

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

RONALD D. OSBORN,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Commissioner, Social
Security Administration,

Defendant.

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CIVIL ACTION H-07-01501

MEMORANDUM AND RECOMMENDATION

Plaintiff Ronald D. Osborn seeks review of the denial of his request for disability insurance benefits under Title II of the Social Security Act.¹ The parties have filed motions for summary judgment (Dkts. 12, 13). The court recommends that Osborn's motion be denied and the Commissioner's motion be granted.

BACKGROUND

Osborn filed on August 6, 2004 an application for benefits under the Social Security Act, alleging he was disabled and unable to work as of June 20, 2003 due to diabetes mellitus, hypertension, and degenerative disc disease. After his application and request for reconsideration were denied, an administrative law judge conducted a hearing on April 11, 2006. The ALJ held in a May 24, 2006 decision that Osborn

¹ The case has been referred to this magistrate judge for report and recommendation (Dkt. 7).

was not disabled within the meaning of the Social Security Act. The Appeals Council denied Osborn's request for review, making the ALJ's determination the final decision of the Commissioner of Social Security. Osborn now seeks judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

ANALYSIS

A. Standard of Review

Section 405(g) of the Social Security Act sets forth the standard of review in this case. The federal courts review the decision of the Commissioner to deny Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the Commissioner's 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 the questions *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. The Commissioner's Decision and the Evidence of Record

Osborn, born October 8, 1957, was a commercial airline pilot for Continental Airlines from 1985 until June 20, 2003, the alleged onset date of his disability. He has not worked since. The ALJ determined that Osborn has the severe impairments of diabetes mellitus, hypertension, and degenerative disc disease of the lumbar spine, none of which meet or equal in severity a listed impairment. The ALJ found that Osborn cannot perform his past work. The ALJ further found that Osborn possesses the residual functional capacity “to stand or walk three hours in an eight hour day, sit six to eight hours in an eight hour day, lift ten pounds occasionally and less than ten pounds frequently, only occasionally climbing stairs but never ropes ladders and scaffolding, and occasionally balancing, stooping, kneeling, crouching and crawling.”² Osborn’s ability to perform sedentary work is limited by the requirements that he not work around hazardous machinery or at unprotected heights. The ALJ further found that Osborn has moderate limitations in “understanding, remembering and carrying out detailed instructions, sustaining concentration, persistence and pace and ability to complete a normal work day.”³ Based on these limitations, the ALJ concluded that Osborn could perform less than a full range of sedentary work. Based

² Tr. at 26.

³ *Id.*

on the testimony of a vocational expert, the ALJ concluded that Osborn was capable of performing work that exists in significant numbers in the national economy, and thus not disabled within the meaning of the Social Security Act.

C. Alleged Errors

Osborn argues that the ALJ erred by not considering his obesity, and by not giving controlling weight to the disability opinion of his treating physician.

Obesity. There are numerous passing references to Osborn’s obesity in the record.⁴ However, the mere fact that Osborn is obese does not warrant an assumption about his ability to function. As with any impairment, it is the claimant’s burden to establish how obesity limits his ability to function. An ALJ will not make assumptions about the severity or functional effects of obesity combined with other impairments. “[O]besity in combination with another impairment may or may not increase the severity of functional limitations of the other impairment. [An ALJ] will evaluate each case based on the information in the case record.” Social Security Ruling (SSR) 02-01p, “Title II and XVI: Evaluation of Obesity” (September 12, 2002), 2000 WL 628049 *6.

There is no medical evidence in the record attributing any limitation on Osborn’s ability to function to his weight. Osborn has been told that most or all of

⁴ See, e.g., Tr. at 119, 271, 283-84.

his pain would subside if he lost weight.⁵ “If an impairment reasonably can be remedied by treatment, it can not serve as a basis for disability.” *Stillwell v. Cohen*, 411 F.2d 574, 575-76 (5th Cir. 1969). While weight loss is very difficult under the best of circumstances, there is no indication in this record that Osborn has taken any significant steps, such as seeking medical treatment, to lose weight, or that there is any medical reason he cannot lose weight. *Cf. Scott v. Heckler*, 770 F.2d 482, 486-87.

The ALJ did not err by not considering Osborn’s obesity in making his disability ruling.

Opinion of Treating Physician. Osborn relies on the November 2005 impairment questionnaire prepared by his treating physician, Dr. Naveen Korivi.⁶ In response to the questionnaire, Dr. Korivi stated that Osborn could lift or carry only 5-10 pounds occasionally, could sit only up to one hour a day, and could stand/walk for the same length of time.⁷

⁵ Tr. at 98.

⁶ Tr. at 287-93.

⁷ Tr. at 289-90.

The ALJ decided that Osborn is not as limited as reported by Dr. Korivi's questionnaire.⁸ The ALJ explained that Dr. Korivi's own treatment notes, as well as other medicate evidence, indicate that Osborn has a full range of motion in his lumbar spine and that medication addresses his pain.⁹ The record also contains the hearing testimony of a medical expert, Dr. Hoang. Dr. Hoang testified that the diagnostic evidence, (including an October 2003 MRI, and July 2004 and April 2005 EMG tests), indicates that Osborn could sit for six hours a day. Dr. Hoang also pointed out that Osborn reported to Dr. Korivi in January 2006 that he had started walking every morning and runs one mile each night. He also reported at that time that he was sleeping well and his pain was well-controlled with medication.¹⁰

In the face of conflicting medical evidence, an ALJ is not obligated to accept the unsupported reports of a treating physician. *Scott v. Heckler*, 770 F.2d 482, 485 (5th Cir.. 1985). "Good cause may permit an ALJ to discount the weight of a treating physician relative to other experts where the treating physician's evidence is conclusory, is unsupported by medically acceptable clinical, laboratory, or diagnostic

⁸ At the same time, the ALJ also rejected the opinion of the state reviewing physician, who opined that Osborn could perform work at the medium exertional level, meaning he could lift/carry 50 pounds occasionally and 25 pounds frequently. The ALJ found this opinion not persuasive based on Osborn's diagnosis of degenerative disc disease. Tr. at 27.

⁹ *Id.* (citing hearing Ex. 9F, 7F, 11F, 12F).

¹⁰ Tr. at 340, 392.

techniques, or is otherwise unsupported by the evidence.” *Newton v. Apfel*, 209 F.3d 448, 456 (5th Cir. 2000). The ALJ did not err in not fully adopting the opinion of Dr. Korivi in this case.

CONCLUSION

The court concludes that the ALJ applied proper legal standards and the May 24, 2006 decision is supported by substantial evidence. Therefore, the court recommends that the Commissioner’s motion for summary judgment (Dkt. 13) be granted, and Osborn’s motion for summary judgment (Dkt. 12) be denied.

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 March 3, 2008.



Stephen Wm Smith
United States Magistrate Judge

