UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-11115-RWZ

BRETT A. PHILLIPS

V.

JO ANNE B. BARNHART

MEMORANDUM OF DECISION AND ORDER

August 8, 2003

ZOBEL, D.J.

Alleging a knee impairment and a shoulder separation, claimant Brett Phillips applied for Social Security disability benefits in October 2000. His claim was denied initially and on reconsideration. His request for a hearing was granted, and a hearing was held before an Administrative Law Judge ("ALJ") on November 2, 2001, in Manchester, New Hampshire.[1] In a decision dated January 23, 2002, the ALJ determined that claimant was not entitled to disability benefits. The decision became final when the Appeals Council denied claimant's request for review on March 22, 2002. Shortly thereafter, claimant filed a complaint seeking judicial review of the Commissioner's decision. He then filed a Memorandum of Appeal to the District Court which was unaccompanied by a motion. The Commissioner has filed a Motion for an Order affirming her decision.

Pursuant to 42. U.S.C. § 405(g), any individual may obtain review of a final administrative decision by a district court which "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the

[1] At the time, plaintiff lived in New Hampshire, but now he lives in Massachusetts.

decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." The Court must uphold the Commissioner's decision if it is supported by substantial evidence. Rohrberg v. Apfel, 26 F. Supp. 2d 303, 305-6 (D. Mass. 1998). Substantial evidence exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the Commissioner's] conclusion." Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

I. Medical Opinions

The ALJ is not required to give greater weight to the opinions of treating physicians than those who merely review the record. Arroyo v. Secretary of Health and Human Services, 932 F.2d 82, 89 (1st Cir. 1991) (citing Tremblay v. Secretary of Health and Human Services, 676 F.2d 11, 13 (1st Cir. 1982)). However, "in most cases the opinion of the treating physician should be afforded controlling weight unless it is contradicted by or inconsistent with other substantial evidence in the record." Mustain v. Shalala, 1996 WL 131131 (D. Mass.). When the ALJ does not credit the treating physician's opinion, he must apply the following factors in determining the import of the opinion: 1) knowledge of the claimant's impairments based on length, nature, and extent of treatment; 2) evidence supporting the opinion; 3) whether the opinion is consistent with other evidence in the record; and/or 4) whether the opinion pertains to medical issues in the physician's specialty. Weiler v. Shalala, 922 F. Supp. 689, 696 (D. Mass. 1996) (citing 20 C.F.R. § 404.1527(d)(2)(i), (d)(3), (d)(4), and (d)(5)); Makuch v. Halter, 170 F. Supp. 2d 117, 125 (D. Mass. 2001) ("[T]he ALJ must give 'good reasons' for the weight given to the treating physician's opinions). Where there is no contradictory medical evidence based on an examination of the claimant, the ALJ's determination that

the treating physician's opinion is inadequate to receive controlling weight requires him to seek clarification or additional evidence from the treating physician in accordance with 20 C.F.R. § 404.1512(e).[2] Newton v. Apfel, 209 F.3d 448, 453 (5th Cir. 2000). In any case, the ALJ cannot "ignore medical evidence or substitute his own views for uncontroverted medical opinion." Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999).

According to the record, three doctors treated the claimant: Dr. Arnold Miller, claimant's primary physician; Dr. Valentin Michev, who found that claimant suffered from mild asthma; and Dr. Frank Graf, an orthopedic surgeon. Drs. Miller and Graf found that claimant could not work for a year, while Dr. Michev gave no opinion. After an MRI scan, Dr. Miller, found that the claimant had a torn anterior cruciate ligament ("ACL"), which made the claimant's right knee "quite loose." He also diagnosed a chronic separation of the right shoulder. On Dr. Miller's recommendation, claimant underwent ACL reconstruction surgery. On September 8, 2000, Dr. Miller opined that claimant could not return to work for a full year from the date of his knee surgery because upon recovery, he would probably have to undergo shoulder surgery. The ALJ accorded the opinion of Dr. Miller "little weight" because it was "not well supported or

---

[2] 20 C.F.R. § 404.1512(e) states in relevant part that:

> When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision . . . We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques.

adequately explained." (Op. at 3).

On April 27, 2001, the claimant saw Dr. Frank A. Graf, an orthopaedic surgeon, who diagnosed a "complete rupture of conoid trapezoid and acromioclavicular joints with substantial restrictions in ranges of motion of the right shoulder and anterior cruciate insufficient right knee with marked instability." (Op. at 4). Consistent with Dr. Miller's views, Dr. Graf opined that claimant had very limited functional capacity and concluded that he is "without work capacity and is unemployable. His condition is expected to last consecutively month after month for a minimum of 12 months." The ALJ found that Dr. Graf's opinion was also "entitled to little weight" because it, too, was "not well supported or adequately explained." Id.

Before rejecting the treating physicians' opinions, the ALJ was required to seek additional evidence as he had no contrary or inconsistent medical opinions. Furthermore, he failed to judge the opinions in accordance with the factors detailed in the regulations. That requirement is not met by his conclusory statements dismissing the opinions as "not well supported or adequately explained."

II. Claimant's Testimony

A. Subjective Pain Testimony

"An ALJ must consider a claimant's subjective assertion of pain by examination of the following factors: (1) the nature, location, onset, duration, frequency, radiation, and intensity of pain; (2) any precipitating or aggravating factors; (3) the type, dosage, effectiveness, and adverse side effects of any pain medication; (4) any treatment, other than medication, for the relief of pain; (5) any functional restrictions; and (6) the claimant's daily activities." Rohrberg v. Apfel, 26 F. Supp. 2d 303, 308 (D. Mass. 1998)

(finding that the ALJ erred as a matter of law by not examining claimant's allegations of pain according to the enumerated factors). Where the claim of pain is not supported by objective findings, and further review of the medical evidence is not helpful, the ALJ must engage in a full assessment: "before a complete evaluation of this individual's [residual functional capacity ("RFC")] can be made, a full description of the individual's prior work record, daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered." Avery v. Secretary of Health and Human Services, 797 F.2d 19, 23 (1st Cir. 1986) (quoting the *Secretary's Program Operations Manual System*, DI T00401.570.). Specifically, the claimant's descriptions of his daily activities are useful in evaluating his pain and its effects. Id.

Here, the ALJ did not analyze the claimant's reported pain at all. He did not apply the enumerated factors to claimant's testimony. More specifically, he did not ask about aggravating factors, about pain medication, or treatment alternatives. Notably, he determined that claimant's residual functional capacity allowed him to do sedentary work, yet he did not obtain a detailed description of claimant's daily activities in order to fully assess how the pain affected him. Because the ALJ failed to consider the necessary factors when analyzing claimant's complaints of pain, his determination of claimant's RFC "was analytically flawed and not supported by substantial evidence." Rohrberg, 26 F. Supp. 2d at 309.

B. Claimant's Credibility

When the ALJ discounts or disregards the claimant's testimony, he "must make

specific findings as to the relevant evidence he considered in determining to disbelieve the [claimant]." Da Rosa v. Secretary of Health and Human Services, 803 F.2d 24, 26 (1st Cir. 1986). Here, the ALJ concluded that the claimant's "complaints regarding his pain were credible but not to the extent alleged." He found that the complaints were reasonable in light of his impairments, but the treatment notes were inconsistent with disabling pain because the pain was described as severe only on an intermittent basis.

The ALJ's determination of claimant's credibility is not supported by substantial evidence. Absent a medical opinion, the ALJ cannot find that claimant's intermittent, but severe pain is not disabling. See Nguyen v. Chater, 172 F.3d 31, 35 (1 Cir. 1999) (As a layperson, the ALJ cannot interpret raw medical data in functional terms.). Furthermore, the ALJ did not make the necessary specific findings explaining why he discounted the claimant's testimony concerning the extent of his pain.

III. Substantial Gainful Work

An applicant is considered disabled only if he has a medical condition "which makes it impossible to perform any substantial gainful work, and which can be expected to result in death or to last for a continuous period of at least twelve months." Thomas v. Barnhart, 2003 WL 1716808 (D. Mass.) (citing 42 U.S.C. § § 416(i)(1), 423(d)(1)). Initially, the claimant must show that his disability does not allow him to work his former jobs, then the burden shifts to the Secretary to show that the claimant can work other jobs that exist in the national economy. Sherwin v. Secretary of Health and Human Services, 685 F.2d 1, 2 (1st Cir. 1982) (citation omitted). Before relying on the testimony of the vocational expert ("VE"), the ALJ must resolve any conflict between job descriptions provided in the Dictionary of Occupational Titles ("DOT") and the VE's

testimony. S.S.R. 00-4p (Cum. Ed. 2000).

At the hearing, the VE explained that although the security guard position is denoted as an exertionally light job in the DOT, there are some sedentary jobs within that category. (Tr. at 21-22). Defendant notes that the DOT lists the approximate maximum exertional level for each position, not the possible range. Jones v. Chater, 72 F.3d 81, 82 (8th Cir. 1995). However, the VE's estimation that there are 87,000 sedentary security guard jobs in the national economy and 280 in New Hampshire is wholly unsupported. (Tr. at 18). He stated that the Department of Labor did not provide statistics on the number of existing sedentary security jobs in the country. (Tr. at 23). He agreed "to a degree" that there was no way to quantify how many sedentary positions there are because "nobody keeps the statistics subdivided between light and sedentary." (Tr. at 24). The VE's general statement that he relied on his knowledge and expertise is insufficient to constitute substantial evidence and to the extent that the ALJ relied on these numbers, his decision is unsupported.

For the reasons stated, the decision below is vacated, and the case remanded for the required analyses detailed above and, where necessary, for further development of the record.

DATE

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE