

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11613-RGS

DAVID R. McDONALD

v.

MICHAEL ASTRUE, Commissioner
of the Social Security Administration

MEMORANDUM AND ORDER ON
APPELLEE'S MOTION FOR AN ORDER
AFFIRMING THE DECISION OF THE COMMISSIONER
AND APPELLANT'S MOTION TO REMAND

October 31, 2007

STEARNS, D.J.

After an administrative hearing, claimant David McDonald was awarded Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) benefits commencing February 27, 2003. McDonald asks the court to modify the award by adjusting the date of his eligibility retroactively to November 15, 2000, when he suffered the first of two unrelated knee injuries.

BACKGROUND

McDonald was born in 1962. He is married with three teenage children. He has an eleventh grade education. He worked as a pressman (heavy and semiskilled labor) from 1988 to 2000. He also does auto repair work as a hobby.

McDonald claims two disabling injuries: the first, to his left knee in November of 2000; the second to his right knee on February 27, 2003. McDonald sought emergency treatment in November of 2000 after being struck by a motor vehicle while entering his car.

The initial diagnosis was a left knee contusion. However, pain symptoms persisted. On January 30, 2001, McDonald was treated by Dr. David Alessandro, an orthopedist, who diagnosed prepatellar bursitis (an inflammation of the bursa above the kneecap), persistent patellofemoral arthrosis (pain originating from the region of the kneecap), and symptomatic lateral plica (a synovial fold in the knee joint). Dr. Alessandro gave McDonald a cortisone injection and prescribed pain medication and physical therapy.

During a check-up visit the following month, McDonald reported “significant pain and burning with a click along the left knee retinaculum.” He had not, however, begun physical therapy. Dr. Alessandro noted mild to moderate discomfort, and again injected McDonald’s knee with cortisone. He strongly advised McDonald to undergo physical therapy, and prescribed Percocet for “p.r.n. pain.” Dr. Alessandro noted that if McDonald did not improve with “an adequate course of [physical] therapy, he would consider an arthroscopic examination and excision of the plica.” On March 21, 2001, Dr. Alessandro recommended a six week biweekly course of physical therapy. There is no indication in the record that McDonald ever followed the recommendation or sought further treatment for his left knee.

McDonald visited a hospital emergency room on September 19, 2002, after a jack slipped while he was “changing a flat tire and his car fell on his left foot.” The examiner’s note described McDonald as “healthy.” An x-ray of his left foot was normal. No other relevant medical evidence appears in the record before February 27, 2003, when McDonald was treated for injuries to his right knee suffered in a fall on a patch of ice.

PROCEDURAL BACKGROUND

McDonald applied for SSDI and SSI benefits on August 12, 2003. In his application for disability benefits, McDonald listed knee pain as his primary impairment. McDonald claimed to have become disabled on November 15, 2000. The application was denied by the Social Security Administration (SSA) on October 31, 2003. McDonald filed a request for reconsideration on November 28, 2003. The SSA denied the request on March 4, 2004. A request for a hearing was filed on March 22, 2004. The hearing took place on July 27, 2005, before ALJ Stephen C. Fulton. The ALJ issued a written decision on September 17, 2004, granting McDonald's application for benefits as of February 27, 2003, but denying his request for benefits for the period from November 15, 2000 to February 26, 2003. The denial of benefits was based on the ALJ's finding that McDonald's first knee injury did not result in a "severe" impairment. A request for review was filed with the Appeals Council on September 30, 2005. The Appeals Council, in a decision dated November 15, 2005, affirmed the ALJ's decision. On September 6, 2006, McDonald sought review of the decision in the district court pursuant to 42 U.S.C. § 405(g).¹ McDonald assigns a single error on appeal: he maintains that the ALJ did not properly weigh his subjective complaints of pain.

DISCUSSION

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental

¹When the Appeals Council grants review, the decision of the Appeals Council is the final decision of the Commissioner. However, if the Appeals Council denies review, the ALJ's decision becomes the Commissioner's final decision. 20 C.F.R. §§ 404.981 and 416.1481.

impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 416(l)(1) and 423(d)(1). The Act further states that

an individual . . . shall be determined to be under a disability 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, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists insignificant numbers within the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d)(2)(A).

Judicial review is statutorily limited to determining whether the findings of the Commissioner are supported by substantial evidence. See 42 U.S.C. § 405(g). See also Manso-Pizarro v. Sec’y of Health and Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). “Substantial evidence . . . means evidence reasonably sufficient to support a conclusion. Sufficiency, of course, does not disappear merely by reason of contradictory evidence. . . . [The] question [is] not which side [the court] believe[s] is right, but whether [the ALJ] had substantial evidentiary grounds for a reasonable decision” Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998). The court “must uphold the [Commissioner’s] findings . . . if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion.” Rodriguez v. Sec’y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

In evaluating a disability claim, the ALJ is required to follow the sequential step

analysis prescribed by 20 C.F.R. § 404.1520. The ALJ must first determine whether a claimant was gainfully employed prior to the onset of the disabling condition. The ALJ must then determine whether the claimant suffers from a severe impairment limiting his ability to work. If the impairment is the same as, or equal in its effect to, an impairment (or combination of impairments) listed in Appendix 1 of Subpart P of the regulations, the claimant is presumptively deemed disabled.² If the impairment is not covered by Appendix 1, the fourth step of the analysis requires that the claimant prove that his disability is sufficiently serious to preclude a return to his former occupation. Goodermote v. Sec’y of Health and Human Servs., 690 F.2d 5, 6-7 (1st Cir. 1982). Only if he meets that burden is the Commissioner at the fifth step required to prove that there are other jobs in the national economy that the claimant could nonetheless perform. Gonzalez Perez v. Sec’y of Health, Educ. and Welfare, 572 F.2d 886, 888 (1st Cir. 1978).

For all practical purposes, the ALJ pretermitted the analysis of McDonald’s claim for benefits related to the November 2000 knee injury at Step 2, by finding that McDonald had failed to meet his burden of showing that any resulting impairment was “severe.” McDonald does not specifically challenge that finding. Rather, he asserts that the ALJ improperly discounted his subjective complaints of pain without applying the multi-factor analysis required by Avery v. Sec’y of Health and Human Servs., 797 F.2d 19 (1st Cir.

²The test for disability under the Social Security Act is whether McDonald’s injury or limitation rendered him totally disabled and incapable of performing any substantial gainful activity for a continuous period of at least 12 months. 42 U.S.C. §§ 416(i)(1) and 423(d)(1). The mere existence of an impairment is not disabling; rather it must produce a resulting functional loss that precludes all substantial gainful activity, and not just a claimant’s usual work. See, e.g., Burgos Lopez v. Sec’y of Health and Human Servs., 747 F.2d 37, 41 (1st Cir. 1984); Sitar v. Schweiker, 671 F.2d 19, 20-21 (1st Cir. 1982).

1986). Under Avery, the ALJ must specify his reasons for finding a claimant not to be a credible witness. See Da Rosa v. Sec'y of Health and Human Servs., 803 F.2d 24, 26 (1st Cir. 1986).

“In determining the severity of a claimant’s pain, ‘the absence of objective medical evidence supporting an individual’s statements about the intensity and persistence of pain or other symptoms is only one factor that the adjudicator must consider in assessing an individual’s credibility.’” Makuch v. Halter, 170 F. Supp. 2d 117, 127 (D. Mass. 2001), quoting SSR 96-7p. If after evaluating the objective findings, the ALJ determines that the claimant’s reports of pain are significantly greater than what could be reasonably anticipated from the objective evidence, the ALJ must then consider other relevant information. Avery, 797 F.2d at 23. Considerations capable of substantiating subjective complaints of pain include evidence of: (1) the claimant’s daily activities; (2) the location, duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness and side effects of any medication taken to alleviate the pain or other symptoms; (5) treatment, other than medication, received for relief of pain; (6) any other measures used to relieve pain or other symptoms; and (7) any other factors relating to claimant’s functional limitations and restrictions attributable to pain. 20 C.F.R. §§ 404.1529 and 416.929(c)(3)(i-vii).

McDonald contends that the ALJ erred by failing to include a detailed discussion of his credibility determination “in the body of the decision” as Avery stipulates.³ The ALJ,

³The ALJ’s opinion contains only a brief synopsis of his credibility finding.

McDonald’s statements concerning the intensity, duration and limiting effects

however, did not base his decision with respect to the November 2000 knee injury on the credibility finding; rather, he found that any impairment to McDonald's left knee was "not severe," as it resulted in no more than a minimal impact on McDonald's ability to perform basic work activities. See Tr. 19-23. McDonald challenged this finding in the administrative appeal of the ALJ's decision, but not in his appeal to this court.

The Commissioner makes two arguments: first, that McDonald has waived the issue of the correctness of the ALJ's Step 2 determination by failing to raise it on appeal. Second, the Commissioner argues that because the burden is on McDonald at Step 2 to show, by clinical or other evidence, a medically determinable severe impairment, and because he failed to meet this burden, the ALJ was under no obligation to conduct an Avery assessment of the credibility of his subjective complaints. See Bowen, 482 U.S. at 146 n.5; McDonald v. Sec'y of Health and Human Servs., 795 F.2d 1118, 1122 (1st Cir. 1986). See also Perez v. Sec'y of Health and Human Servs., 958 F.2d 445, 446-447 (1st Cir. 1991); Irlanda Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991).⁴ If anything, the Commissioner argues, the ALJ did more than the law requires by

of these symptoms [related to his left knee injury] are not entirely credible prior to February 27, 2003. There is insufficient objective medical evidence in the record to support McDonald's allegations of such limitations. . . . Due to the paucity of objective and opinion evidence, reflected the period of time prior to February 27, 2003, the undersigned cannot find that the claimant had a severe impairment prior to that date.

⁴The cases McDonald cites are distinguishable as in those cases, the Commissioner conceded the existence of a severe impairment that could reasonably produce the symptoms alleged, such that pain and credibility issues warranted more detailed consideration. See Da Rosa, 803 F.2d at 25; Avery, 797 F.2d at 27; Makuch, 170 F. Supp. 2d at 123; Aguiar v. Apfel, 99 F. Supp. 2d 130, 133 (D. Mass. 2000); Rohrberg

giving at least some consideration to McDonald's subjective complaints of pain.

Whatever the merits of the waiver argument, I agree with the Commissioner that McDonald failed to show at Step 2 that his left knee injury had caused him to be severely impaired. The pertinent medical evidence produced by McDonald established only that his left knee had required occasional treatment over (at best) a four month period. Although McDonald points to Dr. Alessandro's March 21, 2001 recommendation that he undergo additional physical therapy, there is no indication in the record that he ever followed his doctor's advice. Evidence of McDonald's activities during the disputed period contradict his claim of a continuing disability. As the ALJ noted in his decision, "[t]he claimant's condition did not preclude his changing a tire on September 19, 2002 during his alleged period of disability." The ALJ also pointed out that the December 11, 2000 X-rays of McDonald's left knee reflected only "mild patellofemoral arthritic changes with osteophyte formation," and that Dr. Alessandro's February 2001 office note recorded only complaints of "mild discomfort." Finally, the ALJ noted that on January 30, 2001, McDonald was given a "final" prescription of Percocet by Dr. Alessandro, strongly implying that in his judgment, the knee injury was near its resolution.

ORDER

v. Apfel, 26 F. Supp. 2d 303, 307 (D. Mass. 1998); Corchado v. Shalala, 953 F. Supp. 12, 15 (D. Mass. 1996); Adie v. Comm'r, 941 F. Supp. 261, 264 (D.N.H. 1996). None of these cases involved a Step 2 denial. Similarly, SSR 96-7p, which McDonald cites as support, emphasizes that the Commissioner need not further investigate the intensity, persistence, or functionally limiting effects of claimed symptoms unless there is a medically determinable impairment that could reasonably be expected to produce the alleged pain or symptoms. If no such level of impairment is found, then symptoms alone cannot be said to affect an individual's ability to perform basic work activities.

Because the ALJ's Step 2 determination that McDonald's left knee injury was "not severe" is supported by substantial medical evidence, the decision of the Commissioner must be and is AFFIRMED. The Clerk will now close the case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE