

**SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

GREGORY O. PATE,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner, Social
Security Administration,

Defendant.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION H-05-1726

MEMORANDUM AND RECOMMENDATION

Plaintiff Gregory O. Pate filed this case under the Social Security Act, 42 U.S.C. § 405(g), for review of the final decision of the Commissioner denying his request for disability insurance benefits.¹ Pate has petitioned for remand and/or reversal. (Dkt. 1). The Commissioner has filed a motion for summary judgment. (Dkt. 14). Having considered the parties' submissions, the administrative record, and applicable law, the court recommends that Pate's motion should be granted and the Commissioner's motion should be denied.

I. Background

Pate, now 55 years old, filed for disability benefits under Title II of the Social Security Act claiming disability as of August 23, 2001 due to a "frozen" left shoulder, left carpal tunnel syndrome, double vision, right foot pain, and diabetes mellitus. The claim was denied initially and on reconsideration, and a request for hearing was timely filed. After a hearing,

¹ This case has been referred to this Magistrate Judge for a report and recommendation.

the administrative law judge issued an unfavorable decision on October 27, 2004. Pate sought review from the Appeals Council on November 15, 2004, and provided additional medical records to support the request for review. The Appeals Counsel denied Pate's request for review on March 2, 2005, making the October 27, 2004 decision final.

II. Analysis

A. Standard of Review

Section 405(g) of the Social Security Act sets forth the standard of review in this case. Federal courts review a decision denying Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the decision is supported by substantial evidence. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Substantial evidence is "more than a scintilla and less than a preponderance." *Masterson*, 309 F.3d at 272; *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try issues *de novo*, or substitute its own judgment for that of the Commissioner. *Masterson*, 309 F.3d at 272. "Conflicts in the evidence are for the [Commissioner] and not the courts to resolve." *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990).

In order to qualify for disability benefits, a plaintiff must prove he has a disability, which is defined under the Social Security Act 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); *Masterson*, 309 F.3d at 271. The administrative law judge must follow a five-step sequential analysis to determine whether a plaintiff is in fact disabled:

1. Is the claimant currently engaged in substantial gainful activity, *i.e.*, working? If the answer is yes, the inquiry ends and the claimant is not disabled.
2. Does the claimant have a severe impairment? If the answer is yes, the inquiry proceeds to question 3.
3. Does the severe impairment equal one of the listings in the regulation known as Appendix 1? If so, the claimant is disabled. If not, then the inquiry proceeds to question 4.
4. Can claimant still perform his past relevant work? If so, the claimant is not disabled. If not, then the agency must assess the claimant’s residual functional capacity.
5. Considering the claimant’s residual functional capacity, age, education, and work experience, is there other work claimant can do? If so, claimant is not disabled.

20 C.F.R. §§ 404.1520, 416.920; *Waters*, 276 F.3d at 718. At step five, the burden shifts to the Commissioner to show that employment for the claimant exists in the national economy. *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991).

B. Defective Hypothetical

Pate argues that the Administrative Law Judge (“ALJ”) posed a defective hypothetical question to the vocational expert. A determination based on a defective hypothetical question cannot stand. *Bowling v. Shalala*, 36 F.3d 431, 436 (5th Cir. 1994). Mere procedural imperfection will not call a judgment into doubt. *See Morris v. Bowen*, 864 F.2d

333, 335 (5th Cir. 1988) (citing *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 1988)). However, it is possible that a defective hypothetical question could call into doubt “the existence of substantial evidence to support the ALJ’s decision.” *Morris*, 864 F.2d at 335.

The test to determine if a defective hypothetical question posed to a vocational expert should result in reversible error was first articulated in *Bowling v. Shalala*,² 36 F.3d at 436, and later clarified by *Boyd v. Apfel*, 239 F.3d 698, 707 (5th Cir. 2001).³ A hypothetical question is defective, resulting in reversible error unless:

- 1) The hypothetical reasonably incorporates all disabilities of the claimant recognized by the ALJ, and
- 2) The claimant is given a real opportunity to correct deficiencies in the hypothetical.

It should be noted that *Bowling* sets out these two conditions in the conjunctive, rather than disjunctive: thus, both conditions must be satisfied to avoid reversible error in this circumstance.⁴ Neither condition is satisfied here.

² “Unless the hypothetical question posed to the vocational expert by the ALJ can be said to incorporate reasonably all disabilities of the claimant recognized by the ALJ, and the claimant or his representative is afforded the opportunity to correct deficiencies in the ALJ’s question by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions (including additional disabilities not recognized by the ALJ’s findings and disabilities recognized but omitted from the question), a determination of non-disability based on such a defective question cannot stand.” *Bowling*, 36 F.3d at 436.

³ *Boyd* explained that *Bowling* “did not state that a party’s failure to point out the problems in a defective hypothetical automatically salvages that hypothetical as a proper basis for a determination of non-disability.” 239 F.3d at 707.

⁴ One might legitimately question the logic of joining these conditions conjunctively. After all, condition #2 (opportunity to correct) seems superfluous if condition #1 (all recognized disabilities incorporated) is met. But close reading of the *Bowling* test (*see* n.2 *supra*) yields another possibility. A hypothetical may be defective even when it incorporates “all

The ALJ specifically recognized that Pate had the following functional limitations:

[T]he claimant retains the following residual functional capacity: to perform light exertional activities, with the limitations that 1) he be allowed to **alternate sitting and standing, at will**; 2) he do no climbing, working at heights, or working with moving/dangerous equipment; 3) he do no repetitive overhead reaching or pushing/pulling with his left arm; and 4) he do no commercial driving. . . . Although light work may require prolonged standing/walking, the limitation that the claimant be allowed to alternate sitting and standing will afford the opportunity to sit when right foot pain begins. . . . Thus, the stated residual functional capacity adequately accommodates for the claimant's established impairments and symptoms.

(Dkt. 1) (emphasis added).

The ALJ asked the vocational expert the following hypothetical:

Now based on his age, education and past work experience it seems I find that he can **sit and stand at will**, lift up to 20 pounds at a time, frequently carrying objects up to 10 pounds, light level, further restrictions of no heights or climbing, no moving or dangerous equipment, no repetitive overhead reaching and no repetitive pushing and pulling with the arms and no commercial driving, could he do his past relevant work?

(Tr. 244) (emphasis added). This hypothetical improperly suggests that the claimant has no postural limitations with regard to sitting or standing, contrary to the ALJ's subsequent findings. Thus, the vocational expert could not have provided an informed answer to the incorrect hypothetical posed by the ALJ.

disabilities recognized by the ALJ." For example, the record may reflect additional disabilities which, although unmentioned in the ALJ's findings, should properly be considered by a vocational expert at step five. In such a case the hypothetical might not constitute reversible error if the claimant fails to take advantage of the opportunity to correct. Whether the *Bowling* test was formulated with this circumstance in mind may be debatable. Regardless, this court is not at liberty to assume that the *Bowling* court really meant "or" when it wrote "and."

The significant difference between the ability to sit and stand at will and the need to alternate sitting and standing is explained by Social Security Ruling 83-12:⁵

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. . . . **Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work.** (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.). . .

Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implications for the occupational base.

Social Security Ruling 83-12 (emphasis added). In other words, this limitation could render an individual incapable of performing jobs classified as either sedentary work or light work.

Social Security Ruling 96-9P also emphasizes the need for informed vocational expert testimony to assist the ALJ in properly determining the residual functional capacity of a claimant who must alternate sitting and standing:

Alternate sitting and standing: An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. **The RFC assessment must be specific as**

⁵ While Social Security Rulings are not binding on this court, they must be applied by the ALJ. See *Myers v. Apfel*, 238 F.3d 617, 620 (5th Cir. 2001); 20 C.F.R. § 402.35(b)(1).

to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work.

Social Security Ruling 96-9P (emphasis added).

The ALJ's determination indicated reliance upon the testimony of the vocational expert. "Based on the testimony of the vocational expert, the undersigned [ALJ] concludes that considering the claimant's age, educational background, work experience, and residual functional capacity, he is capable of making a successful adjustment to work that exists in significant numbers in the national economy." (Dkt. 1). The reliance on vocational expert testimony that was based on a defective hypothetical question amounts to error.

Nor is it clear that Pate's counsel had a real opportunity to correct the deficient hypothetical. Here, the deficiency in the hypothetical amounted to a subtle, yet critical omission of the word "alternate." Even though Pate's counsel was present at the hearing, the deficiency was not patently obvious or readily discoverable without the benefit of a hearing transcript. In fact, the shortfall in the evidence would not become apparent until after the ALJ issued his written decision. When the ALJ posed his hypothetical to the vocational expert at the close of the hearing, Pate's counsel could reasonably have believed the ALJ had explicitly rejected the postural restriction in question. After all, an ALJ would normally be expected to correctly convert the RFC he is contemplating into a hypothetical question that successfully conveys the limitations he plans to adopt. It is easily conceivable that Pate's counsel, or any counsel, could have missed or been misled by such an omission in the

hypothetical, thus unintentionally forgoing a meaningful opportunity to inform the vocational expert of defects. This does not appear to be an instance of a claimant letting an obvious deficiency pass without comment at the hearing.

Accordingly, because the hypothetical did not reasonably incorporate all disabilities recognized by the ALJ, and because there was no meaningful opportunity to correct the deficiency in the hypothetical question, the determination of the ALJ based on a defective hypothetical question is reversible error.

C. Carpal Tunnel Syndrome

Pate next challenges the ALJ's failure to find left hand limitations related to carpal tunnel syndrome, a condition which Pate has consistently complained about in written and oral statements to the agency. (Tr. 77, 81, 236-37). An ALJ's decision, as adopted by the Appeals Council, "must stand or fall with the reasons set forth in the ALJ's decision." *Newton v. Apfel*, 209 F.3d 448, 455 (5th Cir. 2000). The ALJ rejected Pate's carpal tunnel complaints for three reasons:

[1] The medical record shows that the claimant's physicians have never diagnosed carpal tunnel syndrome; and [2] there is no diagnostic testing or clinical examination that supports a diagnosis of carpal tunnel syndrome. [3] Furthermore, the medical record contains no notes indicating that the claimant has reported or complained of left hand dysfunction apart from his left shoulder impairments.

(Dkt. 1). Evidence in the record does not support these conclusions.

Medical records before the ALJ contain several references to the condition of Pate's left hand. "Carpal tunnel syndrom L. wrist" appears in the medical history on his "primary

care initial evaluation” visit to the VA on October 29, 2002. (Tr. 187). He was then referred to the VA’s “orthopedic hand clinic,” and a progress note dated June 19, 2003 shows that the hand clinic referred him to a physical therapist so that treatment for this condition could be incorporated into his exercise regimen. (Tr. 172). Additional records from the hand clinic were not sought or obtained by the ALJ, despite the agency’s statutory obligation to retrieve them. *See* 42 U.S.C. § 423(d)(5)(B) (“Commissioner . . . shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability.”); *see also* *Newton v. Apfel*, 209 F.3d 448, 458 (5th Cir. 2000) (“If the ALJ does not satisfy his duty, his decision is not substantially justified.”).

Pate also submitted additional medical evidence related to carpal tunnel to the Appeals Council after the ALJ’s determination was issued, but prior to the decision of the Commissioner becoming final.⁶ *Higginbotham v. Barnhart*, 405 F.3d 332, 337 (5th Cir. 2005). Thus, as part of Pate’s appeal to the District Court, the additional evidence presented to the Appeals Council must be “considered and addressed” by this court. *Id.* at 338.

These additional records support Pate’s complaints about his hand condition. On July 19, 2001, Dr. Hrachovy diagnosed Pate as having “probable carpal tunnel.” (Tr. 225). Dr. Hrachovy’s notes of that day record the following symptoms:

⁶ The Appeals Council denied Pate’s request for review of the ALJ’s decision. The determination was made, in part, after considering Pate’s November 15, 2004 letter to the Appeals Council that included the additional medical information.

Mr. Pate presents to the clinic today complaining of a very painful left hand. His history dates back to at least a year ago when he was having difficulty with his 3rd and 4th fingers of his left hand. However over the past several days he has begun having more and more pain with some swelling of the PIP joints to the point where he can no longer flex his fingers completely. He states also he has been having a lot of difficulty with numbness on the 2nd, 3rd and 4th fingers of the left hand.

Id. Four days later on July 23, 2001, Dr. Hrachovy noted that Pate stated “he is doing much better” and has noticed “some improvement in the discomfort in his left fingers since he has been wearing a cock-up splint.” (Tr. 224). Dr. Hrachovy specifically noted that “If [Pate] continues having difficulty with the carpal tunnel we will have to refer to an orthopedist.”

Id.

While these records are not conclusive proof of Pate’s hand use limitations, they certainly undermine the ALJ’s stated reasons for declining to find such an impairment. Moreover, any error on hand use limitations would certainly have affected the claimant’s substantial rights, given that the available jobs identified by the vocational expert require good manual dexterity.⁷ Therefore, the ALJ’s stated rationale for declining to find hand use limitations is not supported by substantial evidence, and constitutes reversible error.

III. Conclusion

⁷ The job of “ticket seller” requires that handling and fingering be done “constantly.” U.S. Dept. of Labor, *Dictionary of Occupational Titles*, job no. 211.467-030 (ticket seller). The job “cashier” requires such tasks “frequently,” *i.e.* from one-third to two-thirds of each work day. *Id.* at job nos. 211.462-010 (cashier II) and 211.362-010 (cashier I). The job of “shipping and receiving weigher” requires “frequent” handling. *Id.* at job no. 222.387-074 (shipping and receiving weigher).

The Commissioner's decision is not supported by substantial evidence. *See Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Therefore, the court recommends that Pate's motion should be granted and the Commissioner's motion should be denied. It is further recommended that on remand the ALJ properly evaluate step five of the disability analysis to determine if a requisite job base exists for the claimant. The ALJ should also re-evaluate the extent of Pate's hand limitations related to carpal tunnel syndrome and evaluate the medical records that Pate provided to the Appeals Council.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas, on June 13, 2006.


Stephen Wm Smith
United States Magistrate Judge