

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

<b>CLETUS CUBBAGE,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Civil Action No. 5:00-CV-00040</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>KENNETH S. APFEL,</b>	)	<b>By: Samuel G. Wilson,</b>
<b>Commissioner of Social Security,</b>	)	<b>Chief United States District Judge</b>
	)	
<b>Defendant.</b>	)	

Plaintiff Cletus Cabbage (“Cabbage”) brings this action against defendant Kenneth S. Apfel, Commissioner of Social Security (“Commissioner”), seeking judicial review of the Commissioner’s final decision denying Cabbage’s claims for a Period of Disability, Disability Insurance Benefits, and Supplemental Security Income under the Social Security Act (“Act”), as amended, 42 U.S.C. §§ 416(i), 423 and 42 U.S.C. § 1381 et seq. This court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3). The United States Magistrate Judge has filed a report pursuant to 28 U.S.C. § 636(b)(1)(B) supporting the Commissioner’s decision and recommending that an order be entered affirming the Commissioner’s final decision. Cabbage has objected to that report, contending that the Act’s amendments relating to alcohol abuse do not apply to this case because it was pending before the administration at the time the amendments became effective. Finding substantial evidence to support the Commissioner’s final decision, the court will enter judgment for the Commissioner.

## I.

Cubbage filed applications for Disability Insurance Benefits and Supplemental Security Income payments on July 7, 1993. In his applications Cubbage indicated that he had been unable to work since December 31, 1986, due to alcoholism.

At the hearing held on November 29, 1994, Cubbage testified that he has an extensive history of alcoholism. He also testified that he has stomach pains, shoulder and back pain, pancreatitis, and arthritis. He stated that he had worked as a musician, done laundry work, operated a dog kennel, and, for a period beginning in 1992, worked in the kitchen at a Ramada Inn. (R. at 95-104.) The vocational expert, Dr. Andrew V. Beale, testified that Cubbage's work as a dog trainer would be skilled, medium exertion work, his work as a kitchen helper and in the laundry was unskilled, medium work, and his work as a musician was skilled, light work. (R. at 124-25.)

On March 31, 1995, the Administrative Law Judge ("ALJ") concluded that Cubbage was not disabled and, therefore, ineligible for benefits under the Act. Disagreeing with the ALJ's decision, Cubbage sought review by the Appeals Council of the Social Security Administration. On April 26, 1996, the Appeals Council determined that no basis existed under the regulations for granting review. On June 24, 1996, Cubbage's attorney, A. Thomas Lane, Jr., brought an action in the United States District Court seeking judicial review of the Commissioner's final decision. Upon review, the district court remanded Cubbage's applications to the Commissioner for further administrative proceedings. Accordingly, on October 31, 1997, the Appeals Council remanded the case to the ALJ for proceedings consistent with the court's order. (R. at 367.)

In the meantime, on May 6, 1996, Cubbage filed a second application for supplemental

security income in another jurisdiction. He retained a new attorney, Roger L. Smith, to represent him at a hearing before an ALJ on October 31, 1997. On November 14, 1997, the ALJ, without mentioning the concurrent claim pending in another jurisdiction, found that Cubbage was disabled and eligible for Supplemental Security Income payments beginning on May 6, 1996, the date Cubbage filed his second application.

On remand to reconsider Cubbage's original claim for benefits, the ALJ issued a continuance at a hearing on March 26, 1998 to allow for further development of the record. At the hearing on August 11, 1998, Cubbage again testified to a history of severe alcoholism. He testified that from 1992 to 1993 he drank a case of beer and a fifth of liquor a day. (R. at 483.) He stated that he drinks alcohol as often as he can obtain it. (R. at 484.) "It's what I do best." Id. Cubbage also testified that he injured his back in a car accident in 1990. He repeatedly stated that his back pain had prevented him from working as a kitchen helper at the Ramada Inn in 1992, a job which he held for six months. (R. at 496-511.) The medical expert at that hearing, Dr. Robert S. Brown, Jr., testified that Cubbage had been a severe alcoholic all his adult life. He stated that, beginning in 1986, his alcoholism had precluded his ability to do any work. (R. at 529.) Dr. Brown also testified that, absent his alcoholism, Cubbage was capable of light duty work prior to March 1997. (R. at 528.) Dr. Brown based his conclusions on the assumption that Cubbage's testimony was fully credible. (R. at 520.)

The medical evidence concerning the severity of Cubbage's back pain prior to March 1997 is not entirely consistent. The first medical documentation of Cubbage's back pain is included in the record of his 1990 treatment for alcoholism. That report noted a "probable low back muscle strain," but recommended that Cubbage treat it with heat rather than medication. (R. at 11.)

On August 26, 1993 Cabbage underwent a Residual Functional Capacity Assessment performed by the state agency medical consultant, Dr. R.S. Kadian. Without comment or description of any complaint by Cabbage, Dr. Kadian's report indicates that Cabbage was capable of medium duty work, i.e., of occasionally lifting or carrying a maximum of 50 pounds and of frequently lifting or carrying a maximum of 25 pounds. (R. at 263)

On December 29, 1993, Cabbage was examined by Dr. Gordon Stevenson on a complaint of pain in his lower back that had troubled him since his car accident in 1990. (R. at 273.) However, Dr. Stevenson reported that after briefly examining him and suggesting x-rays, Cabbage declined the x-rays, suggesting that he could obtain them elsewhere without cost. (R. at 273.) Cabbage never returned for treatment. Dr. Stephenson's comments on Cabbage's lifting and carrying ability are inconclusive. (R. at 274)

In October of 1994, Cabbage was examined by Dr. Benjamin Rezba. Dr. Rezba reported that Cabbage suffered from a lumbosacral strain/sprain and a cervical strain/sprain. Dr. Rezba further reported that Cabbage's complains of pain were "only partially" supported by his evaluation, noting that Cabbage had only "some limitation of his neck on side bending and extension," and "limitation of his lower back on extension and lateral bending." (R. at 305.) X-rays of Cabbage's back and neck were normal. Id. Dr. Rezba further reported that Cabbage could carry frequently no more than 10 pounds and agreed with Cabbage that he could carry occasionally 25 to 35 pounds. (R. at 306.) He also noted that Cabbage would be capable of working on a "light duty restricted basis." (R. at 307.)

On June 18, 1998, Cabbage was evaluated by Dr. Richard Milligan for the Virginia Department of Rehabilitative Services. Dr. Milligan noted that his shoulder pain from the car

accident in 1990 was causing him more pain than it had during an earlier evaluation in 1996. (R. at 440.) He further reported that Cubbage's pain had intensified by his fall from a porch in March of 1997. (R. at 442.) Based on the advancement of his injuries since 1996, Dr. Milligan concluded that Cubbage was capable of lifting frequently no more than 20 pounds and carrying frequently no more than 10 pounds. (R. at 452.)

In an opinion dated October 22, 1998, the ALJ concluded that Cubbage was not disabled at any time during the periods relevant to his June 1993 applications. He found that Cubbage's only substantial gainful activity and past relevant work was his work for 6 months in 1992 as a kitchen helper at the Ramada Inn. He concluded that, prior to May 6, 1996, Cubbage possessed the residual functional capacity to perform medium work activities, and, therefore, could perform his past relevant work as a kitchen helper. Upon review of the objective medical evidence, the ALJ found that Cubbage's statements concerning his back pain, and its restriction on his ability to work, were overstated, and were not entirely credible. While the ALJ found that Cubbage suffered from severe strains of the cervical and lumbar spine in 1994, he concluded that Cubbage's condition was not so severe as to preclude him from performing his past relevant work. Finally, the ALJ found that, even if Cubbage was disabled prior to May 6, 1996, alcoholism was material to his disability, and, therefore, the Act's alcohol and drug abuse amendments precluded him from recovering disability benefits.

On April 15, 2000, the Appeals Council found that the ALJ's decision was supported by substantial evidence and declined to assume jurisdiction. (R. at 310.)

## II.

The issue before the court is whether there is substantial evidence to support the Commissioner's final decision that, based on his application filed on June 7, 1993, Cubbage was not under a disability, absent alcoholism, and, therefore, was not entitled either to a Period of Disability and Disability Insurance Benefits under sections 216(i) and 223 of the Social Security Act, or Supplemental Security Income under sections 1602 and 1614(a)(3)(A) of the Act. Cubbage's individual applications require that, in order to recover benefits, Cubbage must have been disabled during certain fixed periods of time.

In regard to his claim for Disability Insurance Benefits, Cubbage met the disability insured status requirements of the Act on December 31, 1986 (the date he allegedly became unable to work). However, he acquired sufficient quarters of coverage to remain insured only through December 31, 1988. Therefore, the court must determine whether there is substantial evidence that Cubbage was not disabled from December 31, 1986, until December 31, 1988.

With respect to his application for Supplemental Security Income, the period of Cubbage's potential entitlement begins with the date he filed his application, June 7, 1993, and ends on May 6, 1996, the date he was found disabled by the ALJ who considered his latter application for benefits. The court, therefore, must determine whether substantial evidence supports the Commissioner's decision that Cubbage was not disabled from June 7, 1993 until May 6, 1996.

Substantial evidence is "evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance." Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966); see Richardson v. Perales, 402 U.S. 389 (1971). If substantial evidence exists to support the

Commissioner's final decision, this court's review must cease, and the final decision must be affirmed. See Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966). Finding that the Commissioner's final decision is supported by substantial evidence, this court is constrained to enter judgment in his behalf.

### III.

The facts in this case substantially support the ALJ's conclusion that Cubbage is ineligible for Disability Insurance Benefits because, absent alcoholism, Cubbage had no medically determinable impairments when his insured status expired on December 31, 1988. The record contains no medical evidence that Cubbage was treated for any impairment whatsoever prior to his treatment for alcoholism on June 25, 1990. (R. at 10, 329.) Although the record of his 1990 treatment mentions a "probable lower back strain" (R. at 11), Cubbage himself testified that he injured his back in a car accident in June 1990 and never testified to any previous back injury. (R. at 97,123, 502.) Furthermore, there is nothing in the record to establish that Cubbage had any problems with his back prior to 1990. Thus, after careful consideration of the record, the court finds that there is substantial evidence that Cubbage was not disabled during the period he was insured and, therefore, is ineligible for Disability Insurance Benefits.

The court also finds that substantial evidence supports the ALJ's conclusion that Cubbage was not disabled, in the absence of alcoholism, at any time prior to May 6, 1996, and, thus, is not eligible for Supplemental Security Income payments. (R. at 331). A claimant is not disabled under the Act if they retain the residual functional capacity to perform their past relevant work. See 20 C.F.R. § 416.920(f). Cubbage's only previous substantial gainful activity is his six month employment in 1992 as a kitchen helper at the Ramada Inn. (R. at 327-28.) The vocational

expert testified that Cubbage's work as a kitchen helper was medium exertion work. Medium exertion work entails lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c).

In his Supplemental Security Income Application filed on June 7, 1993, Cubbage did not indicate that back pain prevented him from working. Rather, he suggested only that alcoholism caused his disability. In August 1993, Dr. R.S. Kadian reported no problem with Cubbage's back, reporting that he could occasionally lift or carry 50 pounds and frequently lift or carry 25 pounds. Cubbage first complained of back pain in December 1993 to Dr. Gordon Stevenson, but after an initial visit he never returned for treatment. In October, 1994, however, Dr. Benjamin Rezba reported a lumbosacral strain and a cervical strain. He opined that Cubbage was capable of light duty restricted work. Dr. Rezba reported that Cubbage could carry no more than ten pounds frequently, a limitation that would, in fact, prevent the performance of medium exertion work. See 20 C.F.R. § 404.1567(c). However, his indication that Cubbage could carry 25 to 35 pounds occasionally is not necessarily inconsistent with medium work. See id. Moreover, Dr. Rezba's x-rays of Cubbage's back and neck were normal. In June 1998, after the period relevant to Cubbage's claim expired, Dr. Richard Milligan also concluded that Cubbage was capable of only light work. However, he based his conclusions on the advancement of Cubbage's injuries since his evaluation in 1996, implying that prior to 1996 Cubbage was capable of more rigorous exertion. The medical expert, Dr. Robert S. Brown, Jr., testified that Cubbage was capable of light duty restricted work prior to March 1997. However, Dr. Brown based his conclusion on the credibility of Cubbage's testimony. The ALJ's decision to discredit Cubbage's testimony that his back pain prevented his work as a kitchen helper in 1992 was reasonable given that Cubbage did

not seek treatment for his back until December of 1993. Moreover, after his initial visit in December 1993, Cabbage never returned for treatment. On the only other occasion, before May 6, 1996, that Cabbage sought back treatment, the doctor “only partially” agreed with Cabbage’s complaints of back pain. (R. at 305.)

The court concludes that, contrary medical evidence notwithstanding, substantial evidence supports the ALJ’s finding that, but for his alcoholism, Cabbage could have performed his past relevant work as a kitchen helper. Therefore, the court must affirm the Commissioner’s final decision that Cabbage was not disabled before May 6, 1996, and, accordingly, is not entitled to Supplemental Security Income benefits.

Finally, the court finds that substantial evidence supports the ALJ’s conclusion that alcoholism was material to any disability Cabbage suffered prior to May 6, 1996, and, therefore, the 1996 Amendments to the Act preclude Cabbage from recovering disability benefits. On March 29, 1996, Congress amended the Social Security Act to eliminate alcoholism as a basis for obtaining Disability Insurance and Supplemental Security Income benefits. The Amendment provides: “An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner’s determination that the individual is disabled.” 42 U.S.C. § 423(d)(2)(C) (1994).

Cabbage argues that the 1996 Amendment does not apply to his claim, and, therefore, he is not precluded from recovering alcoholism-based disability benefits. He reasons that the Amendment does not apply to a claim filed before March 29, 1996, even if the claim was not finally adjudicated by that date. The court disagrees.

The relevant statutory language provides: “The amendments . . . shall apply to any individual who applies for, or whose claim is finally adjudicated by the Commissioner of Social Security with respect to, benefits under Title II of the Social Security Act based on disability on or after the date of the enactment of this Act . . . .” 1996 Amendment, § 105(a)(5)(A), 110 Stat. at 853 (regarding Disability Insurance Benefits); see also, 1996 Amendment, § 105(b)(5)(A), 110 Stat. at 854 (applying same language to Supplemental Security Income benefits).

The court concludes that the 1996 Amendment applies to all claims not finally adjudicated before the Amendment’s enactment on March 26, 1996. The critical statutory language is the phrase “after the date of enactment.” The court is convinced that, “grammatically, ‘after the date of enactment’ modifies the clause, ‘whose claim is finally adjudicated by the Commissioner.’” Torres v. Chater, 125 F.3d 166, 170 (3rd Cir. 1997).<sup>1</sup>

Therefore, if Cubbage’s claim was not finally adjudicated by the Commissioner before March 29, 1996, then the 1996 Amendment precludes him from recovering alcoholism-based disability benefits.<sup>2</sup> Congress has provided that a claim for disability benefits is not “finally adjudicated . . . if . . . there is pending a request for either administrative or judicial review with respect to such claim . . . .” 42 U.S.C. § 1382(D)(i) (1994) (respecting Supplemental Security

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<sup>1</sup>The court’s conclusion accords with the finding of every circuit court that has interpreted the statute to date. See id. at 172; Adams v. Apfel, 149 F.3d 844, 846 (8th Cir. 1998); Hiblar v. Apfel, 205 F.3d 1351, 1999 WL 1253218, at \*1 (9th Cir. Dec. 22, 1999); O’Kane v. Apfel, 224 F.3d 686, 688 (7th Cir. 2000).

<sup>2</sup>Cubbage argues that this interpretation necessitates an impermissibly retroactive application of the 1996 Amendment to his claim. However, Congress expressed clear intent for the Amendment to apply retroactively by providing that claims not “finally adjudicated” prior to March 29, 1996 are denied alcoholism-based benefits. Therefore, this court may not bar the statute’s retroactive application. See Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994).

Income); 42 U.S.C. § 405(D)(i) (1994) (applying the same language to Disability Insurance Benefits). The appeals council denied Cabbage's request for review on April 26, 1996. (R. at 365). Accordingly, the 1996 Amendment precluding the award of alcoholism-based benefits applies to Cabbage's claim.

The only issue remaining before the court is whether substantial evidence supports the ALJ's conclusion that alcoholism materially contributed to any disability Cabbage suffered prior to May 6, 1996. Cabbage testified that from 1992 to 1993, he drank a case of beer and a fifth of liquor a day. He further stated that he drinks alcohol whenever he can get it. The medical expert testified that Cabbage has suffered from severe alcoholism all his adult life, and that beginning in 1986 his alcoholism prevented him from doing any work. These facts provide substantial evidence in support of the ALJ's finding that alcoholism materially contributed to any disability Cabbage suffered prior to May 6, 1996. Therefore, the 1996 Amendment to the Act precludes Cabbage from recovering disability benefits.

#### **IV.**

Accordingly, the court concludes that substantial evidence supports the Commissioner's final decision that, absent alcoholism, Cabbage was not disabled prior to May 6, 1996, and, therefore, Cabbage is not entitled to either Disability Insurance Benefits or Supplemental Security Income. The Commissioner's final decision is affirmed. An appropriate order granting summary judgment to the Commissioner will enter this day.

The Clerk of this court is directed to mail certified copies of this Memorandum Opinion to all counsel of record.

**ENTER** this \_\_\_\_ day of August, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

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

<b>CLETUS CUBBAGE,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Civil Action No. 5:00-CV-00040</b>
	)	
<b>v.</b>	)	<b><u>FINAL ORDER</u></b>
	)	
<b>KENNETH S. APFEL,</b>	)	<b>By: Samuel G. Wilson,</b>
<b>Commissioner of Social Security,</b>	)	<b>Chief United States District Judge</b>
	)	
<b>Defendant.</b>	)	

This case is before the court on the objection of plaintiff, Cletus Cubbage, to the Magistrate Judge’s report setting forth proposed findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The court has reviewed the administrative record, the Magistrate Judge’s report, and plaintiff’s objections to that report. For the reasons stated in its memorandum opinion, the court concludes that the Magistrate Judge’s recommendation is correct and adopts that recommendation. Accordingly, it is **ORDERED** and **ADJUDGED** that summary judgment be entered in favor of defendant, Kenneth S. Apfel, Commissioner of Social Security, and against defendant, Cletus Cubbage, and this case is **ORDERED** stricken from the docket of the court.

**ENTER** this \_\_\_ day of August, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE