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

TRAVIS R. BLANKENSHIP,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 7:07cv503**
v.	)	
	)	
MICHAEL J. ASTRUE,	)	**By: Michael F. Urbanski**
Commissioner of Social Security,	)	**United States Magistrate Judge**
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Travis R. Blankenship ("Blankenship") brought this action for review of the Commissioner of Social Security's ("Commissioner") decision denying his claim for supplemental security income benefits under the Social Security Act (the "Act"). On appeal, Blankenship contends that the Administrative Law Judge ("ALJ") erred in failing to give adequate weight to a June 22, 2004, Functional Capacity Assessment, and that the ALJ erred in finding Blankenship's complaints of pain incredible. Having reviewed the record, the undersigned finds the ALJ's decision is supported by substantial evidence and thus recommends that the Commissioner's decision be affirmed.

I

Section 405(g) of Title 42 of the United States Code authorizes judicial review of the Social Security Commissioner's denial of social security benefits. Mastro v. Apfel, 270 F.3d 171, 176 (4th Cir. 2001). "'Under the Social Security Act, [a reviewing court] must uphold the factual findings of the [ALJ] if they are supported by substantial evidence and were reached through application of the correct, legal standard.'" Id. (alteration in original) (quoting Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996)).

"Although we review the [Commissioner's] factual findings only to establish that they are supported by substantial evidence, we also must assure that [his] ultimate conclusions are legally correct." Myers v. Califano, 611 F.2d 980, 982 (4th Cir. 1980).

The court may neither undertake a de novo review of the Commissioner's decision nor re-weigh the evidence of record. Hunter v. Sullivan, 993 F.2d 31, 34 (4th Cir. 1992). Judicial review of disability cases is limited to determining whether substantial evidence supports the Commissioner's conclusion that the plaintiff failed to satisfy the Act's entitlement conditions. See Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966). Evidence is substantial when, considering the record as a whole, it might be deemed adequate to support a conclusion by a reasonable mind, Richardson v. Perales, 402 U.S. 389, 401 (1971), or when it would be sufficient to refuse a directed verdict in a jury trial. Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Substantial evidence is not a "large or considerable amount of evidence," Pierce v. Underwood, 487 U.S. 552, 565 (1988), but is more than a mere scintilla and somewhat less than a preponderance. Perales, 402 U.S. at 401. If the Commissioner's decision is supported by substantial evidence, it must be affirmed. 42 U.S.C. § 405(g); Perales, 402 U.S. at 401.

"Disability" is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The "[d]etermination of eligibility for social security benefits involves a five-step inquiry." Walls v. Barnhart, 296 F.3d 287, 290 (4th Cir. 2002). This inquiry asks whether the claimant (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements

of a listed impairment; (4) can return to his or her past relevant work; and if not, (5) whether he or she can perform other work. Heckler v. Campbell, 461 U.S. 458, 460-462 (1983); Johnson v. Barnhart, 434 F.3d 650, 654 n.1 (4th Cir. 2005) (citing 20 C.F.R. § 404.1520). If the Commissioner conclusively finds the claimant "disabled" or "not disabled" at any point in the five-step process, he does not proceed to the next step. 20 C.F.R. § 416.920(a)(4). Once the claimant has established a prima facie case for disability, the burden then shifts to the Commissioner to establish that the claimant maintains the residual functional capacity ("RFC"),[1] considering the claimant's age, education, work experience, and impairments, to perform alternative work that exists in the local and national economies. 42 U.S.C. § 423(d)(2)(A); Taylor v. Weinberger, 512 F.2d 664, 666 (4th Cir. 1975).

II

Blankenship was born in 1975, (Administrative Record, hereinafter "R." 77, 161, 398), and at the time of the ALJ's decision was considered a "younger individual" under the Act. 20 C.F.R. § 416.963(b). He received his general equivalency diploma, (R. 110, 158, 568), and his past relevant work includes warehouse worker, landscape laborer, line worker, line runner, odd jobs, and order clerk. (R. 18, 105, 113-17.)

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[1] RFC is a measurement of the most a claimant can do despite his limitations. See 20 C.F.R. § 416.945(a). According to the Social Security Administration:

> RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule.

Social Security Regulation (SSR) 96-8p. RFC is to be determined by the ALJ only after he considers all relevant evidence of a claimant's impairments and any related symptoms (e.g., pain). See 20 C.F.R. § 416.929(a).

Blankenship filed an application for disability insurance benefits ("DIB") and social security income payments ("SSI") on April 5, 2005, initially claiming an onset date of September 27, 2000 due to chronic back pain, bilateral leg pain and numbness. (R. 17, 132, 544, 546.) Pursuant to the regulations, Blankenship must prove he became disabled on or before his date last insured, December 31, 2000, in order to establish a DIB claim. 20 C.F.R. § 404.141. Blankenship previously filed an application for benefits on February 21, 2002, and the ALJ found him not to be disabled on or before May 30, 2003. (R. 17-18; see also R. 30-37.) The ALJ's decision was upheld by the Appeals Council and affirmed upon review by the court. See Blankenship v. Barnhart, No. 704cv443, 2005 WL 1594329 (W.D. Va. July 5, 2005). Thus, *res judicata* precludes consideration of the issue of disability through May 30, 2003. Blankenship amended his alleged onset date to May 31, 2003,[2] (R. 17-18, 546), and the ALJ considered this a request to withdraw the DIB application and dismissed the DIB claim. (R. 18, 25.)

Blankenship's application for benefits was rejected by the Commissioner initially and again upon reconsideration. An administrative hearing was convened before an ALJ on March 27, 2006. (R. 541-83.) In determining whether Blankenship was disabled under the Act, the ALJ found that he suffers from degenerative disc disease and depression, which are considered severe impairments pursuant to 20 C.F.R. § 416.920(c). (R. 21.) However, neither his mental impairment nor any physical impairment rises to listing-level severity, according to the ALJ. (R. 21.) The ALJ also held that Blankenship retains the residual functional capacity for simple, routine, unskilled sedentary work but

[2] At the administrative hearing, the ALJ stated that her last decision was rendered April 30, 2003. Thus, counsel for Blankenship amended the onset date to May 1, 2003. (R. 546.) However, in her April 27, 2006 decision, the ALJ noted her prior decision was handed down on May 30, 2003, and thus amended Blankenship's onset date to May 31, 2003. (R. 17-18.) The ALJ's opinion at issue addresses the issue of disability beginning May 31, 2003 through the present date. (R. 18.)

requires a sit/stand option incorporating brief stretch breaks in place each forty-five minutes or so, with no climbing and no more than occasional balancing, stooping, kneeling, crouching or crawling. (R. 23.) The ALJ further held that "[d]epressive symptomatology and exacerbations of pain result in a moderate reduction in concentration defined as limiting claimant to simple/non-complex tasks and a moderate limitation on his ability to interact directly with co-workers or the public." (R. 23.) Finding there are a significant number of jobs in the national economy that he can perform, the ALJ held that Blankenship is not disabled under the Act. (R. 24-26.) The Appeals Council denied Blankenship's request for review and this appeal followed. (R. 6-8.)

III

Blankenship argues that the ALJ did not give proper weight to the KEY Functional Capacity Assessment ("FCA") performed by occupational therapist Laura Fickel on June 22, 2004. (R. 168-75.) On brief, Blankenship contends that the ALJ did not mention the FCA and its conclusions in her opinion. (Pl.'s Br. 10.) At oral argument, however, Blankenship conceded that the ALJ did address the FCA in her opinion (see R. 19, 22), but argued that the ALJ should have given the assessment more weight.

The FCA indicates that Blankenship has a five hour workday tolerance. (R. 168.) Recommendations for Blankenship included, "return to work within the parameters he has set for himself here, a home program for exercises and stretches, and a pain management program may also be of benefit." (R. 168.) The vocational expert ("VE") testified at the administrative hearing that no jobs would be available to Blankenship if he were limited to a five hour workday. (R. 581.)

Substantial evidence supports the ALJ's decision not to accept the RFC finding set forth in the June, 2004, assessment. The FCA was performed by an occupational therapist, which is not an acceptable medical source to provide evidence to establish an impairment, pursuant to 20 C.F.R. § 416.913(a). Moreover, the FCA findings are based on one, three hour session with Blankenship, including a physical functioning questionnaire that Blankenship filled out himself, in addition to testing and observations. (R. 168-75.) The assessment results indicate that on this physical functioning questionnaire, Blankenship placed himself in the light work category for work capacities. (R. 168.)

Additionally, the medical evidence of record contradicts a finding that Blankenship is limited to working five hours per day. Blankenship claims his back pain began on April 6, 2000 while he was working at Kroger, when he bent over to pick up a box of frozen juice, which was stuck to another case. (R. 211.) Blankenship was diagnosed with a back strain.[3] (R. 211.) By April 26, 2000, notes from Dr. Castern reveal that Blankenship had "recovered sufficiently" from the April 6th incident and could return to work duties, restricting Blankenship only to lifting over 40 pounds, avoiding overhead reaching and limiting excessive pushing and pulling. (R. 208.) An initial x-ray and MRI were unremarkable and revealed no significant abnormalities. (R. 196, 206.) In June, 2000, Dr. Spetzler noted he was "a healthy young man," who had resolved from his strain, had full range of motion, good flexibility, normal x-rays, no neurologic deficit, and needed no operative intervention. (R. 205, 209-210.) Indeed, Dr. Spetzler recommended that Blankenship get back into condition through exercise and stretching. (R. 205, 210.)

[3] Although Blankenship initially complained of pain in his upper back between his shoulder blades (R. 211), he began complaining of lower back pain around August, 2000, without any indication of a correlating traumatic event. (R. 186.)

On August 4, 2000, Dr. Spetzler noted Blankenship "continues to complain pretty adamantly about a lot of discomfort where his exam is not all that impressive." (R. 203.) He released Blankenship to 8 hour workdays, and on August 7, 2000, Dr. Guth released him to full work duty. (R. 204, 205.)

Over the course of the next seven years, Blankenship continued to present to various physicians with persistent complaints of back pain. On September 26, 2000, Dr. Spetzler noted, "To date we have given him the maximum treatment with epidural injections, exercises, anti-inflammatory medication and without satisfactory resolution of his symptoms. Certainly I do not see anything limiting him right now. . . ." (R. 194.) Dr. Spetzler recommended Blankenship see a psychologist for counseling to deal with his pain issues. (R. 194.) In early 2002, Dr. Perry, a physician at Pain Management of Southwest Virginia, prescribed methadone for Blankenship's pain. (R. 180-83.) In August, Blankenship sought a refill of his methadone prescription at Kuumba Community Health and Wellness Center ("Kuumba"), as he stated he was unable to continue paying Dr. Perry. (R. 269.) Notes reveal that when Kuumba was unable to help with his medication request, Blankenship left angrily. (R. 270)

In September, 2002, Blankenship saw a neurosurgeon, Dr. Vascik, who noted, "I am just shocked at the amount of narcotics this man has been on" for what Dr. Vascik called "benign pain." (R. 178.) Reviewing Blankenship's MRI films from 2000 and 2001, Dr. Vascik stated, "[T]here is nothing significantly wrong with his spine except that he is 27 years old and has some minimal degenerative changes. . . . He wanted narcotics and I told him the last thing he needs for benign pain is narcotics. He needs to come off them completely." (R. 179.) Blankenship had a worker's compensation

examination on September 25, 2002 by Dr. Alfred Durham, who found that Blankenship did not appear to have incapacitating back pain. (R. 176-77.) Blankenship later requested a letter of disability from Kuumba on October 30, 2003; they declined to provide one. (R. 267-68.) Office notes from 2004 indicate Blankenship moved without difficulty and was able to get up on the exam table without assistance. (R. 264-65.) No limitation was noted. (R. 265.)

An MRI on March 3, 2005 revealed early/mild intervertebral disk degeneration and posterior anular bulging at the L5-S1 level and a mild degree of facet hypertrophy at L4-5 and L5-S1. (R. 246.) There was no evidence of disk herniation, spinal stenosis or focal abnormality. (R. 246.) Three weeks later, Blankenship called Kuumba and requested an x-ray of his entire back "to see how much arthritis has spread;" Kuumba declined to order an x-ray, as it was unnecessary. (R. 244.)

Dr. Fraser, a neurosurgeon, stated on June 20, 2005, that "[t]he reportedly unimpressive studies, the exam suggestive of symptom magnification and his current SSI issues would all predict a low likelihood of his benefiting from spine surgery. . . ." (R. 361-62.) On September 25, 2005, Dr. Fraser noted that Blankenship's x-rays showed no instability, his bone scan was normal, and his MRI showed no nerve root compromise. (R. 395.) An MRI of the c-spine taken on September 28, 2006 was likewise normal. (R. 475.) Blankenship was encouraged once again to walk and do exercises. (R. 395.)

Blankenship was repeatedly told to seek employment. (R. 448, 451, 504, 506.) Dr. Chapmon stated on December 22, 2006, that Blankenship is "capable of going on hunting trips where he would carry and fire an [sic] rifle or possibly a bow, drag out a deer, maybe climb tree stands, so I expect he could find some capacity of work he could

perform." (R. 448.) After Blankenship requested yet another MRI on March 22, 2007, Dr. Chapmon declined to order one, noting he suspects Blankenship has not pursued any type of employment and stating, "I cannot help him if he is not going to try and help himself." Dr. Chapmon further stated Blankenship "may have an injury, but certainly not one that would prevent him from pursuing something other than a lawsuit or disability." (R. 504.)

The record abounds with Blankenship's subjective complaints of pain, but no objective medical evidence supports the finding by Laura Fickel in the FCA that he is limited to working five hours per day. In the Psychology Report issued on January 25, 2006, Dr. Nichols stated Blankenship seems capable of performing work activities on a consistent basis. (R. 388.) In fact, his treating physicians consistently released him to work and encouraged him to find employment. (R. 189, 194, 199, 204, 205, 448, 451, 504, 506.) Yet Blankenship admitted at the administrative hearing that he did not pursue employment. (R. 549-550, 573.)

A Department of Rehabilitative Services independent medical exam performed by Dr. Humphries on January 25, 2005, revealed Blankenship could sit six hours in an eight hour workday, stand and walk six hours in an eight hour day, lift 25 pounds occasionally and 10 pounds frequently, and was limited to occasional stooping, crouching, occasional climbing, kneeling and crawling. (R. 239-43.) Likewise, following a review of the medical records, state agency physicians opined on February 3, 2005 and March 28, 2005 that Blankenship could frequently lift or carry 10 pounds, occasionally lift or carry 20 pounds, stand and/or walk 6 hours in an 8-hour day, sit for a total of 6 hours in an 8-hour

day, with occasional balancing, stooping, kneeling, crawling, crouching. (R. 271-78; 332-39.)

On this record, the undersigned finds that the ALJ's consideration of the June 22, 2004, FCA was more than adequate. The ALJ's opinion sufficiently supports her RFC determination and her finding that the FCA is inconsistent with the medical evidence of record.

IV

Blankenship further argues that the ALJ improperly evaluated his complaints of pain and erred in concluding that his complaints were not credible. Blankenship testified that he could sit for 15 to 20 minutes and then has to get up to move around for 15 to 20 minutes, and that he lies down during the day two or three times for an hour or two each time. (R. 571.) At the administrative hearing, Blankenship was questioned about his attempts to gain employment, and he responded:

A. If I could work, I wouldn't be here today.

Q. Did you make any efforts to go back to work ---

A. No –

Q. –part-time, sir?

A. – I can't do it.

Q. Did you look for a job and –

A. No ma'am, I didn't.

Q. … And why do you think you could not work five hours a day as was recommended?

A. My back's tore up. I have a lot of problems with it.

(R. 549-550.) In response to further questions about why he did not try to obtain employment for five hours per day as recommended in the FCA, (see R. 168), Blankenship reiterated, "I know I can't do it." (R. 573.)

However, Blankenship testified that on a daily basis, he drives his girlfriend to and from work and drives his girlfriend's daughter to and from school. (R. 563-64.) He takes care of the pets, picks up around the house, and helps his girlfriend's daughter with her homework. (R. 121-22.) He is able to make sandwiches and frozen dinners for meals (R. 123,142) and can sometimes clean (R. 123), including putting away light groceries and washing a few dishes. (R. 142.) Notes from Dr. Perry in 2002 reveal Blankenship continued to maintain his housework and had been able to continue his activity, "including walking and playing with his [girlfriend's] child." (R. 181, 182.) Blankenship indicates he can drive himself around, shop for groceries with his girlfriend, talk on the phone to others, and sometimes eat dinner at a restaurant with family. (R. 124-25.) He can also dress himself, bathe, care for his hair, shave, and feed himself. (R. 141.) In August, 2006, he was able to travel to South Carolina, (R. 422-30), and in December, 2006, he went on a hunting trip. (R. 454-58, 449-53.)

When faced with 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. Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996); accord Melvin v. Astrue, No. 606cv32, 2007 WL 1960600, at *1 (W.D. Va. July 5, 2007). Accordingly, the ALJ is not required to accept Blankenship's testimony that he is disabled by pain and must lie down several times during the day, and instead must determine through an examination of the objective medical record whether Blankenship

has proven an underlying impairment that could reasonably be expected to produce the symptoms alleged. Craig v. Chater, 76 F.3d 585, 592-94 (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."). A claimant's statements alone are not enough to establish a physical or mental impairment. 20 C.F.R. § 416.928(a). "[S]ubjective claims of pain must be supported by objective medical evidence showing the existence of a medical impairment which could reasonably be expected to produce the actual pain, in the amount and degree, alleged by the claimant." Craig, 76 F.3d at 591 (citing Mickles v. Shalala, 29 F.3d 918, 922 (4th Cir. 1994)); see also 20 C.F.R. § 416.929(b). Subjective evidence cannot take precedence over objective medical evidence or the lack thereof. Craig, 76 F.3d at 592 (quoting Gross v. Heckler, 785 F.2d 1163, 1166 (4th Cir. 1986)). The ALJ must determine whether Blankenship's testimony about his symptoms is credible in light of the entire record. 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); Melvin, 2007 WL 1960600, at *1; SSR 95-5p.

In this case, various notes contained in the medical evidence give the court pause as to Blankenship's general level of credibility. In a January 25, 2006, Psychology Report, Dr. Nichols found Blankenship responded in a manner that suggests the exaggeration of symptoms. (R. 386.) Dr. Nichols noted Blankenship "tends to be a person who converts stress into physical symptoms." (R. 386.) Dr. Fraser's notes also suggest symptom magnification. (R. 361-62.) On September 24, 2002, Dr. Vascik stated Blankenship "is totally involved with his pain and he is well familiar with his records and

his films." (R. 178.) During his functional capacity assessment, Blankenship placed himself in the light work category for work capacities. (R. 168.) Despite repeated recommendations that Blankenship return to work (R. 168, 189, 194, 199, 204, 205, 448, 451, 504, 506), he admits that he never pursued employment. (R. 549-50, 573.)

Further, the medical evidence does not support Blankenship's complaints of disabling pain. There is no objective evidence of any worsening of his back condition over time. X-rays, MRIs and bone scans reveal no significant abnormalities and, at most, show some minimal degenerative changes. (R. 179, 196, 206, 209, 246, 395.) The record indicates that physicians declined to order further x-rays or MRIs at Blankenship's request, because they were unnecessary. (R. 244, 506.) The record also makes plain that Blankenship does not need surgical intervention for any impairment. (R. 178-79, 210, 395-97.) As discussed in detail above, there are simply no objective findings of anything that could be causing the degree of pain or limitation Blankenship claims. See discussion, supra, § III. Indeed, Blankenship's physicians consistently released him to work and encouraged him to find employment. (R. 189, 194, 199, 204, 205, 448, 451, 504, 506.)

Accordingly, the court finds no reason to disturb the ALJ's credibility assessment. 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). Although the record is replete with complaints from Blankenship of chronic back pain, allegations of pain and other subjective symptoms, without more, are

insufficient to establish disability. Craig, 76 F.3d at 592. Thus, the undersigned recommends that the ALJ's decision be affirmed.

V

It is the court's role to determine whether the Commissioner's decision is supported by substantial evidence and, in this case, substantial evidence supports the ALJ's opinion. In affirming the final decision of the Commissioner, the court does not suggest that Blankenship is totally free of all pain and subjective discomfort. The objective medical record simply fails to document the existence of any condition which would reasonably be expected to result in total disability from all forms of substantial gainful employment. It appears that the ALJ properly considered all of the objective and subjective evidence in adjudicating Blankenship's claim for benefits. It follows that all facets of the Commissioner's decision in this case are supported by substantial evidence. Accordingly, the undersigned recommends that the Commissioner's decision be affirmed and the defendant's motion for summary judgment be granted.

The Clerk is directed to transmit the record in this case to James C. Turk, United States District Judge and to provide copies of this Report and Recommendation to counsel of record. 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 that is 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 conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

ENTER: This 12th day of January, 2009.

/s/ Hon. Michael F. Urbanski
United States Magistrate Judge