALJ's conclusions of law are, however, not subject to the same deferential view and are to be reviewed *de novo*. *Island Creek Coal Company v. Compton*, 211 F.3^d 203, 208 (4th Cir. 2000).

III. Administrative History

The record shows that the plaintiff protectively filed his applications in January 2007 alleging disability as of December 1, 2006. (R.10,65-66,129-139,149-162,204-229,233-248, 251-260.) His claims were denied both initially and on reconsideration. (R.10,57-64,67-72, 78-90.) Pursuant to the plaintiff's timely request, an administrative hearing on his applications was held on June 24, 2009 before an administrative law judge ("ALJ"). (R.10,92,94-96,100, 102-116,128.) At the hearing, the plaintiff was present; he testified; he was represented by counsel, and vocational testimony was given by Robert Lester. (R.10,20-56,75,77,97-98,) By written decision dated July 29, 2009 the plaintiff's applications were once again denied, and his subsequent request for Appeals Council review was also denied. (R.1-6,270.) The ALJ's unfavorable decision, therefore, now stands as the Commissioner's final decision. *See* 20 C.F.R. § 404.981.

Between January 10, 2007 and May 2009 the plaintiff's medical records show that he sought treatment from multiple medical providers for multiple chronic medical problems and concerns. These included congestive heart failure, coronary artery disease, high blood pressure, diffuse interstitial pneumonitis, chronic obstructive pulmonary disease ("COPD"), "profound" sleep apnea, a painful

entheopathic condition affecting his tendons and ligaments, a left shoulder impingement, a left knee medial meniscal tear, and treatment of an "adjustment disorder with mixed disturbances of emotion and conduct" that included two psychiatric admissions.⁵ (R.275-276,282-283,286-298,323-325, 331-337,372-385,556-557,559-560.)

Following the second of the psychiatric admissions in January 2007, Dr. R. David Lee (the plaintiff's primary care physician) noted that the plaintiff appeared "quite depressed and concluded that he "was probably a good candidate for disability" due to the combined functional effects of his chronic physical and mental conditions. (R.289,559; *see also* R.543.)

Despite aggressive mental health treatment, which included the prescription use of Cymbalta, counseling through Northwestern Community Services and a second psychiatric hospitalization in March 2008, the plaintiff's depression and related mental health issues have continued to remain "severe." (R.275-276,294-298, 377-385.)

⁵ When admitted with suicidal ideations for the first time in March 2006, the plaintiff was assessed to be functioning at a GAF level of 35, and at the time of discharge his level of functioning was only marginally improved to a GAF level of 45-50. (R.372-375.) When admitted for a second time in January 2007, again with suicidal ideations, his GAF assessment was 35, and on discharge it was assessed to have improved to 60. (R.331-337.)

Similarly, his hospitalization in March 2007 for treatment of an acute lung infection episode and subsequent ongoing treatment of diffuse interstitial pneumonitis resulted in no long-term improvement in his chronic obstructive pulmonary disease symptoms. ⁶ (R.281-282-284-285,312-322,422,426,428,443,446-447,449,456,452-455,456,482-486,488-492,494-495, 505-508,526,528-531,537,543,550,552-555,563-565; *see also* R.541.)

Although the plaintiff's congestive heart failure improved some with the use of a double daily dose of Lasix, this condition remained functionally severe enough to prevent him from completing a dobutamine stress test at University of Virginia Medical Center in the Spring of 2009. (R.420,468-473,530,536-537,539,548,662.) A coronary angiograph on May 1, 2009 separately demonstrated the plaintiff's significant attendant right coronary artery constriction. (R.525-526.)

His left shoulder impingement improved following a distal clavicle resection in early November 2007. (R.286,325,328,457-468,476-481,487,499-501,503,532-533,544.) Being left-hand dominant, however, it is not surprising that the result has proven to be "variable," and the plaintiff remains less than pain free. (R.453,460.)

The plaintiff's medical records additionally document diagnoses of chronic high blood pressure for which beta blockers were prescribed (R.418-420,469, 541,562), chronic tenderness over the plantar fascia (R.286,328), chronic back and hip pain (R.541), bilateral knee arthralgias (R.453), morbidly obesity (R.469,510,528,539,537,542,548-549), ⁷ a renal stone with attendant right flank pain (R.510-516,517-518,520-524), and a left medial meniscal tear (R.532,537,546-547,474-475,537,544).

⁶ *Inter alia* he experiences "significant dyspnea" and intermittent chest pain on exertion. R.505,537.) The results of pulmonary function testing in April 2009 demonstrated a "marked decline in his FEV1 ration from 2.02 to 1.63" and a similar vital capacity decrease indicative of a "moderately severe obstructive process." (R.530.)

⁷ The plaintiff's height is listed as 66 ½ inches, his weight is listed at 290-302 lbs., and his body mass index ("BMI") is

Based on his multi-year record of providing the plaintiff's primary medical care and his attendant familiarity with the plaintiff's specialized treatment during the period by multiple medical specialists, on June 23, 2009 Dr. David Lee submitted his written assessment of the plaintiff's residual functional abilities. (R.567-571). Therein, Dr. Lee outlined the plaintiff's multiple physical limitations linked to his diverse chronic medical conditions. (R.567-571.) Due specifically to his left shoulder condition, Dr. Lee noted the plaintiff's limited range of left shoulder motion, pain on use, and inability to lift more than approximately 5 lbs. (*Id.*) Due to his lower extremity and back conditions, Dr. Lee noted the plaintiff's limited ability to stand or sit comfortably for longer than approximately 15 minutes without interruption or for longer than 4 hours during an 8-hour work day. (*Id.*) In addition, Dr. Lee noted the plaintiff's several attendant postural and manipulative limitations, and he also outlined the plaintiff's multiple environmental restrictions due in significant part to his restrictive airway disease and depression. (*Id.*)

IV. Analysis

After summarily finding the plaintiff's obesity, chronic pulmonary disease, left shoulder and knee osteoarthritis, plantar fasciitis, coronary artery disease and depression to be *severe* impairments within the meaning of the Act, the ALJ summarized the plaintiff's 300-page record of medical treatment for these conditions in a single paragraph. (R.12-13.) He then discussed in some detail the bases for his conclusion that none of these decisionally significant impairments met or equaled a listed impairment. (R.13-14.) In his written decision, the ALJ then found that the plaintiff retained the residual functional capacity to perform sedentary work that required only simple instructions, no exposure to environmental extremes, no

47.9. "Morbid obesity is defined as weighing more than two (2) times the ideal weight and is associated with many serious and life-threatening disorders. Dorland's Illustrated Medical Dictionary ("DIMD"), 28th Ed. (1994) at 1166." *Bailey v. Halter*, 2001 U.S. Dist. LEXIS 9684 *7 n.1 (EDPa, 2001)

exposure to unprotected heights or moving machinery, no overhead use of his left upper extremity, and only occasional stooping or crawling. (R.14-17.)

Based on this functional capacity finding and the attendant vocational witness's testimony, the ALJ further concluded that the plaintiff could not perform his past relevant work as either a dry wall finisher or door maker, but there were jobs he could perform such as an administrative support worker, call-out operator, and charge account clerk. (R.17-18.)

Central to this non-disability finding by the ALJ's was his summary rejection of Dr. Lee's assessment of the plaintiff's residual functional capacity. As the plaintiff argues in his brief, the ALJ's stated basis for this rejection of Dr. Lee's treating source assessment consists of a single conclusory statement that it was "inconsistent with the nature of the [plaintiff's] medical care, the generally normal physical examinations and . . . significant daily activities" (R.17).

Citing the plaintiff's good response to left shoulder surgery, his use of non-prescription pain relievers, his "refusal" to undergo knee surgery following diagnosis of a torn medial meniscus in 2008, his activities of daily living, the Commissioner argues in his brief that substantial evidence exists in the record to support the ALJ's rejection of Dr. Lee's assessment of the plaintiff's residual functional capacity.

Generally, the treating physician's medical opinions are entitled to great deference. *See Hines v. Barnhart*, 453 F.3d559, 563 (4thCir. 2006) (courts typically "accord greater weight to the testimony of a treating physician because the treating physician has necessarily examined the [plaintiff] and has a treatment relationship with the [plaintiff]."); 20 C.F.R. § 404.1527(d)(2) ("Generally, we give more weight to opinions from your treating sources.") If the treating physician's opinion concerning the nature and severity of the plaintiff's condition is not inconsistent with other substantial evidence, it is entitled to controlling weight. Moreover, pursuant to the agency's regulations, when an ALJ fails to give controlling

weight to the treating physician's opinion, the ALJ is obligated to consider the length, nature and extent of that treating relationship, and he is similarly obligated to consider the degree to which the opinion is consistent with and supported by the entire medical record. See 20 C.F.R. § 404.1527(d)(2)(i)-(ii) and (3); *Foster v. Heckler*, 780 F.2^d1125, 1130 (4th Cir. 1986) ("A treating physician's testimony is ignored *only* if there is persuasive contradictory evidence.") (emphasis in original). And the ALJ must "give good reasons . . . for the weight . . . [given] . . . [to the] treating source's opinion. See 20 C.F.R. § 404.1527(d)(2) and § 416.927(d)(2).

In the case now before the court, the evidence cited by the Commissioner is simply not persuasive.

The ALJ's assertion that the plaintiff had "refused knee surgery is patently contrary to the evidence. At the hearing the ALJ directly asked the plaintiff if he would undergo knee surgery and the attendant painful physical therapy despite it being complicated his multiple other medical problems. (R.43-44.) The plaintiff's unequivocal response was that "[he] would do what they tell me to [do]." (R.45.)

The plaintiff's reported daily activities are routine, limited and they, likewise, demonstrate no ability on the part of the plaintiff to engage in work activity on a regular and sustained basis. The ability to perform household chores, operate a motor vehicle, fix simple meals, bathe oneself and care for one's personal needs in no compelling way suggests that these activities are performed by the plaintiff for any prolonged periods or require prolonged physical activity. In short, the plaintiff's ability to perform activities of daily living is neither inconsistent with Dr. Lee's assessment nor incompatible with *disability* under the Act. See e.g., *Broadbent v. Harris*, 698 F.2^d 407, 413 (10th Cir. 1983); *Thomas v. Alcoa, Inc.*, 2008 U.S. Dist. LEXIS 67668, *41 (DMd. 2008).

The ALJ's total focus on the plaintiff's residual physical ability to use his extremities to perform a range of sedentary is equally non-compelling. By doing so the ALJ failed to acknowledge Dr. Lee's consideration of his observed adverse impact of chronic obstructive pulmonary disease, coronary artery disease and constriction, chronic depression, morbid obesity and adjustment disorder on the plaintiff's functional abilities. While it is true that the ALJ acknowledged in his decision that these conditions were *severe* and that he seems to have considered them in crafting his hypothetical questions to the vocational witness, both the ALJ's written decision and the Commissioner's brief on appeal ignore Dr. Lee's consideration of these conditions as part of his residual functional capacity assessment of the plaintiff's condition.

Likewise, while it is true that an ALJ is not required to discuss all of the evidence in the record, he "may not select and discuss only that evidence that favors his ultimate conclusion." *Hines v. Barnhart*, 453 F.3^d 559, 566 (4th Cir. 2006) (quoting *Diaz v. Chater*, 55 F.3^d 300, 307 (7th Cir. 1995)). Moreover, even assuming *arguendo* that the record in this case contains a cognizable reason for the ALJ refusal to give controlling weight to Dr. Lee's opinion, the agency's regulations require the ALJ to give "good reasons" for a decision not to give controlling weight to a treating physician's opinion. See *Wilson v. Comm'r of Soc. Sec.*, 378 F.3^d 541, 545 (6th Cir. 2004); 20 C.F.R. § 404.1527(d)(2).

Given Dr. Lee's extensive office records documenting his multiple physical examinations of the plaintiff, his ongoing treating relationship with the plaintiff, his detailed, longitudinal picture of the plaintiff's condition, and the consistency of his opinion with the objective medical record as a whole, his opinion is entitled to controlling weight. See *Hines v. Barnhart*, 453 F.3^d 559, 563 (4th Cir. 2006); see also 20 C.F.R. and Social Security Regulation 96-2p.

V. 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 Commissioner's final decision is not supported by substantial evidence;
2. Dr. Lee's treating source medical opinion (R.566-571) meets the test for controlling weight, and the ALJ erred by failing to give it controlling weight or special decisional significance;
3. The ALJ's- non disability finding is not supported by substantial evidence;
4. The plaintiff has met his burden of proving a disabling condition as alleged in his applications; and
5. The final decision of the Commissioner should be reversed.

VI. Recommended Disposition

For the foregoing reasons, it is RECOMMENDED that an order be entered REVERSING the final decision of the Commissioner, GRANTING SUMMARY JUDGMENT to the plaintiff, DENYING the Commissioner's motion for summary judgment, and REMANDING this case solely for the purpose of calculating and paying benefits consistent with this report and recommendation.

Should the remand of this case result in the award of benefits, plaintiff's counsel should be granted an extension of time pursuant to Rule 54(d)(2)(B) within which to file a petition for authorization of attorney's fees under 42 U.S.C. § 406(b), until thirty (30) days subsequent to the receipt of a notice of award of benefits from the agency; provided, however, any such extension of time would not extend the time limits for filing a motion for attorney's fees under the Equal Access to Justice Act

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.

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 fourteen (14) 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.

DATED: this 9th day of December 2010.

/s/ James G. Welsh
United States Magistrate Judge