

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

MICHAEL D. HENRY,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION H-05-1081
	§	
JOANNE B. BARNHART,	§	
COMMISSIONER OF THE SOCIAL	§	
SECURITY ADMINISTRATION,	§	
<i>Defendant.</i>	§	

OPINION ON SUMMARY JUDGMENT

Plaintiff Michael D. Henry filed this action for judicial review of the final decision of the Commissioner of Social Security denying his claim for disability insurance benefits under the Social Security Act. 42 U.S.C. § 401, *et seq.*

Before the court are the parties' motions for summary judgment.¹ The court has considered the motions, the administrative record, and the applicable law. For the reasons set out below, the plaintiff's motion for summary judgment (Dkt. 23) is DENIED, the defendant's motion for summary judgment (Dkt. 26) is GRANTED, and the Commissioner's decision denying benefits is AFFIRMED.

I. PROCEDURAL HISTORY

Henry filed an initial application for disability insurance benefits on September 30, 2002. (Tr. 45-47).² Henry contends he is disabled and has been unable to work since July 17, 1999, due to an on-the-job head and neck injury and a mental disorder. (Tr. 51). After Henry's application was denied at the initial and reconsideration levels (Tr. 22-23), Henry requested a hearing before an administrative law judge ("ALJ"). The hearing was held on April 6, 2004. (Tr. 30, 232-74).

¹ The parties have consented to magistrate judge jurisdiction in this case.

² The administrative record will be cited as "Tr. ___".

In a decision dated April 26, 2004, the ALJ denied Henry's application for disability benefits, finding that Henry was not disabled as defined by the Act. (Tr. 20-21). The Appeals Council of the SSA's Office of Hearings and Appeals approved the ALJ's decision on August 16, 2004, thereby transforming it into the final decision of the Commissioner. (Tr. 5-7). *See Sims v. Apfel*, 530 U.S. 103, 107 (2000).

II. APPLICABLE LAW

A. STANDARD OF REVIEW

In Social Security disability cases, 42 U.S.C. § 405(g) (2004) governs the standard of review. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002). The federal courts review the Commissioner's denial of Social Security benefits to ascertain whether (1) the final decision is supported by substantial evidence, and (2) whether the Commissioner used the proper legal standards to evaluate the evidence. *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002).

"Substantial evidence" means that the evidence must be enough to allow a reasonable mind to support the Commissioner's decision; it must be more than a mere scintilla and less than a preponderance. *See Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

If the Commissioner's findings are supported by substantial evidence, they must be affirmed. *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the issues *de novo*, or substitute its judgment for that of the Commissioner. *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001). "Conflicts in the evidence are for the Commissioner and not the courts to resolve." *Masterson*, 309 F.3d at 272. The courts strive for judicial review that is deferential but not so obsequious as to be meaningless. *Brown*, 192 F.3d at 496.

B. STANDARD FOR DETERMINING DISABILITY UNDER THE ACT

The Act authorizes payment of disability insurance benefits and supplemental security income to individuals with disabilities. *Barnhart v. Walton*, 535 U.S. 212, 214 (2002). “Disability” is defined 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 which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A) and 1382c(a)(3)(A) (2004). The burden is on the claimant to prove he or she has such a disability. *Masterson*, 309 F.3d at 271.

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) (2004). The mere presence of an impairment does not necessarily establish a disability. *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). A claimant is disabled only if he is incapable of engaging in any “substantial gainful activity,” which is defined as “work activity involving significant physical or mental abilities for pay or profit.” *Newton*, 209 F.3d at 452-53.

To determine whether the claimant is, in fact, disabled, the ALJ follows a five-step analysis outlined in 20 C.F.R. § 416.920(a) (2004). First, the claimant must not be presently engaged in substantial gainful activity. Second, a claimant must have an impairment or combination of impairments which significantly limits his physical or mental ability to do basic work activities. Third, to secure a finding of disability without consideration of age, education, and work experience, a claimant must establish that his impairment meets or equals an impairment in the appendix to the

regulations. If so, he is presumed disabled and is entitled to benefits without further inquiry. Fourth, a claimant must establish that his impairment prevents him from doing past relevant work. Fifth, the impairment must prevent him from doing any other work. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002).

The claimant bears the burden of proof under the first four steps. If the claimant successfully carries that burden, the burden shifts to the Commissioner in step five to show that other substantial gainful employment is available in the national economy, which the claimant is capable of performing. If the Commissioner successfully makes that showing, the burden shifts back to the claimant to prove that he cannot perform the alternative work suggested. A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis. *Masterson*, 309 F.3d at 272.

III. ANALYSIS

While not making a specific assertion of error, Henry challenges the ALJ's findings on the grounds that they were not supported by substantial evidence. This claim is without merit, as discussed below.

A. THE ALJ'S DECISION

Henry was fifty-two years of age at the time of the hearing. (Tr. 244). He has received a GED and earned a limited number of credits at a junior college. *Id.* Henry's past relevant work experience includes employment as a lot attendant at Home Depot, an in-home care-giver, a gas station attendant, a self-employed lawn care service provider, and a rental property overseer. (Tr. 69).

At his hearing, Henry was present and testified on his own behalf. (Tr. 234). The ALJ also heard testimony from Dr. Nancy Tarrand, a medical expert, and Thomas King, a vocational expert.

(Tr. 255-72). In his testimony, Henry alleged he was disabled due to memory problems, headaches, and neck aches brought about by an on-the-job injury. (Tr. 246). He also claimed that he has difficulty sitting or standing for prolonged periods of time due to nerve damage caused by a bulging cervical disk. (Tr. 239, 246-47, 250). The nerve damage allegedly causes his hands to shake intermittently so that he is unable to perform fine motor functions. (Tr. 251-253). Henry also claimed to suffer from depression. (Tr. 245).

Dr. Tarrand reviewed the medical records and testified that Henry has memory impairment, depression, and impairment of impulse control in social situations. (Tr. 259). Dr. Tarrand also determined that none of Henry's impairments, either singly or in combination, meet or equal the criteria for any listing found in Appendix 1 to Subpart P of 20 C.F.R. § 404. King, a vocational expert, testified that Henry was capable of performing light, unskilled work, but that he was unable to perform past relevant work in light of his poor ability to work with the public. (Tr. 268). King also testified that there are a significant number of jobs in the national economy that Henry can perform. (Tr. 268-71).

After reviewing the evidence, the ALJ determined that Henry was not disabled within the meaning of the Act, using the five-step analysis specified in 20 C.F.R. § 416.920(a). At step one, the ALJ found Henry had not engaged in substantial gainful activity since his alleged onset date of July 17, 1999. (Tr. 20). At step two, the ALJ found Henry has severe impairments; in particular, dysthymia, amnestic disorder, and a cervical facet strain, but held that these impairments did not meet or medically equal one of the listed impairments in Appendix 1. *Id.* At the fourth step, the ALJ found Henry was unable to perform any of his past relevant work. (Tr. 21). However, at step five, the ALJ determined that Henry has the residual functional capacity ("RFC") to perform a significant range of

unskilled light work, and that consequently there are a significant number of jobs in the national economy that he could perform. *Id.* Thus, the ALJ concluded that Henry was not entitled to disability benefits. *Id.*

B. RESIDUAL FUNCTIONAL CAPACITY FOR UNSKILLED LIGHT WORK

The ALJ found that Henry “has the RFC to perform a significant range of unskilled light work.” (Tr. 21). While conceding that Henry is not able to perform any of his past relevant work due to his physical and mental conditions, the ALJ concluded that his “subjective symptoms are of only a mild to moderate degree and tolerable for the level of work, RFC and work limitations as found herein.” (Tr. 17). In addition, Henry’s subjective complaints were found to be “not credible” because they were unsupported by objective medical evidence. *Id.*

The ALJ also relied upon the opinions of Dr. Tarrand. Dr. Tarrand testified that Henry had a dysfunction of the brain that caused memory impairments and other maladies, a depressive syndrome, difficulties in daily living and dealing with the public, and difficulties carrying out complex job instructions. (Tr. 257-62). According to Dr. Tarrand, Henry demonstrated “significantly better memory, and recall, and executive functioning than was [previously] indicated...” (Tr.265). The ALJ found that Henry has dysthymia, amnesic disorder, and cervical facet strain, but he determined that these impairments “do not meet or medically equal, either singly or in combination to one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.” (Tr. 14). Based on the medical record and the testimony of Dr. Tarrand, the ALJ reasonably concluded that although Henry’s impairments are severe, he still retains the RFC necessary to perform limited light duty.

The ALJ’s determinations were also supported by Henry’s own testimony regarding his daily activities. *See Leggett v. Chater*, 67 F.3d 558, 565 n.12 (5th Cir. 1995) (“It is appropriate for the

Court to consider the claimant's daily activities when deciding the claimant's disability status"). Henry read the newspaper, drove an automobile, ran a vacuum cleaner, went grocery shopping, and took out the trash. (Tr. 246-48). Henry also was able to use a computer and a touch-button phone. (Tr. 252). Together with the medical record and the testimony by Dr. Tarrand, the testimony given by Henry at his hearing regarding his daily activities constitutes substantial evidence that he has the RFC for unskilled light work, and based on this information a reasonable mind could agree with the Commissioner's decision in this respect.

C. AVAILABILITY OF JOBS IN THE NATIONAL ECONOMY

The ALJ determined that there are a significant number of jobs in the national economy that Henry could perform, and because of this he is not entitled to disability benefits under the Social Security Act. (Tr. 21) These determinations were based on the medical record as well as the testimony of Thomas King, a vocational expert.

Responding to a hypothetical question regarding an individual with Henry's work restrictions, King testified that such an individual could work as a garment sorter, silverware wrapper, or mail clerk, and that these jobs exist in the regional economy in the numbers of 1500, 900, and 1500 respectively. (Tr. 268-71). After the ALJ expressed concern about Henry's ability to perform the hypothetical jobs with shaking hands, King testified that sedentary unskilled jobs are available that do not require manual dexterity, such as surveillance system monitor, floatation clerk, or order clerk. (Tr. 270-71). These jobs exist in the regional economy in numbers of 800, 800, and 900 respectively. *Id.* Henry has made no objections to these hypotheticals.

Henry asserted at his hearing that he has applied for jobs and been rejected. (Tr. 272). He also asserts in his memorandum to the court that "No employer exists that will hire an individual who

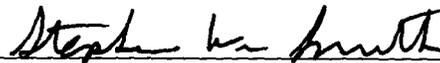
is over 52 years of age who has the physical and mental impediments that the Complainant suffers.” (Dkt. 23). The legal standard is not whether the claimant will be able to find a job, but rather whether or not there are a significant number of jobs in the national economy that he could perform. 20 C.F.R. § 404.1566; *see P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 n.10 (5th Cir. 1991) (noting that social security regulations require only that jobs exist, not that claimant would be hired if he applied). There is substantial evidence from the testimony of the vocational expert, King, supporting the ALJ’s finding that there are jobs existing in significant numbers in the national economy that Henry could perform.

IV. CONCLUSION

The ALJ did not err in ruling that Henry was not entitled to disability benefits under the Social Security Act because substantial evidence in the record supports that conclusion and the proper legal standards were applied. Therefore, the plaintiff’s motion for summary judgment (Dkt. 23) is DENIED, and the Commissioner’s motion for summary judgment (Dkt. 26) is GRANTED, and the administrative law judge’s decision denying benefits is AFFIRMED.

The court will issue a separate final judgment.

Signed at Houston, Texas on June 7, 2006.



Stephen Wm. Smith
United States Magistrate Judge