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

DAVID B. TERREY	:	CIVIL ACTION
	:	
v.	:	NO. 06-1959
	:	
MICHAEL J. ASTRUE,[1]	:	
Commissioner of Social Security	:	

MEMORANDUM AND ORDER

AND NOW, this 25th day of April, 2007, upon consideration of the brief in support of review filed by plaintiff, defendant's response thereto and plaintiff's reply thereto (Doc. Nos. 19, 20, and 21), the court makes the following findings and conclusions:

1. On July 29, 2002, David B. Terrey ("Terrey") filed for disability insurance benefits ("DIB") and supplemental security income ("SSI") under Titles II and XVI, respectively, of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383f, alleging an onset date of December 1, 1994. (Tr. 156-58; 299). Throughout the administrative process, including an administrative hearing held on April 9, 2003, before an administrative law judge ("ALJ") and in the ALJ's June 9, 2003 decision, Terrey's claims were denied. (Tr. 37-60; 102-114; 115-18; 307-310). The Appeals Council vacated the ALJ's June 9, 2003 decision and remanded the case in order for the ALJ to, *inter alia*, give further consideration to: (1) Terrey's residual functional capacity ("RFC") and evaluate his need for an assistive device; and (2) the examining, treating and non-examining source opinions and explain the weight given to each. (Tr. 151-154). The ALJ conducted a second hearing on October 5, 2004 after which, in a November 5, 2004 decision, the ALJ concluded that Terrey was not disabled. (Tr. 17-29; 61-99). On May 11, 2006, after the Appeals Council denied his request for review, Terrey filed his complaint in this court seeking review of the ALJ's decision pursuant to 42 U.S.C. § 405(g). (Tr. 8-11).

2. In her November 5, 2004 decision, the ALJ concluded that Terrey suffered from severe degenerative disc disease. (Tr. 21 ¶ 6; 28 Finding 3).[2] The ALJ further concluded that Terrey's impairment did not meet or equal a listing, that he had the residual functional capacity ("RFC") to perform a limited range of light work with a sit/stand option, and that he could perform a significant number of jobs in the national economy, and, thus, was not disabled. (Tr. 21 ¶ 7; 26 ¶ 1; 27 ¶ 4 - 28 ¶ 1; 28 Findings 4, 6, 11; 29 Findings 12-13).

3. The Court has plenary review of legal issues, but reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 431 (3d. Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence is "such

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[1] On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Michael J. Astrue has been substituted for former Commissioner Jo Anne Barnhart as the defendant in this lawsuit.

[2] All numbered paragraph references to the ALJ's decision begin with the first full paragraph on each page.

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988). If the conclusion of the ALJ is supported by substantial evidence, this court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

4. Terrey raises several arguments in which he alleges that the determinations by the ALJ were legally insufficient or not supported by substantial evidence. These arguments are addressed below. However, upon due consideration of all of the arguments and evidence, I find that the ALJ's decision is legally sufficient and supported by substantial evidence.

A. First, Terrey contends that the ALJ improperly rejected the opinion of his treating neurologist, Dr. David Tabby ("Dr. Tabby"). Specifically, Terrey asserts that the opinion found in Dr. Tabby's October 1, 2004 medical source statement[3] should have been given controlling weight by the ALJ because Dr. Tabby saw Terrey over a long period of time and was a specialist. See (Tr. 285-289). As rightly contended by Terrey, an ALJ may not reject a treating physician's medical opinion without explanation and a showing of contradictory evidence in the record. Wallace v. Sec. of Health and Human Servs., 722 F.2d 1150, 1155 (3d Cir. 1983); Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988). However, a treating physician is only provided controlling weight when his or her opinion is well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

Here, the ALJ explained why she did not credit Dr. Tabby's assessment and noted the evidence with which it conflicted. The ALJ explained that she did not find the opinions in Dr. Tabby's medical source statement to be probative of Terrey's RFC because they appeared to be based on Terrey's self-reported limitations, Dr. Tabby had not previously noted any functional limitations, and the level of limitation noted by Dr. Tabby was inconsistent with the limited findings from exams and with the significant gaps in treatment.[4] (Tr. 26 ¶ 5; see e.g. 231; 265; 290). The ALJ also noted that Terrey's neurological examinations and muscle strength were generally normal, that the positive findings on physical examinations were fairly limited (with the exception of positive straight leg raising), and that his treating physicians recommended and prescribed only medication (which he did not always take) and physical therapy for his complaints of pain. (Tr. 25 ¶ 5; 27 ¶ 1; see e.g. 230-234; 236-237; 238-240; 243; 256; 260-262; 263; 264; 265; 291; 295; 389-390; 408; 438). Earlier in her opinion, the ALJ also reviewed the medical evidence which included, *inter alia*, that Terrey had never had surgery although doctors had suggested he further explore that option, that MRI's showed only mild to moderate findings and x-rays and EMG's were normal, and that Terrey had little to no loss in muscle tone or bulk. (Tr. 22 ¶ 2- 25 ¶ 1; see e.g. Tr. 230-234; 239-240; 256; 265; 266-267; 276-278; 280-281; 284; 290; 295; 297-98; 389; 390; 395; 408). Although the limitations in Dr. Tabby's statement were

[3] In the medical source statement, Dr. Tabby found, *inter alia*, that Terry could sit and stand less than two hours each per day, could occasionally lift ten pounds, needed three twenty minute unscheduled breaks during each work day, must use a cane for standing and walking, and would be absent from work more than three times per month. (Tr. 287-289).

[4] On page 27 of her opinion, the ALJ erroneously refers to Dr. Tabby as Dr. Thad.

corroborated by one other doctor, they were inconsistent with other doctors' opinions and much of the medical evidence, and that is why the ALJ discounted Dr. Tabby's assessment. (Tr. 26 ¶ 2 - 27 ¶ 1). It is the ALJ's duty to weigh these contradictory evidentiary sources and make the disability determination. See Richardson, 402 U.S. at 399. It is not my duty to re-weigh the evidence, but to determine if there is substantial evidence to support the ALJ's decision. Hartranft, 181 F.3d at 360 (citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-1191 (3d Cir. 1986)). If the proper standard was whether there was substantial evidence to support Dr. Tabby's assessment, my determination would likely be quite different.

Terrey further claims that Dr. Tabby's exam findings such as positive straight leg raise and muscle spasms were consistent with his disability assessment. The ALJ did not dispute that Terrey had an injury which would likely cause pain and these findings, but only the severity of the pain and resultant limitations. (Tr. 286, 429, 458, 480). Such a determination is within the purview of the ALJ. Hartranft, 181 F.3d at 362 (citing 20 C.F.R. § 404.1529(c)) (stating that the ALJ is required to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it). As a result of the above analysis, the ALJ's decision to discount Dr. Tabby's opinions found in the medical source statement was supported by substantial evidence.[5]

B. Second, Terrey argues that the ALJ improperly relied on the opinion of medical examiner Dr. Stanley Askin ("Dr. Askin"). Terrey claims that the ALJ was greatly influenced by Dr. Askin in making his decision but that Dr. Askin's opinion was worthy of no weight because of contradictions in his testimony and because he did not base his opinion on the medical evidence but on what he personally felt a person with back pain should be able to accomplish. Dr. Askin is a qualified medical examiner to whom Terry had no objection at the time of his second hearing. (Tr. 65). After reviewing Dr. Askin's testimony, I find that it was proper and that Terrey's arguments to the contrary are unfounded. Moreover, there is no indication that the ALJ was greatly influenced by Dr. Askin's testimony. The ALJ merely summarized his testimony and stated that while certain non-treating sources, including that of Dr. Askin, were "consistent with the record [in] its entirety" he gave Terrey the benefit of the doubt and imposed additional restrictions. (Tr. 25 ¶ 1; 26 ¶ 3). As a result, Terrey's argument must fail.

C. Third, Terrey claims that the ALJ failed to properly assess his credibility or that of his two witnesses, Jacquelyn Terrey ("Mrs. Terrey") and Rev. Joel Barnaby (Rev. Barnaby"). "Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." Pysher v. Apfel, No. 00-1309, 2001 WL 793305, at *3 (E.D. Pa. July 11, 2001) (citing Van Horn v. Schweiker, 717 F.2d 871, 973 (3d Cir. 1983)). Moreover, such determinations are entitled to deference. S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 271 (3d Cir. 2003). There is no question that Terrey had a documented impairment that could cause pain. However, the ALJ determined, after discussing the medical evidence and limited findings, Terrey's subjective complaints, and his daily activities, that Terrey's complaints of pain were not fully justified. (Tr. 22 ¶ 2 - 25 ¶ 5); see Hartranft, 181 F.3d at 362 (stating that the ALJ is required to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it). The ALJ's credibility determination is supported by substantial evidence and is

[5] For the same reasons, the ALJ did not err in failing to incorporate these limitations into the hypothetical given to the vocational expert at the initial hearing. Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987) (stating that "A hypothetical question must reflect all of a claimant's impairments that are supported by the record").

in accord with the regulations as she gave specific reasons for why she discounted Terrey's credibility including that his testimony appeared "disproportionate to the objective findings" and that he had failed to follow up with recommended testing and treatment and had large gaps in treatment. (Tr. 25 ¶ 5; 28 Finding 5); see S.S.R. 96-7p.

In the decision, the ALJ discussed Mrs. Terrey's testimony but did not discuss her credibility and did not mention Rev. Barnaby's testimony at all. I agree that this is legal error. Burnett v. Comm'r of Soc. Sec. Admin., 220 F.3d 112, 122 (3d Cir. 2000) (stating that an ALJ must consider and weigh all of the non-medical evidence before him and on remand must address the testimony of additional witnesses); Van Horn v. Schweiker, 717 F.2d 871, 873 -874 (3d Cir. 1983) (finding that an ALJ should find that a witness was not credible before wholly disregarding his testimony). However, it is obvious that the ALJ, to the extent that she did discount the credibility of these two witnesses, did so for the same reasons that she discounted the credibility of Terrey. It is also apparent that the ALJ heard the testimony of these two witnesses and was not swayed by it in light of, *inter alia*, the objective medical evidence. In Burnett and Van Horn, the decisions of the ALJs were rife with multiple reversible errors, whereas here, this single error does not demand a remand. I find that any further discussion of the credibility of these two witnesses would not have changed the outcome of the case and, thus, the error is harmless. Rutherford v. Barnhart, 399 F.3d 546, 553 (3d Cir. 2005) (refusing to remand where stricter compliance with a social security ruling would not have changed the outcome of the case); Fisher v. Bowen, 869 F.2d 1055, 1057 (7th Cir. 1989) (stating that "No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result").

Upon careful and independent consideration, the record reveals that the Commissioner applied the correct legal standards and that the record as a whole contains substantial evidence to support the ALJ's findings of fact and conclusions of law. Therefore, it is hereby

ORDERED that:

1. **JUDGMENT IS ENTERED AFFIRMING THE DECISION OF THE COMMISSIONER OF SOCIAL SECURITY** and the relief sought by Plaintiff is **DENIED**; and

2. The Clerk of Court is hereby directed to mark this case closed.

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LOWELL A. REED, JR., S.J.