STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JOSEPH STONE,

Petitioner,

v

File No. 05-24704-AA
HON. PHILIP E. RODGERS, JR.

DEPARTMENT OF HUMAN SERVICES,

Respondent.
/

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DECISION ON APPEAL

This is an appeal from the decision of an administrative law judge ("ALJ") finding Petitioner not disabled and denying Petitioner Medicaid and State Disability Assistance ("SDA") benefits. This Court entertained the oral arguments of counsel on December 19, 2005 and took the matter under advisement. The Court now issues this decision and, for the reasons stated herein, remands the case to the Department of Human Services for an award of benefits.

The issues presented on appeal are as follows:

I. Whether the administrative law judge was bound by the Medical Review Team and State Hearings Review Team determinations that Petitioner has a severe physical impairment that will not allow Petitioner to return to work; and

II. Whether the administrative law judge's decision is supported by competent, material and substantial evidence on the whole record;

III. Whether the administrative law judge was biased and his decision was arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

I.

The Petitioner contends that the ALJ should have but failed to give controlling weight to the earlier determinations of the Medical Review Team ("MRT") and the State Hearings Review Team ("SHRT") that found the Petitioner disabled through step 4 of the sequential analysis set forth in the Social Security Regulations. 20 CFR 416.920.

The 5-step sequential evaluation process that must be utilized to determine disability is set forth in the federal regulations. 20 CFR 416.920. If at any point during the analysis it is determined that the applicant is disabled or not disabled the inquiry ceases. The steps in the sequential analysis are as follows:

1. If a claimant is working and the work he is doing is substantial gainful activity, he will not be found disabled regardless of his medical condition or age and work experience.

2. A claimant can only be found disabled if he is unable to do 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 12 months. (See 416.905.) The claimant's impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. (See 416.908.)

3. When a claimant's impairment meets or equals a listed impairment in appendix 1 and meets the duration requirement, he will be found disabled without considering his age, education, and work experience.

4. A claimant's impairment must prevent him from doing past relevant work. If a determination or decision cannot be made at the first three steps of the sequential evaluation process, the claimant's residual functional capacity will be compared with the physical and mental demands of past relevant work. (See 416.960(b).) If a claimant can still do this kind of work, he will not be found disabled.

5. A claimant's impairment must prevent him from making an adjustment to any other work. If he cannot do his past relevant work because he has a severe impairment (or he did not have any past relevant work), the residual functional capacity assessment will be considered, together with vocational factors (age, education, and work experience) to determine if the claimant can make an adjustment to other work. (See 416.960(c).). If the claimant can make an adjustment to other work, he will be found not disabled. If he cannot, he will be found disabled.

The Petitioner contends that the MRT and the SHRT "determined that Petitioner had a disabling condition which met the requirements through step four of the sequential analysis" or, in other words that both the MRT and SHRT found that the Petitioner had physical impairments which are severe and would not allow the Petitioner to return to his previous work. (Petitioner's brief, p 8). Based on principles of administrative *res judicata*, the Petitioner contends that the ALJ was bound by their analysis and conclusion.

The MRT found that the Petitioner's "impairments do not meet/equal the intent or severity of a Social Security listing." The SHRT found that the Petitioner "retains the capacity to perform a wide range of light work." Both the MRT and the SHRT found that the Petitioner was not disabled.

While the MRT and the SHRT based their determinations on the Petitioner's vocational profile, indicating that they reached step 4 in the sequential analysis, there is nothing in their reports to indicate that they made the requisite finding under step 2 that the Petitioner was "unable to do any substantial gainful activity" by reason of a "severe impairment."

The Petitioner relies upon the case of *Drummond v Commissioner of Social Security*, 126 F3d 837, 841 (6th Cir1997). His reliance is misplaced. In *Drummond*, the Court held that *res judicata* applies in an administrative law context following a trial-type hearing. Thus, "when the Commissioner makes a final decision concerning a claimant's entitlement to benefits, the Commissioner is bound by that determination absent a change in circumstances." *Id.*

The MRT and SHRT determinations in the instant case were not made "following a trial-type hearing." They were not "final" decisions. Therefore, principles of administrative *res judicata* do not apply.

II.

The ALJ found at step two of the sequential analysis that a "severe physical impairment was not medically established." He based this conclusion on a finding that the Petitioner's "disabling complaints. . . are out of proportion to the objective medical evidence as it relates to an impairment that would prevent him from engaging in substantial gainful work." Further, he found that the Petitioner's treating physician's assessment and statement that the Petitioner is "unable to work because of back pain" is an "unsupported medical conclusion" that is "inconsistent with the [medical] reports."

The Petitioner argues that the ALJ's decision is not supported by competent, material and substantial evidence on the whole record because the ALJ failed to follow Social Security Rulings 86-8, 96-2p and 95-p2 regarding how to evaluate medical evidence and pain, and that the ALJ did not properly evaluate the opinion of Dr. Wine consistent with the regulation on treating source opinions. 20 CFR 416.927(d). The Respondent, on the other hand, argues that the ALJ properly determined that the Petitioner was not disabled at the second step of the five-step sequential analysis.

This appeal is governed by Section 37 of the Social Welfare Act and the Administrative Procedures Act ("APA"), being MCL 24.301, *et seq*. Section 106 of the APA states in pertinent part:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
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> (b) In excess of the statutory authority or jurisdiction of the agency.
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> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.
>
> (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

It is important to keep in mind the Petitioner's medical history and the overlapping procedural history of this case.

In 1999, the Petitioner was involved in a three-wheel, motor vehicle accident as a result of which he suffered a fracture of the spine at T12 and had fusion surgery. In December of 2003, he broke his left leg and had operative reduction and internal fixation. There is a note in his medical record from December 20, 2003, when he went to Munson because of his broken leg, that: "He does have chronic pain syndrome."

In May of 2004, he experienced persistent pain in his right hand. On May 6, 2004, he went to Munson Medical Center where, at the time of presentation, his entire hand was "painful

with mottled discoloration." He was admitted to the hospital and a workup showed thromboembolic disease with some evidence of thrombosis as high as the subclavian artery with complete occlusion of both the radial and ulnar arteries. He showed ischemic changes of the tips of the second and third fingers, and was aware that if it became progressive he may need at least partial digital amputation. It was recommended that he undergo rib resection to decompress his thoracic outlet – relief the blockage in the arteries to his hand. He was treated with pain medication and anti-coagulants and ultimately discharged on a stable pain regimen on May 20, 2004.

On July 7, 2004, the Petitioner again went to the emergency room at Munson Medical Center because he "ran out of his medications" and was experiencing "numbness in leg, pain in hip, groin and leg, finger pain." He had an appointment later that day with Dr. Leslie because of his "necrotic digits." His diagnosis was "acute and chronic back pain" and "necrotic digits, right hand." He was scheduled for an outpatient MRI.

On July 8, 2004, the Petitioner had an MRI of his lumbar spine. The MRI revealed "small disc herniation on the left at L4-5 with another on the right at L2-3 the clinical significance of which is uncertain." However, the report noted that the herniation at L4-5 was "encroaching on the L5 nerve root" and the herniation at L2-3 "would most likely effect [sic] the L3 nerve root."

On July 21, 2004 the Petitioner applied for State Disability Assistance ("SDA") and Medicaid. There was an initial review by the MRT on August 2, 2004.

On August 7, 2004, the Petitioner was examined by Dr. Simpson, a DDS physician. At that time Petitioner was taking "Neurontin 300 mg once every eight hours for discomfort as well as Morphine 60 mg twice daily and Methadone 10 mg three times daily." Dr. Simpson found some limited grip strength in the right hand and only a small degree of deficiency in cervical spine flexion, extension and right lateral flexion and "mild difficulty squatting secondary to low back discomfort." Although Petitioner had undergone an MRI, Dr. Simpson did not have or review the MRI results.

On August 27, 2004, the Petitioner went to the Family Practice Center to establish himself as a new patient. He reported that he was hospitalized in May because of his right hand and that while he was in the hospital he was found to have "new onset hypertension." He further reported that he was being seen by the pain clinic for his ischemic pain and that Drs. Leslie and

Quinn were managing his hand ischemia. However, Dr. Quinn wanted him to have a cervical first rib resected to help his thoracic outlet syndrome but that he did not have insurance and was afraid of the extensive medical bill so he opted to stay on anti-coagulants. He stated that he was at the Family Practice Clinic because of "a new onset of acute and chronic back pain." He reported that the methadone he was on for the pain associated with his hand ischemia had helped somewhat with the pain but not with the paresthesia that he is experiencing in his leg. He was diagnosed with "acute low back pain secondary to herniated/bulging disk with left lower extremity radiation." Because he did not have insurance and was already on high doses of Coumadin, the doctor tried conservative therapy with Tylenol 4000 mg a day. She also recommended that he be enrolled in physical therapy as soon as he gets some insurance coverage. His hypertension was stable and he was to continue his medications. He was also to continue his Coumadin and other pain medications through the pain clinic and continue management by Drs. Quinn and Leslie of his thoracic outlet syndrome with resultant emboli.

The MRT denied benefits on September 29, 2004.

On October 13, 2004, the Petitioner again saw Dr. Wine at the Family Practice Clinic for chronic back pain. He had recently been discharged from the pain clinic for marijuana use and had stopped taking all narcotic medications. He had "sciatic type symptoms down into his left leg." Dr. Wine started him on a regimen of Ultram, Flexeril and Tylenol.

On October 27, 2004, the Petitioner again went to the Family Practice Clinic because of back pain. He reported that the new regimen of pain medications was not working. "Musculoskeletal exam demonstrates significant tissue texture abnormalities appreciated throughout the entire lumbar region with increased tissue tension, does describe some radicular signs down the left lower extremity." He was scheduled for surgery on his hand and stated that the pain [associated with his hand] had been controllable. Dr. Swan increased the medications for his back pain, but noted that "[i]f still intolerable, would consider addition of a narcotic." She also noted that the Petitioner was aware that his back condition may be "life long" and that prolonged treatment with narcotics was not recommended.

On December 20, 2004, Dr. Wine completed a form entitled "Disorders of the Spine" stating that Petitioner has a disorder of the spine because of "T-12 fracture with fusion and L2-L5 disc herniation with root compression and neuro-anatomic distribution of pain." As a result he has limitation of motion of the spine, muscle weakness, diminished reflexes in his left leg

with positive straight-leg raising both sitting and supine. These limitations are expected to remain in effect "indefinitely." Dr. Wine further opined that this low back chronic pain condition either alone or in combination with the thoracic outlet syndrome causing chronic hand pain, was equivalent to the spinal disorders impairment described on the form which is taken directly from 20 CFR 404, Subpart P, Appendix 1.

The SHRT issued its decision denying Petitioner benefits on February 3, 2005.

On February 9, 2005, Dr. Wine wrote to the Friend of the Court that Petitioner has "chronic back pain due to a history of a fracture at the level of T12 and precious fusion surgery. He also had bulging disk at L2 through L5. He would be a good candidate for physical therapy and rehabilitation and occupational therapy but is limited by his financial resources and lack of insurance. At this time, he is unable to work due to the amount of pain that he has."

An administrative hearing was held on April 20, 2005 and the record was left open so that additional medical information and correspondence could be submitted. On May 10, 2005, the SHRT again denied Petitioner benefits. On May 13, 2005, the ALJ issued a hearing decision affirming the denial of benefits. Petitioner requested rehearing/reconsideration which the Department of Human Services denied on June 17, 2005.

The Petitioner applied for benefits because of chronic pain – in his back, right hand and left leg. He initially focused on his hand pain because he was facing expensive, thoracic surgery for which he did not have insurance coverage. However, it is clear from the Petitioner's medical records that he has had chronic back pain with intermittent flare ups since the 1999 accident and fusion surgery. In May of 2004, this condition was overshadowed by the pain associated with his ischemic hand. While he was on narcotics for the hand pain, he did not experience significant back pain. Once the narcotics were terminated, the back pain alone or in conjunction with the hand pain became "intolerable."

The ALJ discounted the Petitioner's disabling complaints because they were "out of proportion to the objective medical evidence as it relates to an impairment that would prevent him from engaging in substantial gainful work." The only medical evidence he cites is the examination by the DDS physician Dr. Simpson on August 7, 2004 and the medical examinations by Dr. Wine on October 13, 2004 and December 20, 2004. He concludes that these reports show only "a non-severe impairment."

The ALJ ignored the Petitioner's medical history of chronic pain, the MRI results, the deterioration of the spine and increasing back pain that is consistently documented in the medical records, and the "Disorders of the Spine" form that was completed by Dr. Wine on December 20, 2004. He also totally discounted Dr. Wine's medical conclusion stated in the February 9, 2005 letter that Petitioner "is unable to work due to the amount of pain that he has" because "it is an unsupported medical conclusion" and "is inconsistent with the [medical] reports." The ALJ concluded that Petitioner did not have a severe impairment and, even if he did, "the objective medical evidence does not establish the durational requirements (one continuous year for [Medicaid] and 90 continuous days for SDA)." This conclusion totally ignores Dr. Wine's uncontradicted statement that the limitations imposed upon Petitioner because of his back pain will continue "indefinitely."

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v Perales*, 402 US 389, 401; 91 S Ct 1420; 28 L Ed 2d 842 (1971). The ALJ must consider all the record evidence and cannot "pick and choose" only the evidence that supports his position. See, *Switzer v Heckler*, 742 F2d 382, 385-86 (7th Cir1984); *Garfield v Schweiker*, 732 F2d 605, 609 (7th Cir1984); *Green v Shalala*, 852 F Supp 558, 568 (NDTex.1994); *Armstrong v Sullivan*, 814 F Supp 1364, 1373 (WDTex1993). In addition, provided that they are based on sufficient medical data, "[t]he medical opinions and diagnoses of treating physicians are generally accorded substantial deference, and if the opinions are uncontradicted, complete deference." *Harris v Heckler*, 756 F2d 431, 435 (6th Cir1985).

In this case, the ALJ's decision is not supported by competent, material and substantial evidence on the whole record. He failed to consider all of the medical evidence and he failed to give the treating physician's medical opinions, diagnoses and prognoses the deference they deserved. (See SSR 96-2p.)

In accordance with a five-step sequential analysis, the Petitioner was not engaged in substantial gainful employment at the time of the disability application. 20 CFR 404.1520(b). Second, Petitioner has shown that he suffers from a severe impairment. 20 CFR 404.1520(c). Third, Petitioner is not engaged in substantial gainful employment and, according to the uncontradicted opinion of his treating physician, his impairment(s) meets or equals a listed disorder of the spine and meets the duration requirement. 20 CFR 404.1520(d). Therefore, the ALJ erred by not finding him disabled at step three.

III.

The Petitioner contends that the ALJ was biased and his decision was arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion. This issue was not raised before the ALJ and thus was not preserved for review by this Court. In addition, this issue has been rendered moot by this Court's disposition of this appeal based on the other issues that were properly presented.

CONCLUSION

The ALJ followed the requisite five-step analysis, but erred by not considering all of the medical evidence, by relying upon only some of the early medical reports and the examination by the DDS physician, and by giving less weight to the treating physician's medical opinions, diagnoses and prognoses than was warranted. The ALJ should have found the Petitioner disabled at the third step of the sequential analysis.

The case is remanded to the Department of Human Services for an award of benefits.

IT IS SO ORDERED.

This decision resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/03/06