

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES OSTROWSKI,	:	
Plaintiff	:	
vs.	:	Civil No. 3:01cv2321 (PCD)
	:	
JO ANNE B. BARNHART,	:	
Commissioner, Social Security	:	
Administration,	:	
Defendant	:	

RULING ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff moves pursuant to 42 U.S.C. § 405(g) and FED. R. CIV. P. 12(c) for judgment on the pleadings seeking reversal of the decision of the Administrative Law Judge (“ALJ”) denying his claim for social security benefits. Defendant cross-moves for an order affirming the decision of the ALJ. For the reasons set forth herein, Plaintiff’s motion is **granted** and Defendant’s motion is **denied**. The matter is **remanded** for further proceedings in light of this ruling.

I. BACKGROUND:

In April, 1993, Plaintiff applied for Supplemental Security Income (“SSI”). In June, 1995, Plaintiff was awarded SSI benefits. The ALJ found that Plaintiff had severe alcoholism, a generalized anxiety disorder, and panic disorder with agoraphobia as well as functional limitation of the right hand. In January, 1997, and after the passage of PL 104-121, Plaintiff’s benefits were discontinued based on the determination that drug abuse had been material to the finding of disability. Rather than appealing that determination, Plaintiff reapplied for benefits in March, 1997. Plaintiff claimed disability since January 1, 1997 due to panic disorder, depression, right arm paralysis, and a cardiac condition. Plaintiff’s claim was denied initially and on

reconsideration. Plaintiff requested a hearing before an ALJ. The hearing took place on October 21, 1999 before ALJ John Mason. ALJ Mason held that Plaintiff was not disabled under the Social Security Act based on the following findings:

1. Claimant has not engaged in substantial gainful activity since January 1, 1997.
2. The medical evidence establishes that the claimant has substance abuse, medial nerve paralysis of the right hand, a rotator cuff injury on the left shoulder, major depression, anxiety, and personality disorder, impairments which are severe within the meaning of the regulations. The claimant also has a history of heart murmur and a history of sever aortic stenosis with moderate aortic insufficiency, status post aortic valve replacement surgery, that did not impose significant restrictions in the ability to perform basic work activities for the durational period and were not severe impairments as that term is used in the regulations.
3. The severity of the claimant's impairments, including his history of drug and alcohol abuse, meet the requirements of sections 12.04, 12.06, 12.08, and 12.09, Appendix 1, Subpart P, Regulations No. 4 and has precluded him from working for at least 12 continuous months. (20 C.F.R. § 416.925).
4. Independent of the claimant's history of drug and alcohol abuse, the claimant's impairments do not meet or equal the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulation No. 4.
5. Independent of drug and alcohol abuse, the claimant retains the residual functional capacity to perform the exertional demands of light work, or work which requires maximum lifting of twenty pounds and frequent lifting of ten pounds. He is able to lift and carry up to ten pounds frequently and up to twenty pounds occasionally.
6. Independent of drug and alcohol abuse, the claimant's capacity for light work is diminished by non-exertional limitations on his ability to crawl and to climb ladders, ropes, or scaffolds; a limited ability to handle, finger, and feel, on the right; and a need to avoid concentrated exposure to hazards in which fine manipulation using the right hand is important.
7. The claimant's statements concerning their impact on his ability to do work are not entirely credible in light of his demeanor at hearing, the reports of the treating and examining practitioners, and the medical history.
8. The claimant has no history of past relevant work.

9. On January 1, 1997, the claimant was forty-one years old, a "younger individual."

10. The claimant has a limited education.

11. Based on an exertional capacity for light work, and the claimant's age, educational background, and work experience and independent of consideration of drug and alcohol abuse, Section 416.969 and Rule 202.16m Table 2, Appendix 2, Subpart P, Regulations No. 4, would direct a conclusion of "not disabled."

12. Independent of consideration of drug and alcohol abuse, although the claimant is unable to perform the full range of light work, he is capable of making an adjustment to work which exists in significant numbers in the national economy. A finding of "not disabled" is therefore reached within the framework of the above-cited rule.

13. The claimant has not been under a disability, as defined in the Social Security Act, at any time through the date of this decision.

14. The medical evidence established that the claimant would not be disabled if he stopped using alcohol and drugs. Therefore, in accordance with § 105 of Pub. L. 104-121, enacted on March 29, 1996, the claimant is ineligible for disability payments under title XVI of the Act.

R. 28-9.

Plaintiff requested that the Appeals Council review the ALJ's decision and the Appeals Council declined, rendering the determination the final agency decision. Plaintiff now seeks judicial review under the Social Security Act and commenced the present action. See 42 U.S.C. § 405(g) (LEXIS 2003) (Providing that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party ...may obtain a review of such decision by a civil action" in a United States district court.).

II. DISCUSSION:

A. Standard of Review:

A court reviewing an ALJ's decision denying benefits under the Social Security Act must first determine whether the ALJ "applied the correct legal principles in making the determination

[and] . . . then decide whether the determination is supported by ‘substantial evidence.’” Johnson v. Bowen, 817 F.2d 983, 985 (2d Cir. 1987). Substantial evidence is more than a scintilla and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). The reviewing court will “set aside the ALJ’s decision only where it is based upon legal error or is not supported by substantial evidence.” Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998). The Act provides that “the findings of the [ALJ] as to any fact, if supported by substantial evidence, shall be conclusive.” 42 U.S.C. § 405(g) (LEXIS 2003).

B. Analysis:

The Social Security Act establishes that "an individual shall not be considered to be disabled for purposes of this title [42 USCS §§ 1381 et seq.] if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C.S. § 1382c(A)(3)(J) (LEXIS 2003). The regulations require that an inquiry be made as to "whether [the Agency] would still find [a claimant] disabled if [the claimant] stopped using drugs or alcohol." 20 C.F.R. § 404.1535(a)(1) (LEXIS 2003). If the "remaining limitations," considered independently of any drug and alcohol abuse, would not be disabling, then drug addiction and/or alcoholism is a contributing factor material to the determination of disability and the claimant is not disabled. Id. at § 404.1535(a)(2)(I). If the claimant would be disabled regardless of the drug or alcohol use, then it is not a contributing factor. Id. at § 404.1535(a)(2)(ii). The burden, however, is on the claimant to prove that substance abuse is not a contributing factor material to the disability determination. Doughty v. Apfel, 245 F.3d 1274, 1281 (2d Cir. 2001). The ALJ applied the correct legal

standard.

In the present matter, there is no dispute that Plaintiff has a long-standing problem with both alcohol and drugs, thus, the issue is what bearing those problems have on his disability determination. Considered as a whole, ALJ Mason determined that Plaintiff met several listings pertaining to affective disorders (12.04), anxiety related disorders (12.06), and personality disorders (12.08). However, the ALJ also determined that when considered separately, the medical evidence "supports a finding that if the claimant stopped using alcohol and drugs, he would not be disabled." R. 27. The ALJ found that once the substance abuse was eliminated from the picture, Plaintiff's impairments no longer met the listings cited. This finding is not supported by substantial evidence. Instead, the medical evidence is fundamentally inconclusive on this point. Thus it is impossible to say, based on the evidence presented, that the psychiatric impairments would disappear or lessen independent of the substance abuse.

The vast bulk of the medical record reports diagnoses both of a variant of polysubstance abuse and major depressive disorder, with or without psychotic features, as well as panic disorder with agoraphobia. See e.g. R. 199 (major depressive disorder, alcohol and opioid dependence), R. 215 (alcohol/opioid dependency and major depressive disorder), R. 273 (major depression with psychotic features, mixed substance abuse, mixed personality disorder, and other psychosocial and environmental problems), R. 293 (same - without psychotic features), R. 300 (same), R. 318 (same), R. 404 (same - with psychotic features), and R. 408 (same - without psychotic features). This list is not exhaustive.

Defendant's argument that Plaintiff's depressive symptoms "emerge with intoxication," Def. Motion for J. at 8, and thus impliedly would disappear without intoxication, is not well

supported by the record, let alone by substantial evidence. Defendant points to a document from The Institute of Living purportedly diagnosing substance induced mood disorder. R. 293, Ex. B-14F10. The handwritten notes Defendant refers to regarding this diagnosis are difficult to understand, appearing to "rule out" substance induced mood disorder, while also pointing to "depressive features, with onset during intoxication." Id. There is some clarification several pages later when the discharge diagnosis actually crosses out completely any reference to substance induced mood disorder. R. 295, Ex. B-14F10. The document is at best ambiguous and, at worst, contradictory, but in any event not substantially supportive. The University of Connecticut Health Center diagnosed with substance induced mood disorder, R. 401, Ex. B-19F10, but this evidence is significantly eclipsed by ambiguous evidence and/or evidence supportive of a contrary position. Indeed, just a couple of weeks later, the same institution diagnosed him with "major depressive disorder with psychotic features" and no mention of substance induced mood disorder. R. 404, Ex. B-19F10.

Defendant makes much of the fact that the medical evidence demonstrates that Plaintiff was seeking treatment for his substance abuse, arguing that the lack of treatment for the substance abuse problems indicates that "[P]laintiff's disability would not progress in the absence of substance abuse." Def. Motion for J. at 8. This argument is not persuasive and is purely speculative. As the diagnoses cited above make clear, while Plaintiff may have presented himself to substance abuse treatment centers, he was diagnosed and treated for both substance abuse and psychiatric conditions. Moreover, the mere fact that Plaintiff chose to treat one of two ailments first does not imply the other is less severe. There are any number of factors that may have led to this decision, including availability of treatment. Speculation as to his motives is

inappropriate without evidence to support such speculation.

The position that Plaintiff's psychiatric disorders and substance abuse problems are connected is the only conclusion supported by the evidence and is based on the coincidence of diagnoses and treatment. It is impossible to tell, based on the record, whether the psychiatric disorders would disappear in the absence of the substance abuse, and it is also difficult to tell whether the substance abuse problems would disappear in the absence of the psychiatric problems. The latter position is supported by some evidence, see R. 198 (Plaintiff seeks treatment "to get my psychiatric problems back in line so I won't be using drugs."), R. 301 (Plaintiff was successfully detoxed, however "his depression and anxiety continued...."), and R. 316 (Plaintiff experiences "anhedonia, uncontrollable crying, hopelessness, insomnia, poor appetite, and thoughts of death even without use of drugs and alcohol."), but not substantial evidence.

Plaintiff argues that when separation of the effects of the two conditions is not possible, the drug and alcohol problems cannot be considered a contributing factor. Plaintiff points to Emergency Teletype 96-94 ("Teletype") in support of his position. Pl. Motion for J. at 7. The Teletype is an internal memorandum, dated August 30, 1996, addressing questions and answers concerning DAA. The Teletype dictates that when it is not possible to "project what limitations would remain if the individuals stopped using drugs/alcohol" a finding that drugs and/or alcohol are not a contributing factor "will" be made. Q & A 27, see also Q & A 29 ("When it is not possible to separate the mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate.").

Plaintiff points to no decision binding on this Court that finds the Teletype to be binding

as a matter of law.¹ However, in the present case, the ALJ has not contradicted the Teletype. The ALJ found the conditions to be separable and did not address the question of what should be done when the evidence suggests the conditions to be inseparable. Accordingly, it is not necessary to decide the issue now. On remand, the ALJ will consider what is appropriate under circumstances when the evidence does not suggest that the effects and causes of the conditions are separable. It seems, regardless of whether the Teletype is binding, that it represents the sound judgment of the Agency and would be persuasive in that respect.

Plaintiff also argues that the ALJ erred in not considering his psychiatric issues as nonexertional limitations on his ability to work, by failing to consult a vocational expert on the question, and by relying solely on the Grids as opposed to a vocational expert. Pl. Motion for J. at 15-16. The "mere existence of a nonexertional impairment does not automatically require the production of a vocational expert nor preclude reliance on the guidelines." Bapp v. Bowen, 802 F.2d 601, 603 (2d Cir. 1986). Rather, "when a claimant's nonexertional impairments significantly diminish his ability to work -- over and above any incapacity caused solely from exertional limitations -- so that he is unable to perform the full range of employment indicated by the medical vocational guidelines, then the Secretary must introduce the testimony of a vocational expert (or other similar evidence) that jobs exist in the economy which claimant can obtain and perform." Id. The ALJ did not consider Plaintiff's psychiatric issues as nonexertional

¹ The Teletype has been cited before, however, thus far the issue has been avoided in the Second Circuit. See e.g. Doughty 245 F.3d at 1281 n. 4. Plaintiff points to an unpublished district court decision finding the Teletype to be binding. Cutlip v. Commissioner of Social Security, Civil Action No. 5:97CV154 (STAMP) (N.D. W. Virginia 1999). Defendant makes no substantive argument that the Teletype is not binding merely, correctly, points out that the authority cited for the proposition that it is binding is not itself binding.

limitations at all. This is apparently because the ALJ viewed these ailments to be caused by Plaintiff's alcohol and substance abuse and not subject to consideration as they would not meet any of the listings if Plaintiff was not abusing alcohol and drugs. See R. 27 (Finding 4). Inasmuch as the conclusion that the conditions are separable is not supported by substantial evidence, neither is this determination. On remand, the ALJ shall consider to what extent Plaintiff's psychiatric issues constitute nonexertional limitations that would "significantly diminish his ability to work" and, in the event that they do, should seek the counsel of a vocational expert. Cf. Bapp 802 F.2d at 603.

III. CONCLUSION:

For the reasons stated herein,² Plaintiff's Motion for Judgment (Doc. 11) is **granted** and Defendant's Motion for Judgment (Doc. 13) is **denied**. The matter is **remanded** for reconsideration not inconsistent with this ruling.

SO ORDERED.

Dated at New Haven, Connecticut, October ____, 2003.

Peter C. Dorsey, U.S. District Judge
United States District Court

² This Court makes no rulings on arguments made by the parties not considered herein. The issues addressed are independently dispositive.