

FILED: March 30, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EDWARD P. DINAN, :
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 Plaintiff :
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 vs. : CIVIL ACTION NO. 3:CV-98-0626
 : (CHIEF JUDGE VANASKIE)
 :
 KENNETH S. APFEL, :
 Commissioner of Social Security, :
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 :
 Defendant :

MEMORANDUM

Presently pending in the above-captioned matter is plaintiff Edward Patrick Dinan's objections to the Report and Recommendation of United States Magistrate Judge J. Andrew Smyser proposing that the decision of the Commissioner of Social Security denying Dinan's application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401, et seq., be affirmed. Mr. Dinan contends that the Commissioner's decision that Mr. Dinan retained the ability to engage in sedentary work despite herniated lumbar and cervical disks was not supported by substantial evidence. In particular, Mr. Dinan claims that the Commissioner gave insufficient weight to the opinion of Mr. Dinan's treating orthopedic surgeon; accorded too much weight to a consulting Board-certified neurologist; and ignored an opinion of the testifying vocational expert that Mr. Dinan was incapable of gainful employment. Mr. Dinan also claims that the Commissioner should have found that Mr. Dinan satisfied the requirements for a presumptive finding of disability under the Commissioner's "Listing of Impairments" for disorders of the spine set forth in 20 C.F.R. pt. 404, subpt. P.,

App. 1, § 1.05C.

Having carefully reviewed the record de novo, I find that the Commissioner's decision is supported by substantial evidence. In particular, the medical evidence of record is plainly sufficient to support a rational conclusion that, as of the date that Mr. Dinan's insured status expired, March 31, 1994, Mr. Dinan did not meet the requirements for a listed vertebrogenic disorder and his lumbar and cervical problems did not preclude him from engaging in sedentary work with appropriate restrictions. Moreover, contrary to Mr. Dinan's assertion, the Commissioner's finding that there was work available in the economy that Dinan could perform is supported by the testimony of the vocational expert. Accordingly, judgment will be entered in favor of the Commissioner.

I. BACKGROUND

Mr. Dinan, a high school graduate with a birth date of June 6, 1949, was last gainfully employed on January 23, 1989, when he sustained a work-related back injury. At the time of his injury, Mr. Dinan was employed as an insulator, an occupation classified as skilled and involving heavy exertion. (Record of Commissioner's Decision ("R") at 65-66.)

During the course of the next several years, Mr. Dinan was treated by Eric L. Hume, M.D., a board-certified orthopedic surgeon practicing as part of the Jefferson Orthopedic Group in Philadelphia, Pennsylvania. Mr. Dinan was also periodically examined by several other physicians, including Victor T. Ambruso, M.D., a board-certified neurosurgeon, John H. Presper, M.D., and Carson J. Thompson, M.D., a board-certified neurological surgeon.

On March 31, 1994, Mr. Dinan's insured status for disability insurance benefits under Title II of the Social Security Act expired. Mr. Dinan had not applied for disability insurance

benefits prior to that date.

On July 22, 1994, Mr. Dinan was involved in an automobile accident. As a result of that accident he sustained an injury to his neck. While he continued to be treated by Dr. Hume for his lower back condition, Mr. Dinan also began seeing Emmanuel E. Jacob, M.D., for cervical radiculopathy. (R. 251-58.)

On March 26, 1996, Mr. Dinan applied for disability insurance benefits, alleging disability since the date of his work-related injury on January 23, 1989. (R. 97-101.) After the state agency denied Dinan's application initially and on reconsideration, a hearing was conducted on June 5, 1997 by an administrative law judge ("ALJ") (R. 28-70). In addition to receiving Mr. Dinan's testimony, the ALJ heard from a medical expert, Joseph R. Sgarlat, M.D. (a Board-certified orthopedic surgeon), and a vocational expert, James T. Chickson.

On June 25, 1997, the ALJ issued his decision. (R. 11-19.) Proceeding through the five-step sequential evaluation process for determining disability, see 20 C.F.R. § 404.1520,¹ the ALJ found that Mr. Dinan had not engaged in any substantial gainful activity since January 23, 1989 and that his back condition constituted a "severe" impairment in that it caused "significant vocationally relevant limitations." (R. 12.) Observing that no treating or examining

¹ The five-step process consists of ascertaining (1) whether the claimant has engaged in any substantial gainful activity during the relevant time period; (2) whether the claimant has a "severe" impairment, meaning one which "significantly limits . . . physical or mental ability to do basic work activities . . .," 20 C.F.R. § 404.1520(c); (3) whether the impairment meets or equals the requirements of a "listed impairment," in which case the claimant will be found to be disabled without consideration of age, education and work experience; (4) whether the claimant can return to his or her past relevant work; and (5) if not, whether the claimant can perform other work in the national economy consistent with the claimant's impairments, limitations, age, education, and work experience.

physician had mentioned findings equivalent in severity to the criteria of any listed impairment and that Dr. Sgarlat had testified at the hearing that the medical evidence did not support a finding that Mr. Dinan satisfied the requirements for any listed impairment, the ALJ found that Mr. Dinan was not entitled to a presumption of disability at step three of the five-step sequential evaluation process. (R. 13.) At the fourth step, the ALJ concluded that Mr. Dinan was unable to return to his past relevant work. (R. 16.) Proceeding to the final step in the evaluation process, the ALJ found that Mr. Dinan retained the ability to engage in sedentary work with limitations. (Id.) Taking into account such limitations as being able to sit or stand at will, being able to stoop, kneel, crouch or crawl and being able to occasionally climb, balance, and reach above the shoulder level, the ALJ, based upon the testimony of the vocational expert, found that Mr. Dinan could work as a telemarketer, parking lot attendant, examiner, and trimmer of goods. (R.17.) Accordingly, the ALJ found that “on the date his insured status expired, Mr. Dinan retained the capacity to make an adjustment to work which exists in significant numbers in the national economy.” (Id.)

On February 12, 1998, the Social Security Administration Appeals Council denied Mr. Dinan’s request for review. This action was commenced on April 15, 1998. In accordance with the then-customary practice, the parties filed cross-motions for summary judgment. By Report and Recommendation filed on April 2, 1999, United States Magistrate Judge J. Andrew Smyser proposed that the Commissioner’s motion for summary judgment be granted, and Mr. Dinan’s motion denied. Mr. Dinan timely filed objections to the Report and Recommendation, warranting de novo review of the record and plenary consideration of the issues raised in his objections. See 28 U.S.C. § 636(b)

II. DISCUSSION

The penultimate issue in this case is whether substantial evidence supports the Commissioner's decision that Mr. Dinan was not disabled during the period of time that he was eligible for disability insurance benefits. As recognized in Matullo v. Bowen, 926 F.2d 240, 244 (3d Cir. 1990), under the applicable regulations Mr. Dinan was "required to establish that he became disabled prior to the expiration of his insured status." See 20 C.F.R. § 404.131. Mr. Dinan was insured for disability insurance benefits as of January 23, 1989, the date he alleges he became unable to work, and continued to meet the insured status requirements through March 31, 1994, but not thereafter. Thus, as recognized by the Commissioner, the relevant time frame here is January 23, 1989 through March 31, 1994.

Eligibility for disability insurance benefits under the Social Security Act is dependent upon an "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). A claimant is considered unable to engage in any substantial gainful activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A). The Commissioner's determination that the claimant retains the residual functional capacity to engage in some substantial gainful activity is binding if supported by "substantial evidence" in the record. Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). The role of the reviewing court is thus

limited to determining whether the evidence on which the Commissioner relied is “such as a reasonable person would accept as adequate to support [the Commissioner’s] conclusion.” Gilliland v. Heckler, 786 F.2d 178, 183 (3d Cir. 1986). If the evidence upon which the Commissioner relied would be sufficient to justify a refusal to direct a judgment in favor of the claimant were the case before a jury, the “substantial evidence” requirement is met. See Olsen v. Schweiker, 703 F.2d 751, 753 (3d Cir. 1983).

Mr. Dinan contends that the “substantial evidence” standard was not met with respect to the ALJ determination that Mr. Dinan failed to meet the requirements for a listed impairment attributable to a vertebroprogenic disorder found in Section 1.05C of the Commissioner’s Listing of Impairments. Section 1.05C requires that a vertebroprogenic disorder, such as a herniated nucleus pulposus or spinal stenosis, persist at least three months despite prescribed therapy and be expected to last twelve months. In addition, the claimant must show both (1) pain, muscle spasm and significant limitation of motion in the spine, and, (2) appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. 20 C.F.R. pt. 404, subpt. P., App. 1, § 1.05C.

“[T]o show that [an] impairment matches a listing, it must meet all of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify.” Sullivan v. Zebley, 493 U.S. 521, 530 (1990). The claimant bears the burden of showing that he satisfies all the criteria for a listed impairment. See Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993). If a claimant satisfies all applicable criteria or their equivalents, he is considered disabled. See Kangus v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987).

While Mr. Dinan contends that he meets the requirements of the listed impairments for a vertebrogenic disorder, he does not point to any competent objective medical evidence that substantiates his assertion. Dr. Sgarlat, a Board-certified orthopedic surgeon, reviewed the pertinent medical records and testified that there was no evidence of appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. (R. 53-55, 58). Dr. Sgarlat's observation is confirmed by an examination of the medical records. In particular, Dr. Hume noted that as of April 7, 1994, Mr. Dinan's reflexes were symmetrical and straight leg raising was negative for nerve impingement. (R. 275.) In June of 1992, Dr. Hume stated that there were "no special neurological levels on examination." (R. 205.) In December of 1991, he observed that "sitting root and reflexes are fine." (R. 202.) Dr. Carson Thompson noted in a letter dated May 3, 1990, that Mr. Dinan's reflexes were intact and symmetric. (R. 192.) In a July 26, 1991 letter, Dr. Thompson indicated that he had discerned no motor weakness or deficit and that there was no muscle atrophy. (R. 191.) Dr. Sgarlat explained that the absence of muscle atrophy was inconsistent with significant motor loss with muscle weakness, a criteria that must be satisfied under the Commissioner's listing of impairments for vertebrogenic disorders. (R. 54.) Clearly, the evidence was such that a reasonable mind might accept as adequate to support the conclusion that Mr. Dinan's back condition did not satisfy §1.05C.

Mr. Dinan argues that Dr. Sgarlat's opinion on this point should be discounted because Dr. Sgarlat had not considered the reports of Dr. Emmanuel Jacob. Mr. Dinan's reliance on Dr. Jacob's reports, however, is misplaced. Dr. Jacob examined Mr. Dinan for injuries sustained in an automobile accident that occurred after Mr. Dinan's insured status

had expired. While Mr. Dinan had voiced some complaints of a cervical problem prior to his July 22, 1994 motor vehicle accident (R. at 185), he did not complain of disabling symptoms attributable to a neck condition until after the motor vehicle accident. Because Dr. Jacob's reports relate to Mr. Dinan's post-motor vehicle accident condition, they are not relevant to a determination of whether Mr. Dinan was able to engage in substantial gainful activity prior to the expiration of his insured status.

Mr. Dinan also argues that the Commissioner's decision that Mr. Dinan retained the capacity to engage in sedentary work with restrictions can not be regarded as supported by substantial evidence because it is contrary to the opinion of Mr. Dinan's treating physician, Dr. Hume. While a treating physician's opinion "must be accorded great weight," Allen v. Bowen, 881 F.2d 37, 41 (3d Cir. 1989), it is entitled to controlling weight only if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record" 20 C.F.R. § 404.1527(d)(2). The Commissioner is not free to employ his own expertise against that of a treating physician who relies upon competent medical evidence, but the Commissioner is not bound by the opinion of a treating doctor where there is contradictory medical evidence. See Plummer, 186 F.3d at 429. Where there is conflicting medical evidence, it is the Commissioner's function, and not the reviewing court's prerogative, to resolve that conflict. See Rosado v. Sullivan, 805 F.Supp. 147, 153 (S.D. N.Y. 1992). "Substantial evidence" sufficient to overcome the opinion of an attending doctor may consist of reports or testimony of impartial medical consultants. See Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991); Fisher v. Secretary of Health and Human Services, 818

F.Supp. 88, 90-91 (D. Del. 1993).

The Commissioner acknowledged Dr. Hume's opinion, but found that it was "inconsistent with the objective medical finding of no significant neurological deficits noted by the other doctors who did consultative examinations and with the opinion of the independent medical expert [Dr. Sgarlat] that testified at the hearing." (R.14.) Dr. Thompson, who had examined Mr. Dinan in 1990, 1991 and 1992, consistently noted the absence of significant lumbar nerve root impingement, with reflexes remaining intact and symmetric without any sensory impairment and the absence of any motor weakness or deficit or muscle atrophy. (R. 190-92.) Dr. Thompson considered Mr. Dinan capable to work in at least a light duty capacity. (Id.)² Dr. Presper, who examined Mr. Dinan in October of 1989, arrived at similar conclusions, finding that strength in Mr. Dinan's lower extremities was normal, reflexes were symmetrical, and there was no evidence of focal or generalized weakness. (R. 172.) Dr. Presper opined that Mr. Dinan retained the capacity to engage in sedentary work. (Id.) Dr. Ambruso also examined Mr. Dinan several times during 1989. He also found that there was the absence of lumbar nerve involvement with no specific sensory or motor deficit. (R. 163-65.) As noted above, Dr. Hume had acknowledged the absence of objective evidence of neurological deficits referable to Mr. Dinan's back condition. Dr. Sgarlat, after reviewing the pertinent records, concluded that Mr. Dinan had the capacity to perform sedentary work with a sit or stand option. (R. 228-30.)

² While Mr. Dinan complains that Dr. Sgarlat did not consider the post-insured status reports of Dr. Jacob, he ignores the fact that Dr. Hume did not review Dr. Thompson's records. (R. 287.)

The objective findings of all the examining physicians (Drs. Hume, Ambruso, Thompson and Presper) coupled with the conclusions of the reviewing orthopedic surgeon, Dr. Sgarlat, would plainly be sufficient to warrant the refusal of entry of judgment as a matter of law in favor of Mr. Dinan if this case were presented to a jury. As otherwise stated by the Commissioner, “the findings of . . . Drs. Hume, Ambruso and Thompson, an examining physician, Dr. Presper, and a Board-certified orthopedic surgeon, Dr. Sgarlat, are reasonably adequate to support [the] determination that Plaintiff retained the residual functional capacity to perform sedentary work which accommodates his functional limitations through March 31, 1994.” (Response to Plaintiff’s Objections to the Report and Recommendation at 4.)

Mr. Dinan, nevertheless, insists that the Commissioner’s decision must be set aside as inconsistent with the testimony of the vocational expert. In this regard, Mr. Dinan contends that the vocational expert testified that Mr. Dinan would be precluded from all jobs if he could not do any bending. (R. 67-68.) Noting that a restriction to “avoid bending” had been incorporated into the ALJ’s hypothetical question, Mr. Dinan concludes that there is no competent evidence or work existing in the national economy that Mr. Dinan is capable of performing.

The unsound premise of Mr. Dinan’s argument is that he is unable to do any bending. Dr. Sgarlat, in completing a “Physical Capacities Evaluation,” indicated that Mr. Dinan could occasionally bend, as well as squat, crawl and climb, and that he was capable of frequently lifting up to 5 pounds and occasionally lifting from 6-10 pounds. (R. 230.) Mr. Dinan does not point to any evidence of record that says that he is unable to bend. Indeed, he has not

pointed to any evidence that suggests that he must avoid any bending. Thus, as pointed out by the Commissioner, a “hypothetical question based on Plaintiff’s alleged inability to perform any bending is irrelevant.” (Response to Objections to the Report and Recommendation at 6.)

A hypothetical question posed to a vocational expert is adequate if it fairly sets forth “every credible limitation established by the physical evidence.” Plummer, 186 F.3d at 431. In this case, the ALJ first asked a hypothetical question that assumed certain restrictions, such as the ability to sit or stand at Mr. Dinan’s option with an ability to lift no more than 10 pounds, and the vocational expert identified several jobs that Mr. Dinan could perform. (R. 66-67.) This testimony “can be relied upon as substantial evidence supporting the ALJ’s conclusion that [Mr. Dinan] is not totally disabled.” Plummer, 186 F.3d at 431. The later-added restriction of avoiding any bending is simply not pertinent because it is not compelled by the physical evidence. Accordingly, the Commissioner’s finding of no disability is supported by the vocational expert’s testimony.

III. CONCLUSION

In the context of applications for social security disability benefits “[c]omplaints of disabling back pain are among the most difficult types of claims to resolve with any degree of certainty.” Taybron v. Harris, 667 F.2d 412, 415 (3d Cir. 1981). Moreover, “fixing the onset of disability . . . is somewhat arbitrary.” Mims v. Califano, 581 F.2d 1211, 1216 n.10 (5th Cir. 1978). In this regard, “it is not the beginning of a condition that determines eligibility [for] disability benefits but rather only when and if it reaches a point that it precludes all substantial

gainful activity.” McAdams v. Secretary of Health and Human Services, 726 F.Supp. 579, 587 (D. N.J. 1989). In this case, Mr. Dinan has repeatedly emphasized evidence that came into existence after his July 22, 1994 automobile accident and after his insured status had expired. But the pertinent time frame precedes the impact of the injuries suffered in the July 22, 1994 accident. As of March 31, 1994, there was no objective evidence of significant neurologic deficit attributable to the 1989 work-related injury. The medical evidence upon which the Commissioner relied was clearly such as a reasonable mind might accept to support a finding of non-disability. Accordingly, the Report and Recommendation of Magistrate Judge Smyser will be adopted, the Commissioner’s motion for summary judgment will be granted, and Mr. Dinan’s summary motion will be denied. An appropriate Order is attached.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

