UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 05-12110-RGS

KENNETH R. LYNCH

v.

JO ANNE B. BARNHART, Commissioner
Social Security Administration

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION AFFIRMING THE DECISION OF THE COMMISSIONER

November 6, 2006

STEARNS, D.J.

Kenneth Lynch seeks review of the final decision of the Commissioner that he is not disabled within the meaning of the Social Security Act. Lynch maintains that he is permanently unable to work because of chronic pain and functional limitations associated with an aggravated neck injury. The issue on appeal is whether substantial evidence in the record supports the Commissioner's determination that Lynch's impairments do not inhibit his ability to engage in "substantial gainful activities." The appeal is before the court pursuant to 42 U.S.C. § 405(g).

BACKGROUND

Lynch was born on February 6, 1961. He is an unmarried father. He lives with the mother of his eighteen year old son in Swansea, Massachusetts. Lynch has an 8th grade education. He worked from 1986 to 2000 as a self-employed house painter. From February of 2001 until September of 2002, Lynch was employed as a gas company meter

installer. In 2001, Lynch suffered a herniated disc in his neck. He underwent a cervical fusion and diskectomy. In September of 2002, Lynch fell while exiting the rear of a van and reinjured his neck. Lynch has not returned to work as a meter installer because of his inability to carry a 10 to 20 pound tool box and to crawl into tight places.

The post-operative notes of Dr. Leslie Stern, Lynch's primary treating physician, state that Lynch "does have some neck pain radiating over both shoulders . . . (with) some intermitted paresthesia of the left arm . . . [and] difficulty swallowing." During a follow-up office visit on July 16, 2003, Dr. Stern noted that Lynch had

> severe neck pain which is burning in quality and radiates mainly to the left shoulder and to the left axilla, and to the left arm to the elbow level. . . . The question here is whether or not the fusion has been disrupted by the injury. The type of pain that this patient describes is more sclerotomal than radicular, but if it is coming from a disrupted fusion at C6-7, consideration of redoing this level may be indicated.[1]

On October 8, 2003, Dr. Stern wrote to Lynch's counsel stating that a follow-up MRI scan after his injury showed postoperative change at C6-7, and degenerative disc disease at C5-6. Dr. Stern opined that "at the present time [Lynch] is totally disabled from any gainful employment." However, in an October 23, 2003 office note, Dr. Stern noted that Lynch's "bone scan does not show a focus of activity at the C6-7 interspace, indicating that disruption of the fusion is not likely the main source of his pain." Nonetheless, Dr. Stern found that as of January 26, 2004, Lynch "continues to be disabled from gainful work. The duration of this is indefinite." In a June 16, 2004 office note, Dr. Stern observed that "[a]t

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[1]Sclerotomal refers to pain radiating from the skeletal tissues typically described as being "deep, dull, and toothache-like." Radicular refers to pain radiating from the spinal nerve root. STEDMAN'S MEDICAL DICTIONARY 1484, 1584 (26th ed. 1995).

[the] present time, [Lynch] is not using anything for pain. . . . There is a marked restriction of neck extension, and moderate restriction in other directions. . . . Power in the upper extremities remains normal. . . . This patient continues to be symptomatic from his degenerative disc disease."

Dr. Stern also completed several Physical Capacities Evaluation Forms (PCEF) in support of Lynch's disability benefits petition. In a PCEF completed on March 16, 2005, Dr. Stern again opined that Lynch was totally disabled because of the severe and chronic condition of his neck. He stated that Lynch could not sit, stand, or walk for more than 2 hours at a time and could not work for more than a total of 4 hours a day.[2] He also assigned significant lifting restrictions on Lynch's performance of grasping or fine manipulation tasks. Two independent medical examiners, Dr. Bruce Derbyshire and Dr. Kenneth Morrissey, agreed with Dr. Stern's finding that Lynch was significantly restricted in his range of motion. Dr. Derbyshire, however, was of the opinion that while Lynch was not capable of returning to work as a meter reader, he was able to perform a number of less physically exacting jobs. Similarly, Dr. Morrissey found that while Lynch "is totally disabled as to his usual job as an A.M.R./installer. . . .[he] could do light duty work . . . . As a 42 year old man there are plenty of jobs that he could do . . . ."

[2]On March 16, 2005, Dr. Stern opined that Lynch could lift 6-10 pounds "occasionally" and up to 5 pounds "frequently." However on April 11, 2005, Dr. Stern amended his earlier assessment finding Lynch could "never" lift 6-10 pounds, and could only sit, stand and walk for an hour at a time, up to two hours during a entire work day. Jean Hernon, an SSA examiner, determined on October 21, 2003, that Lynch was able to stand, sit, and walk for a total of 6 hours during an 8-hour work day, could occasionally lift 20 pounds and frequently lift 10 pounds, and had an unlimited ability to "push and/or pull."

Lynch applied for disability benefits on August 12, 2003. The application was denied initially and on reconsideration by the Social Security Administration (SSA). A hearing was held before Administrative Law Judge (ALJ) Barry H. Best on April 12, 2005, at which Lynch, his attorney, and a vocational expert appeared. At the hearing, Lynch testified that he was in "continuous pain" and unable to work as his (self-administered) treatment regimen required forty minute traction sessions "four to five times out of a day." Lynch stated that he was unable to help with housework, to drive a car, or to sit or stand for more than an hour at a time. Robert McGinn, a vocational expert, testified that an individual of Lynch's age, education and work experience with a similar residual capacity for light exertion should be able to perform "occupations in the general bench work area (a cutter, a boxer, a linker, a racker, certain assembly, sorter or inspectional jobs.").

In a July 29, 2005 decision, ALJ Best found that Lynch was a "younger individual," with a "limited education,"[3] who was "unable to perform any of his past relevant work." The ALJ found that Lynch's neck impairment was severe (having more than a minimal impact on his ability to perform basic work-related functions), but that his "impairment" did not meet the medical criteria set out in the Commissioner's Listing of Impairments. Moreover, the ALJ did not find Lynch's testimony as to his limitations to be wholly credible. Ultimately, the ALJ determined that Lynch was not disabled as defined in the Act because

[3]Education is primarily defined to mean formal schooling or other training which contributes to a claimant's ability to meet vocational requirements. 20 C.F.R. § 404.1564(a). Generally, for social security purposes, a 7th grade through the 11th grade level of formal education is considered to be a "limited education." 20 C.F.R. § 404.1564(b)(3).

he retained the residual functional capacity to perform a significant number of sedentary jobs available in the national economy.[4]

The SSA Appeals Council denied Lynch's request for review of the ALJ's decision on October 3, 2005, thereby affirming the decision of the ALJ as the final decision of the Commissioner. In this appeal, Lynch contends that the decision is not supported by substantial evidence, and that the ALJ committed reversible error by improperly evaluating the medical evidence, as well as by failing to give controlling weight to the opinion of Dr. Stern as the treating physician.

DISCUSSION

Judicial review in Social Security disability cases is limited statutorily to a determination of whether the findings of the Commissioner are supported by substantial evidence. 42 U.S.C. § 405(g). "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). Thus, the court "must uphold the [Commissioner's] findings . . . if a reasonable

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[4]The Commissioner's regulations at 20 C.F.R. § 404.1567(a) defines sedentary work as follows.

> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting articles like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties.

mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [her] conclusion." Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218, 222 (1st Cir. 1981).

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 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(i)(1) and 423(d)(1)(A). The Act further provides that:

> [a]n 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 in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d)(2)(A). A "physical or mental impairment" is defined as "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. § 423(d)(3). Finally, the Act provides that "[a]n individual shall not be considered under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require." 42 U.S.C. § 423 (d)(5).

SSA regulations require the ALJ as a rule to give "more weight" to the opinions of treating physicians, "since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations." 20 C.F.R. § 404.1527(d)(2). It is not, however, incumbent on the ALJ to give mechanical deference to a treating physician's opinion or to accept the physician's ultimate conclusion that a patient is disabled. Arroyo v. Secretary of Health and Human Services, 932 F.2d 82, 89 (1st Cir. 1991) (where the ALJ's determination that a claimant's ability to function would improve were he to follow a prescribed treatment regimen was supported by the testimony of a treating psychiatrist, the ALJ was "not require[d] . . . to give greater weight to the opinions of treating physicians."). Cf. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003) ("[C]ourts have no warrant to require [ERISA] administrators automatically to accord special weight to the opinions of a claimant's physician.").

In this case, the ALJ rejected Dr. Stern's opinion[5] that Lynch's physical limitations prevented him from pursuing any gainful employment and accepted instead the contrary opinions of Dr. Derbyshire and Dr. Morrissey. In doing so, he made the following findings.

> Dr. Bruce Derbyshire, MD performed an independent medical examination of the claimant on May 1, 2003, and noted no abnormalities except for limitation of neck motion in all planes. He found the claimant capable of

[5]It is worth noting that Dr. Stern's opinion that Lynch was disabled within the meaning of the Social Security Act, while premised on a medical assessment, was ultimately a legal conclusion.

> many types of work as long as he was in a situation that was somewhat protected and did not require him to move his neck very often. The state agency medical consultant at the initial level completed a physical residual functional capacity assessment of the claimant on October 21, 2003, and found him capable of light work with not more than occasional reaching overhead, grasping and twisting with the left upper extremity. Dr. Kenneth Morrissey, MD had similar findings to Dr. Derbyshire in his impartial examination of the claimant on December 2, 2003. He noted no abnormalities in the neck except for difficulty in forward bending past 40 degrees, hyperextension past 30 degrees and lateral bending to the right and left past 20 degrees, and found him capable of light duty work.

ALJ's Decision, at 2.

The ALJ also gave due consideration to Lynch's subjective complaints of pain and made the determination (as he was permitted to do) that Lynch's complaints were not fully credible in light of the objective medical evidence.[6] Again, as he explained

> [t]he claimant's limitations and the degree of pain he alleges . . . are not supported in the medical record. He takes no medication other then extra-strength Tylenol to relieve his pain. He underwent successful fusion surgery for a herniated disk at C6-7 on November 7, 2001. After falling at work on September 23, 2002, his alleged date of onset, he did complain of severe neck pain radiating to the left shoulder and elbow. However, [an] MRI of the cervical spine on December 16, 2002 showed no disk herniation at C6-7, the site of the surgery, minor disk bulging at C5-6 and no other abnormalities. A second MRI on May 27, 2003 revealed a satisfactory post-operative appearance at C6-7 and only a broad based central to right paracentral disk protrusion at C5-6 with no effect on the spinal cord. A bone scan on August 1, 2003 ruled out disruption of the fusion at C6-7 as the source of the

[6]Where 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 consider other relevant information. Avery v. Secretary of Health and Human Services, 797 F.2d 19, 23 (1st Cir. 1986). 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; and (5) any other factors relating to claimant's functional limitations and restrictions due to pain. Id. at 22; 20 C.F.R. §§ 404.1529 and 416.929(c)(3)(i-vii).

> claimant's pain. Physical examinations by Dr. Leslie Stern, MD, the claimant's treating physician and surgeon, on September 24, 2002, July 16, 2003 and January 26 and June 16, 2004 showed no abnormalities except for restricted range of neck motion in all directions.

Id.

The substantial evidence test does not require a perfectly articulated opinion supported by an extraordinarily elevated degree of scientific or medical certainty. See Evangelista v. Secretary of Health and Human Services, 826 F.2d 136, 144 (1st Cir. 1987) (the court "must affirm the [ALJ's] decision even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence."). What it does require is a decision that is legally reasoned and based on facts that are apparent in the record of the case. See Irlanda Ortiz v. Secretary of Health and Human Services, 995 F.2d 765 (1st Cir 1991) ("It is the responsibility of the Secretary to determine issues of credibility and to draw inferences from the record evidence. Indeed, the resolution of conflicts in the evidence is for the Secretary, not the courts."). But see Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) ("The ALJ's findings of fact are conclusive when supported by substantial evidence, 42 U.S.C. § 405(g), but are not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts."). By any analysis, the Commissioner's decision satisfies this flexible standard of review.

ORDER

Appellant's motion to reverse the Commissioner's decision or, in the alternative, to remand for further proceedings is DENIED. The appeal is TERMINATED with prejudice. The Clerk will enter judgment for the Commissioner.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE