IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

LEWIS B. WINWARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-287-SLR
	)	
JO ANNE B. BARNHART, Commissioner of Social Security Administration,	)	
	)	
Defendant.	)	

Angela Pinto Ross, Esquire, Wilmington, Delaware. Counsel for Plaintiff.

Colm F. Connolly, Esquire, United States Attorney and Patricia C. Hannigan, Esquire, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant. Of Counsel: James A. Winn, Esquire, Regional Chief Counsel and David F. Chermol, Esquire, Assistant Regional Counsel, Social Security Administration, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: July 8, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Lewis B. Winward filed this action against defendant Jo Anne B. Barnhart, Commissioner of Social Security Administration ("Commissioner"), on April 22, 2002. (D.I. 1) Plaintiff seeks judicial review pursuant to 42 U.S.C. § 405(g) of a decision by the Commissioner denying his claim for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Currently before the court are the parties' cross-motions for summary judgment. (D.I. 13, 15) For the following reasons, the court shall grant defendant's motion for summary judgment, and deny plaintiff's motion for summary judgment.

II. BACKGROUND

A. Procedural History

On December 2, 1997, plaintiff filed an application for disability benefits alleging that, as a result of surgery to remove a brain tumor, he suffers from problems with his vision, speech, balance and hearing, decreased stamina, difficulty concentrating and right facial nerve paralysis and, therefore, is unable to work. (D.I. 1 at 2) Plaintiff's claim was denied both initially and upon reconsideration. (D.I. 10 at 51-53) Plaintiff requested and subsequently received a hearing before an administrative law judge ("ALJ"), held on May 25, 1999. (Id. at 16) On October 5, 1999, the ALJ issued a decision denying

plaintiff's claim. (Id. at 23) In considering the entire record, the ALJ found the following:

> 1. The claimant met the disability insured status requirements of the Act on August 25, 1997, the date the claimant stated he became unable to work, and has acquired sufficient quarters of coverage to remain insured through at least December 31, 2001.
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> 2. The claimant has not engaged in substantial gainful activity since August 25, 1997.
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> 3. The medical evidence establishes that the claimant has residual effects following removal of a brain tumor, an impairment which is severe but which does not meet or equal criteria of any of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.
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> 4. The claimant's statements concerning his impairment and its impact on his ability to work are not entirely credible.
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> 5. The claimant lacks the residual functional capacity to lift more than 20 pounds. Mr. Winward is limited nonexertionally in that he cannot perform jobs requiring constant visual acuity or bilateral hearing nor can he work around hazards such as heights and moving machinery. Additionally, the claimant cannot be present in atmospheres containing air pollutants or bright lights.
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> 6. In his past work as telephone sales representative, as generally performed in the national economy, the claimant was required to sit for prolonged periods.
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> 7. The claimant's past relevant work as telephone sales representative did not require the performance of work functions precluded by his medically determinable impairment.

> 8. The claimant's impairment does not prevent him from performing his past relevant work.
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> 9. The claimant has not been under a disability, as defined in the Social Security Act, at any time through the date of this decision.

(Id. at 22-23)

The Appeals Council denied plaintiff's request for review, stating that "the ALJ's decision stands as the final decision of the Commissioner." (Id. at 7-8) In reaching its decision, the Appeals Council considered applicable statutes, regulations, and rulings in effect as of the date of plaintiff's action, as well as contentions raised in material submitted by plaintiff, but found no basis for challenging the ALJ's decision. (Id.) Plaintiff now seeks review of this decision before this court pursuant to 42 U.S.C. § 405(g).

B. Facts Evinced at the Administrative Law Hearing

Plaintiff was born on November 3, 1943. (D.I. 10 at 31) He is married. (Id.) He received a GED while serving in the Delaware National Guard and at various times over the last twenty years has been employed as a store manager, clerk, telephone salesman, and owned his own store. (Id. at 46-47)

Plaintiff underwent brain surgery for the removal of an acoustic neuroma on September 15, 1997. (Id. at 132) Plaintiff testified that his recovery has been slow since the procedure and that he continues to suffer from blurred vision, fatigue, hearing

loss, weakness on the right side of his face and problems with balance. (Id. at 33-36)

Plaintiff testified that he spends his days doing daily chores, reading,[1] and watching television. (Id. at 38) Plaintiff stated he sometimes feels he has over exerted himself while doing chores, so he takes naps to recuperate from the activity. (Id. at 41) Occasionally plaintiff will drive his wife to work so he can have use of the car. (Id. at 37) Plaintiff is able to take care of his own personal needs while at home by himself. (Id. at 39) In addition, plaintiff visits with his family and sometimes goes shopping, to the movies or to church. (Id. at 38-39)

In his testimony, plaintiff stated he is unable to lift anything over ten pounds as per doctor's instructions and because he is not as strong as he was prior to surgery. (Id. at 37) Plaintiff alleges he can stand for a half hour and walk approximately one mile, but at a slow pace. (Id.) Plaintiff also testified that although he does not walk with a cane, he cannot make quick moves because of his problems with balance. (Id. at 36) Plaintiff also alleges he has a speech impediment, which worsens as he becomes tired throughout the day, and photosensitivity to sunlight. (Id. at 41, 43) Plaintiff

[1] Plaintiff contends he cannot read as much as he used to because of the problems with his right eye. (D.I. 10 at 38)

testified he is not in pain, but occasionally has headaches and a stiff neck. (Id. at 34) Plaintiff takes Tylenol as needed when he has a headache or stiff neck, but is not currently on any other medication. (Id.) Plaintiff testified the vision in his right eye is blurry most of the time. (Id. at 35) He can clear his vision by wiping the eye with a tissue or blinking hard, but plaintiff alleges his vision does not remain clear for long. (Id.) Plaintiff uses eye drops four or five times a day to clean his right eye. (Id. at 34)

C. Vocational Evidence

During the hearing, the ALJ called William T. Slaven ("Slaven") as a vocational expert. (D.I. 10 at 46) Slaven opined as to the exertional and skill requirements of plaintiff's prior jobs. Slaven testified:

> Salesperson, parts and services, retail trade is the industry, the [specific vocational preparation level ("SVP")] is 5, that's skilled work[,][2] the physical

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[2] Social Security regulations define skilled work as:

> [W]ork requir[ing] qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

20 C.F.R. § 404.1568 (2003).

> demand in the [Dictionary of Occupational Titles ("DOT")] is light . . . [plaintiff] performed the work as sedentary work . . . . Liquor store stock clerk, retail trade the SVP is 4, semi-skilled,[3] the physical demand in the DOT is heavy, based on the work history information [plaintiff] performed the work as light work.
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> Manager liquor establishment, retail trade, the SVP is 6, that's skilled work, the physical demand and the DOT is light, he performed the work as medium work . . . . As an owner of a store the job title will be manager, [] and then sales representative liquors, wholesale trade, the SVP is 4, semi-skilled, the physical demand is light and he performed the work as light. . . .

(Id. at 46-47) The vocational expert further stated plaintiff did not have transfer of ability skills because ability skills do not transfer below light work. (Id. at 47)

Plaintiff submitted additional evidence subsequent to the vocational opinion. The vocational expert reviewed the evidence, but determined the additional information did not change his opinion that plaintiff is able to perform all levels of physical

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[3] Social Security regulations define semi-skilled work as:

> [W]ork which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

20 C.F.R. § 404.1568 (2003).

activity, with some environmental restrictions, such as staying away from fumes and dust. (Id. at 114)

D. Medical Evidence

On July 29, 1997, plaintiff underwent magnetic resonance imaging ("MRI") which revealed a mass involving the right cerebellopontine angle, consistent with an acoustic schwannoma. (D.I. 10 at 119) Dr. Michael T. Teixido, M.D. and Dr. Yokov U. Koyfman, M.D. performed surgery to remove the tumor on September 15, 1997. (Id. at 132-136) Following surgery, plaintiff experienced some problems swallowing and weakness on the right side of his face. (Id. at 128) At the time of plaintiff's discharge from the hospital, the problem swallowing had subsided, but plaintiff was still experiencing weakness on the right side of his face. (Id.)

Prior to plaintiff's brain surgery, he underwent a pulmonary examination because of irregularities seen on a routine pre-operative chest x-ray. (Id. at 125) Following brain surgery, Dr. John J. Chabalko, M.D. performed a bronchoscopy to determine the cause of plaintiff's irregularities. (Id. at 20) Dr. Chabalko's assessment was that plaintiff had a chronic abnormality and should therefore undergo periodic chest x-rays to study the stability of the abnormalities.[4] (Id.)

[4] When questioned by the ALJ if he had problems as the result of the lung condition, plaintiff testified he always has shortness of breath. (D.I. 10 at 36)

Dr. Teixido saw plaintiff two weeks after surgery for a follow up appointment. (D.I. 10 at 173) Plaintiff still had problems with the right side of his face because of nerve damage from the surgery, but plaintiff stated he was feeling well. (Id.) On October 31, 1997, Dr. Teixido again examined plaintiff. Plaintiff's facial nerve paralysis was still "dense" and he was experiencing some eye irritation. (Id. at 172) At plaintiff's four month check up, he still lacked facial nerve function on his right side. (Id. at 170) Plaintiff had no hearing in the right ear and constant mild unsteadiness, especially with rapid head movements, but his speech was relatively unimpaired. (Id.)

In March 1998, plaintiff underwent a second surgery to insert a gold weight in his right upper eyelid and tarsal strip. (Id. at 161) The device was implanted by Dr. David C. Larned, M.D. to improve plaintiff's ability to blink. (Id. at 33)

In April 1998, plaintiff again visited Dr. Teixido. (Id. at 171) Plaintiff still had no facial nerve function and baseline unsteadiness.[5] (Id.) During the visit plaintiff told Dr. Teixido he had been active, but that recovery had not gone as well as he had hoped. (Id.) Dr. Teixido opined physical therapy would be helpful to plaintiff. (Id.)

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[5] Dr. Teixido attributed plaintiff's problems with balance to two factors: 1) plaintiff was weakened because of de-conditioning from a musculoskeletal standpoint; and 2) plaintiff had trouble focusing the right eye because of exposure to keratitis. (D.I. 10 at 171)

Plaintiff had a follow up appointment with Dr. Larned in May 1998. Dr. Larned made changes to plaintiff's eyeglass prescription, but was happy with plaintiff's tear lake and the cosmetic results from the gold weight implant. (Id. at 159) At a July 1998 follow up appointment with Dr. Larned, plaintiff was still experiencing blurred vision. (Id. at 158) Plaintiff's eyeglass prescription was again changed, with the hope that his vision would clear. (Id.)

Plaintiff was evaluated for physical therapy on May 1, 1998, and subsequently began attending physical therapy sessions. (Id. at 210) In late May 1998, plaintiff underwent an excision to remove a lipoma on his back, which was causing him discomfort. (Id. at 212) On June 3, 1998, plaintiff had a follow up appointment to check the lipoma excision. The sutures were removed and the wound was determined to be healing nicely. (Id. at 216) Treatment notes from plaintiff's physical therapy dated June 3, 1998 indicated that plaintiff's condition had improved in his twelve physical therapy sessions since the initial evaluation. (Id. at 211) Plaintiff commented he had noticed improvement in his strength, stability and endurance while walking and standing. (Id.) The physical therapist also noted plaintiff's gait had improved and that his pace was quick and steady. (Id.) The treatment notes stated plaintiff felt stable

walking on the treadmill, but less stable walking outdoors. (Id.)

A physical therapy progress report, dated July 22, 1998, noted plaintiff again showed improvement in his strength, stability, balance, mobility and endurance, but that plaintiff had decreased vision in his right eye that had not been corrected. (Id. at 209) Plaintiff's balance was tested and showed no deficit, but plaintiff stated he was concerned about his balance when outside of his home. (Id.) The physical therapist opined plaintiff's concern may be the result of a perception deficit. (Id.)

Plaintiff visited Dr. Larned on March 8, 1999 for a complete eye exam.[6] (Id. at 262) The treatment notes state plaintiff's right eye had some blurring and tearing. (Id.) Dr. Larned also noted he believed the gold weight in the right eyelid was inducing some astigmatism in the right eye. (Id.) Plaintiff was given bifocals and Dr. Larned recommended plaintiff use Bion or Refresh Tears in his right eye.[7] (Id.)

On March 24, 1999, plaintiff underwent a surgical procedure to try to correct his right facial paralysis. (Id. at 289) The

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[6] Plaintiff also saw Dr. Larned in December 1998 for pain, photosensitivity, and aching in the right eye, however, the examination records imply plaintiff's discomfort was caused by a Christmas tree branch hitting plaintiff's eye a few days earlier. (D.I. 10 at 264)

[7] Dr. Larned's evaluation is the most recent recorded vision exam for plaintiff. At the time, plaintiff's vision was 20/25 in his right eye and 20/20 in his left eye. (D.I. 10 at 306)

procedure was a plication of the right face with right facelift. (Id.) At a follow up appointment on April 5, 1999, plaintiff's sutures were removed and it was noted plaintiff was pleased with the results and had no complaints. (Id.)

On April 20, 1999, plaintiff's new treating physician, Dr. Kevin O'Hara, completed a Residual Functional Capacity Questionnaire ("RFC") assessing plaintiff's condition. (Id. at 299) Prior to completing the RFC, Dr. O'Hara had only seen plaintiff once, on January 26, 1999. (Id. at 196) According to the RFC, plaintiff was not in any pain or on medication. (Id. 299-300) The RFC also stated plaintiff's symptoms were never severe enough to interfere with his attention and concentration.[8] (Id. at 300) In addition, the RFC stated plaintiff can continuously sit for one hour at a time, stand for thirty minutes at a time, walk four city blocks without rest or severe pain, sit for less than two hours total in an eight hour working day, and stand or walk for less than two hours total in an eight hour working day. (Id.) Dr. O'Hara opined plaintiff would need to take unscheduled ten minute breaks once an hour and would be absent from work more than four times a month because of his condition. (Id. at 301-02)

[8] Despite checking that plaintiff's symptoms were never severe enough to interfere with his attention and concentration, Dr. O'Hara commented plaintiff was only capable of low stress jobs because he gets easily frustrated, feels lack of control and has no interest or attention span. (D.I. 10 at 300)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g); 5 U.S.C. § 706(2)(E) (1999); see Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

> "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 56:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> Petitioners suggest, and we agree, that this standard mirrors the standard for a

> directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986) (internal citations omitted). Thus, in the context of judicial review under § 405(g),

> "[a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence — particularly certain types of evidence (e.g., that offered by treating physicians) — or if it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

IV. DISCUSSION

A. Standards for Determining Disability

Congress enacted the Supplemental Security Income Program in 1972 "to assist 'individuals who have attained age 65 or are blind or disabled' by setting a guaranteed minimum income level for such persons." Sullivan v. Zebley, 493 U.S. 521, 524 (1990) (quoting 42 U.S.C. § 1381). Disability is defined in § 1382c(a)(3) as follows:

> (A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this title if he is unable 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 twelve months.
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> (B) For purposes of subparagraph (A), 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.
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> . . . .
>
> (D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities

> which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C. § 1382c(a)(3). Governing regulations set forth a five-step test for determining whether a claimant falls within this definition:

> The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. See 20 C.F.R. §§ 416.920(a) through (c) (1989). In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. See 20 C.F.R. pt. 404, subpt. P, [a]pp. 1 (pt. A) (1989). If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. [20 C.F.R.] § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. [20 C.F.R.] §§ 416.920(e) and (f).

Sullivan, 493 U.S. at 525.

The determination whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Department of Health and Human Services Regulations ("the grids"). See Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (citing Heckler v. Campbell, 461 U.S.

458, 468-70 (1983)). The grids require the ALJ to take into consideration the claimant's age, educational level, previous work experience, and residual functional capacity. See 20 C.F.R. pt. 404, subpt. P, app. 2 (1999). If the claimant suffers from significant nonexertional limitations, such as pain or psychological difficulties,[9] the ALJ must determine, based on the evidence in the record, whether these nonexertional limitations further limit the claimant's ability to work. See 20 C.F.R. § 404.1569a(c)-(d). If they do not, the grids may still be used. If, however, the claimant's nonexertional limitations are substantial, the ALJ must use the grids as a "framework" only. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200(d)-(e). In such a case, or if a claimant's condition does not match the definition provided in the grids, determination of whether the claimant can

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[9]The regulations list the following examples of nonexertional limitations:

> (i) You have difficulty functioning because you are nervous, anxious, or depressed;
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> (ii) You have difficulty maintaining attention or concentrating;
>
> (iii) You have difficulty understanding or remembering detailed instructions;
>
> (iv) You have difficulty in seeing or hearing;
>
> (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or
>
> (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

20 C.F.R. § 404.1569a(c).

work is ordinarily made with the assistance of a vocational specialist. See Santise v. Schweiker, 676 F.2d 925, 935 (3d Cir. 1982).

B. Application of the Five-Step Test

In the present case, the first three steps of the five-part test to determine whether a person is disabled are not at issue: (1) plaintiff is not working; (2) plaintiff's impairment has lasted more than twelve months; and (3) plaintiff does not have an impairment equal to or meeting one listed in the regulations. The issue in this case concerns the fourth and fifth steps: whether plaintiff can perform his past relevant work, and whether plaintiff can perform other work existing in the national economy. See Mason v. Shalala, 994 F.2d 1058, 1064 (3d Cir. 1993).

In the context of this five-step test, plaintiff had the burden of demonstrating that he was unable to engage in his past relevant work. See 42 U.S.C. §§ 416(I), 423(d)(1)(A); Mason, 994 F.2d at 1064. After considering plaintiff's testimony, medical records, and vocational expert testimony, the ALJ found that plaintiff failed to meet this burden. The ALJ determined that plaintiff retained the residual functional capacity to perform the exertional demands of light work, which requires maximum lifting of twenty pounds and frequent lifting of ten pounds. See 20 C.F.R. § 404.1567. Some light jobs are performed while

standing, and those performed while sitting frequently require the use of hand or leg controls. Id. Because plaintiff's former job as a telephone sales representative required only sedentary exertion, the ALJ found that plaintiff was able to perform his past relevant work. Consequently, the ALJ was not required to reach step five of the test, and concluded that plaintiff was not entitled to disability benefits.

C. The ALJ Gave Appropriate Weight to the Opinion of Plaintiff's Treating Physician

Plaintiff argues the ALJ erred because he did not give deference to the opinion of Dr. O'Hara, plaintiff's treating physician. Treating physicians' reports should be accorded great weight, especially "when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000)(quoting Rocco v. Heckler, 826 F.2d 1348, 1350 (3d Cir. 1987)); See also 20 C.F.R. § 404.1527(d)(2) (providing for controlling weight where treating physician opinion is well-supported by medical evidence and not inconsistent with other substantial evidence in the record). An ALJ may not reject a treating physician's opinion outright except on the basis of contradictory medical evidence, but may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided. See Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). Where the opinion of

a treating physician conflicts with that of a non-treating, non-examining physician, the ALJ may choose whom to credit but "cannot reject evidence for no reason or for the wrong reason." Morales, 225 F.3d at 317 (quoting Mason, 994 F.2d at 1066). In choosing to reject the treating physician's assessment, an ALJ may not make "speculative inferences from medical reports" and may reject "a treating physician's opinion outright only on the basis of contradictory medical evidence" and not due to his or her own credibility judgments, speculation or lay opinion. Id. (quoting Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999)).

In the case at bar, the ALJ properly determined Dr. O'Hara's opinion to be unpersuasive in light of objective medical testing and the opinions of other physicians. The ALJ concluded that although Dr. O'Hara's diagnosis was not inconsistent with the medical findings of the other treating physicians, his conclusions regarding plaintiff's ability to perform his past job activities were inconsistent with the medical record. (D.I. 10 at 20) Given the discrepancy between the record and Dr. O'Hara's opinion, and that Dr. O'Hara had only seen plaintiff once prior to completing the RFC questionnaire, the ALJ correctly concluded that Dr. O'Hara's opinion should not be given controlling weight.

In according treating physician's opinions controlling weight when determining Social Security benefits, the court relies on the premise that a treating physician is better

equipped to make a determination as to the patient's impairments because the treating physician is observing the patient over a prolonged period of time. See Morales, 225 F.3d at 317. Dr. O'Hara's opinion does not meet the underlying premise of deferring to a treating physician's opinion because he has not observed plaintiff over a prolonged period of time. By forming an opinion as to plaintiff's abilities after one visit with the patient, Dr. O'Hara's opinion is based on little more than the opinion of a non-treating physician whose judgment is founded on the medical records alone. The ALJ was correct in concluding that since Dr. O'Hara's opinion regarding plaintiff's ability is based on little direct personal contact with plaintiff, Dr. O'Hara's opinion does not warrant controlling weight.

Plaintiff argues that even if Dr. O'Hara's opinion is not given controlling weight, the ALJ should show substantial deference to Dr. O'Hara's determination. Under Newhouse v. Heckler, the ALJ can give the opinion more or less weight depending on the support provided for the treating physician's opinion. See Newhouse, 753 F.2d at 286. Again, the ALJ's determination to not give Dr. O'Hara's opinion substantial deference was reasonable given the lack of support for Dr. O'Hara's RFC opinion. Although Dr. O'Hara's opinion regarding plaintiff's ability to return to his previous work is contrary to the conclusion drawn by the ALJ, based on plaintiff's medical

records the ALJ did not disregard Dr. O'Hara's opinion for no reason or the wrong reason. See Morales, 225 F.3d at 317. From the record it is clear plaintiff continued to suffer from impairments resulting from his brain surgery such as tearing in his right eye, hearing loss in his right ear, and right facial paralysis. However, the record also shows that plaintiff's eyesight was good, his balance showed no deficit and that his condition continued to improve through physical therapy. As a result, the ALJ did not err by failing to give Dr. O'Hara substantial deference. See Universal Camera Corp., 340 U.S. at 477.

Plaintiff also argues the ALJ improperly relied on the opinion of Dr. Robert G. King, a non-treating ophthalmologist,[10] instead of Dr. O'Hara's opinion. The ALJ's decision clearly points to Dr. King's opinion as support for the conclusion that Dr. O'Hara's opinion regarding plaintiff's ability to work is inconsistent with the rest of the record, but the ALJ's determination does not rely solely on Dr. King's opinion. The ALJ's determination is sufficiently supported by the medical records provided by plaintiff's treating physicians prior to Dr.

[10] Dr. King opined plaintiff still had good vision and should have good depth perception. Dr. King concluded plaintiff may have difficulty performing fine detailed work, but that his impairment does not meet the listings in the Social Security regulations. (D.I. 10 at 307-08)

O'Hara and the progress reports submitted from plaintiff's physical therapy.

D. The ALJ Adequately Considered Plaintiff's Residual Functional Capacity in Determining Plaintiff is Able to Return to his Previous Work

Social Security regulations outline the analysis the ALJ must perform to determine whether a disability claimant is capable of performing past relevant work. 1975-1982 Soc. Sec. Rep. 809, available at 1982 WL 31386. The regulations place special emphasis on the evaluation of claimant's ability to perform past relevant work because it can be the controlling issue in determining benefits, as it is in this case. See id. The ALJ's decision must contain: 1) findings of fact as to plaintiff's RFC; 2) findings of fact as to the physical and mental demands of plaintiff's past job; and 3) findings of fact that the individual's RFC would permit plaintiff to return to his past job. Id.

Plaintiff argues the ALJ concluded, without rationale, that plaintiff can return to his previous work. The court finds that the ALJ adequately considered plaintiff's medical history, testimony, and the opinions of medical professionals to reach his decision. The ALJ's determination that plaintiff is capable of returning to his previous work is based on factual findings of plaintiff's impairments that are uncontested by plaintiff. The point of contention is whether plaintiff's impairments are severe

enough to preclude him from performing his past relevant work. As discussed previously, the ALJ's determination is supported by substantial evidence, therefore, the ALJ's decision that plaintiff can return to his previous relevant work is not without rationale.

Plaintiff also argues that the ALJ did not sufficiently outline the evidence to support the conclusion that plaintiff was capable of returning to his past relevant work experience. Plaintiff's argument has no merit. The ALJ's conclusion is supported by plaintiff's medical records. Plaintiff's balance was determined to have no deficit when tested during physical therapy, there is no corroboration in the medical records to support plaintiff's testimony that his speech becomes increasingly impaired throughout the day, and although plaintiff has lost hearing in his right ear, there is no evidence that his left ear is in any way impaired. In his decision, the ALJ also concluded that plaintiff's testimony about his impairments and abilities were not entirely credible. As for plaintiff's problems with his eye, the ALJ accounted for his impairment by limiting plaintiff's nonexertional functional capacity to jobs that do not require constant physical acuity or are in environments with air pollutants and bright lights.

Plaintiff further alleges the ALJ does not provide specific findings to support his decision as to plaintiff's abilities and

the demands of a telephone sales representative. In addition to the medical evidence in the record discussed previously, plaintiff's daily activities indicate that despite his impairments, plaintiff is able to return to his past relevant work. Plaintiff testified that he reads, drives, watches television, performs household chores and takes care of his personal needs. If plaintiff's problems with balance and eye sight were substantial enough to preclude plaintiff from returning to work, the impairments would also preclude plaintiff from performing some of his daily activities, especially driving and reading. Plaintiff's daily activities along with plaintiff's medical records provide specific findings as to plaintiff's abilities.

The ALJ also made sufficient findings as to the demands of work as a telephone sales representative. The ALJ's determination was based on the vocational expert's testimony describing the SVP and work demand, according to the DOT, of plaintiff's past job experience. The vocational expert concluded that plaintiff would be able to return to work, with some environmental restrictions. Plaintiff's past work as a telephone sales representative was found to require only sedentary exertion, which the ALJ determined is not precluded by plaintiff's impairments. The ALJ concluded from the evidence in the record that plaintiff was able to perform light work, but

cannot perform work requiring constant visual acuity or bilateral hearing, and cannot work around hazards or in environments containing air pollutants or bright lights. There was no evidence introduced into the record that plaintiff's past work as a telephone sales representative required him to perform any activities precluded by his impairments. Therefore, the ALJ's conclusion that the demands of work as a telephone sales representative were not in excess of plaintiff's abilities was sufficiently supported by the information provided by the vocational expert and the ALJ's determinations regarding plaintiff's abilities.

E. The ALJ Adequately Considered Plaintiff's Subjective Nonexertional Limitations

Plaintiff argues the ALJ failed to adequately consider his subjective nonexertional limitations. Plaintiff cites Mason v. Shalala to support his contention that the ALJ erred by not giving plaintiff's personal testimony about his nonexertional limitations enough weight.

> An ALJ must give serious consideration to a claimant's subjective complaints of pain, even where those complaints are not supported by objective evidence. While there must be objective evidence of some condition that could reasonably produce pain, there need not be objective evidence of the pain itself. Where medical evidence does support a claimant's complaints of pain, the complaints should then be given great weight and may not be disregarded unless there exists contrary medical evidence.

Mason v. Shala, 994 F.2d 1058, 1067 (3d Cir. 1993)(internal citations and quotations omitted). Once an ALJ determines that a claimant has a medical impairment that could reasonably cause the alleged symptoms, the ALJ must "evaluate the intensity and persistence of the pain or symptom, and the extent to which it affects the individual's ability to work." Hartranft v. Apfel, 181 F.3d 358, 362 (3d Cir. 1999).

There is substantial evidence to support the ALJ's decision not to consider plaintiff's personal testimony the determinative factor as to his residual functional capacity. Courts ordinarily defer to an ALJ's credibility determinations because the ALJ has an opportunity to assess plaintiff's demeanor. Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003). Although it is clear from the record plaintiff does suffer from some residual impairments as the result of his brain surgery, the ALJ concluded that plaintiff's statements concerning the impact of the impairments on his ability to work were not entirely credible. (D.I. 10 at 22) Given the evidence in the record which supports the ALJ's determination that plaintiff retains the functional capacity to perform his past relevant work, it was within the ALJ's discretion to assess plaintiff's testimony and conclude it was not entirely credible.

In addition, aside from the RFC by Dr. O'Hara, there is no medical evidence to support plaintiff's claims as to the severity

of his impairments. Diagnostic tests performed on plaintiff, specifically on his eyesight and balance, indicate that his impairments do not considerably impact on his daily functioning. Plaintiff's medical records tracking his impairments after surgery, his testimony regarding his daily activities, and the ALJ's conclusion that plaintiff's testimony was not entirely credible, all provide substantial evidence to conclude that plaintiff's subjective nonexertional limitations do not preclude him from returning to his previous work. Consequently, plaintiff's subjective complaints are contradicted by the record, therefore, the ALJ adequately considered plaintiff's subjective complaints.

V. CONCLUSION

For the reasons stated, the court shall grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

LEWIS B. WINWARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-287-SLR
	)	
JO ANNE B. BARNHART, Commissioner of Social Security Administration,	)	
	)	
Defendant.	)	

O R D E R

At Wilmington, this 8th day of July, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendant's motion for summary judgment (D.I. 15) is granted.

2. Plaintiff's motion for summary judgment (D.I. 13) is denied.

3. The Clerk of Court is directed to enter judgment in favor of defendant and against plaintiff.

Sue L. Robinson
United States District Judge