

**SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JOHN HUFFMAN,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner, Social
Security Administration,

Defendant.

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CIVIL ACTION H-07-0017

MEMORANDUM AND RECOMMENDATION

Plaintiff John Huffman 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 benefits under Titles II and XVI of the Social Security Act.¹ The parties have filed motions for summary judgment (Dkts. 20, 21). The court recommends that Huffman’s motion be denied and the Commissioner’s motion be granted.

BACKGROUND

Huffman filed on September 9, 2003 an application for disability insurance benefits and supplemental security income under the Social Security Act, alleging he was disabled and unable to work as of January 3, 2003 due to arthritis in his left hand and back problems. After his application and request for reconsideration were

¹ The case has been referred to this magistrate judge for report and recommendation (Dkt. 9).

denied, an administrative law judge conducted a hearing on June 15, 2005. The ALJ held in an August 25, 2005 decision that Huffman was not disabled within the meaning of the Social Security Act. The Appeals Council denied Huffman's request for review, making the ALJ's determination the final decision of the Commissioner of Social Security. Huffman 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

Huffman, 39 years old at the time of the hearing, has an 8th grade education and past relevant work as a tree cutter, apartment maintenance worker, and tire changer. He has not worked since the alleged onset date of disability. The ALJ determined that Huffman has the severe impairments of lumbar spondylosis and asthma, neither of which meet or equal in severity a listed impairment. The ALJ found that Huffman cannot perform his past work. The ALJ further found that Huffman possesses the residual functional capacity to perform light work, limited by the need to avoid pulmonary irritants. Based on these limitations, a vocational expert testified that jobs exist in the regional economy that Huffman is able to perform. Therefore, the ALJ concluded that Huffman is not disabled within the meaning of the Social Security Act.

Huffman argues that the ALJ erred in the following ways: (1) failing to properly inform Huffman of his right to counsel at the hearing; (2) failing to consider all of Huffman's impairments and limitations; (3) failing to find that Huffman's impairments meet or equal Listing 3.02; (4) making a decision that is not supported

by the evidence of record; and (5) finding that Huffman retains the ability to perform other work existing in significant numbers in the regional economy.

1. Waiver of Right to Counsel

A social security claimant has a statutory right to representation by counsel at a hearing before an ALJ, but is not required to have counsel. 42 U.S.C. § 406; 20 C.F.R. § 416.1505. A claimant may waive the right to counsel. *McConnell v. Schweiker*, 655 F.2d 604, 606 (5th Cir. 1981). An ALJ has a special duty to develop a full and fair record where an unrepresented claimant appears before him. *Clark v. Schweiker*, 652 F.2d 399, 406 (5th Cir. 1981). While a claimant need not prove that the presence of counsel would necessarily have resulted in any specific benefits, the claimant must show that he was prejudiced in some way by lack of counsel. *McConnell*, 655 F.2d at 606; *Clark*, 652 F.2d at 406.

The ALJ clearly informed Huffman of his right to representation, and that legal services organizations exist that might be able to help him. Despite the ALJ's statements, Huffman decided to proceed with the hearing on his own. Tr. 390-91. Nonetheless, relying on *Clark*, Huffman argues that ALJ was required to specifically inform him that he might qualify for free representation, that he might be able to acquire counsel who would agree to be paid only if he prevailed, and that the Social Security office would withhold a maximum of 25% of his past due benefits to pay an

attorney's fee. Huffman's case differs in important ways from *Clark*. Huffman was informed of his right to counsel not only in written notices, but on the record at the start of his hearing. Unlike *Clark*, Huffman is not functionally illiterate. And, most importantly, Huffman was not prejudiced by lack of counsel.

The ALJ extensively questioned Huffman, his wife Stephanie Huffman, and his pastor, James Lea, about Huffman's work history and his condition. The ALJ received all of Huffman's medical records into evidence. Huffman was given an opportunity to cross-examine the vocational expert. Tr. 410. The ALJ gave Huffman and his witnesses an opportunity to add anything they wished to the record. Tr. 411. Having been given the opportunity to comment by the ALJ, Lea pointed out information in the medical records that he felt the ALJ should consider. In fact, the ALJ asked an additional hypothetical question of the vocational expert based on Lea's comment regarding Huffman's use of a cane. Tr. 411. In sum, the transcript reflects that the ALJ met his heightened duty to fully develop the record in this case. *See Brock v. Chater*, 84 F.3d 726, 728 (5th Cir. 1996) (the ALJ met the heightened duty by questioning the claimant, considering the medical records, and inviting claimant to add any other relevant evidence to the record); *Castillo v. Barnhart*, 325 F.3d 550, 553 (the ALJ met the heightened duty to explore all relevant facts by questioning the claimant and her husband and gave them the opportunity to add

anything else to the record). Huffman is not entitled to remand on the grounds that he was not adequately informed of his right to counsel at the hearing.

2. Consideration of all Limitations and Impairments

A medically determinable impairment is one which has lasted or can be expected to last for a continuous period of not less than 12 months, and prevents the claimant from engaging in gainful activity. *Bowling v. Shalala*, 36 F.3d 431, 435 (5th Cir. 1994). “A medically determinable impairment must be established by medical evidence consisting of signs, symptoms and laboratory findings,” rather than on the plaintiff’s statement of symptoms alone. *See* 20 C.F.R. §§ 404.1508, 404.1528, 416.908, 416.929(b).

Huffman argues that the ALJ failed to consider all the limitations caused by his impairments. First, Huffman points to the undisputed fact that he uses a cane prescribed by his physician, Dr. Ghanem. The ALJ expressly considered this limitation in reaching his conclusion. As noted above, the ALJ asked the vocational expert whether Huffman’s use of a cane would impact the availability of jobs Huffman could perform at the light work level. The vocational expert testified that it possibly would, but that “the jobs I defined for you previously would not be compromised by the use of the cane.” Tr. 412. Based on the vocation expert’s

testimony, the ALJ found that Huffman could still do the jobs identified by the vocation expert if he used a cane. The ALJ's conclusion is supported by the record.

Huffman further argues that the ALJ did not consider limitations related to his need for breathing treatments for his asthma.² Huffman takes breathing treatments 3 or 4 times a day.³ The ALJ did not expressly consider whether the need to take breathing treatments would impact Huffman's ability to perform certain jobs. However, the ALJ's determination of Huffman's residual functional capacity included the assumption that he would be allowed to take normal breaks. Tr. 406. There is no evidence that Huffman's breathing treatments could not be taken in the course of normal work breaks.

Next, Huffman argues that the ALJ erred in not considering his left hand impairment. Huffman points to a December 16, 2003 medical record indicating the presence of "left hand osteoarthritis." Tr. 285. That document indicates that Huffman initiated care for the subjective complaint of swelling and pain in this left hand. An x-ray indicated degenerative joint disease with no fracture. As the ALJ noted, he was treated with pain medication and the record contains no evidence of more complaints or treatment related to this condition. Dr. Ghanem noted on his

² Huffman smoked cigarettes until about a week before the hearing. Tr. 396.

³ Huffman testified that he takes the treatments "most of the time three [times per day] but I do take it four some days." Tr. 396.

residual functional capacity questionnaire prepared on October 3, 2005, that Huffman's reaching, handling or fingering ability was "only limited due to numbness in hand," Tr. 204, but does not provide an objective medical basis for this assessment or a quantification of the extent of the limitation. Thus, ALJ did not err by finding that Huffman's left hand impairment is no more than a "slight abnormality having such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience." *Stone v Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985).

Finally, Huffman argues that the ALJ erred in failing to consider his mental impairments of difficulty getting along with others and chronic anxiety.⁴ Contrary to Huffman's argument, the record does not contain evidence that Huffman suffered from any mental impairment lasting more than 12 months, or that caused him any significant functional limitations. *See Barajas v. Heckler*, 738 F.2d 641, 644 (5th Cir. 1984) (upholding denial of disability benefits where the claimant "failed to demonstrate that her impairments significantly limit her physical or mental abilities to do work."). The ALJ has a duty to develop the record on mental impairments only

⁴ Huffman did not identify any mental impairment in his application for benefits. Huffman stated in his daily activity questionnaire that "my sister is driving me freaking crazy," Tr. 95, and that he often gets irritated with family members, Tr. 97, but those factors should not impact his ability to work, and in fact might be alleviated by his working outside the house.

where there is evidence in the record sufficient to suggest that such an impairment exists, and “the claimant alleges . . . symptoms but the medical signs and laboratory findings do not substantiate any physical impairments capable of producing the pain or other symptoms.” 20 C.F.R. § 404.1529(b). The ALJ’s duty to investigate does not extend to possible impairments that are are not clearly indicated on the record. *See Leggett v. Charter*, 67 F.3d 558, 566 (5th Cir. 1995).

Huffman testified that he was treated for panic attacks in 2001, but has not received any mental health treatment since 2003. While he testified that he takes Xanax for anxiety, he told the ALJ that the Xanax is effective. Tr. 396. The ALJ noted in his opinion that a mental status report dated September 26, 2003 showed no mental limitations. Tr. 115-16. The ALJ did not err in finding that Huffman does not have a severe mental impairment.

3. Listing 3.02 Impairment

Huffman contends that the ALJ should have found that he meets the requirements of the Listing for chronic pulmonary insufficiency. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 3.02. A person of Huffman’s height meets the criteria for Listing 3.02 if proper testing reveals an FEV1 (forced expiratory volume) level of equal to or less than 1.35. *Id.* at Table I.⁵ Huffman cites an April 8, 2005 spirometry report,

⁵ Huffman incorrectly states the threshold FEV1 value equal or less than 1.55.

Tr. 230, which he claims indicates an FEV1 value of 45.95 “pre-medication,” and 83.48 “post-medication,” and further indicates “severe obstruction as well as low vital capacity.” Huffman misinterprets the spirometry report.⁶ The April 8, 2005 report indicates that Huffman had a “premed,” or pre-medication, FEV1 of .91, and a “pred,” or predicted, FEV1 value of 3.66. Thus, his pre-medication FEV1 was 25% of the predicted level for someone his size. According to Listing 3.00(E) regarding proper documentation of pulmonary function testing, spirometry should be repeated after administration of an aerosolized bronchodilator if the pre-medication FEV1 value is less than 70% of the predicted normal value. However, the April 8, 2005 report does not indicate that any post-medication testing was conducted. Listing 3.00(E) provides that “[i]f a bronchodilator is not administered, the reason should be clearly stated in the report. Pulmonary function studies performed to assess airflow obstruction cannot be used to assess levels of impairment in the range that prevents any gainful work activity, unless the use of bronchodilators is contraindicated.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, 3.00(E). Because no post-medication testing was conducted

⁶ As the Commissioner notes, the FEV1 values cited by Huffman (45.95 and 83.48) do not correspond to a correct FEV1 range. Even if they did, there is no doubt that 45.95 is greater than 1.55, and thus by Huffman’s own analysis he would not meet listing 3.02.

or contraindicated, the April 8,2005 spirometry report cannot be relied upon as evidence that Huffman meets Listing 3.02.⁷

4. Residual Functional Capacity

The state reviewing physician in this case opined that Huffman suffered from lumbar spine spondylosis, but retained the functional capacity to lift and carry 25 pounds frequently and 50 pounds occasionally, stand and/or walk about 6 hours of an 8 hour workday, sit about 6 hours of an 8 hour workday, and unlimited push and pull ability. Tr. 139-146. The ALJ did not wholly adopt the state reviewing physician's opinion, but found that Huffman did retain the capacity for light work, *i.e.*, lifting and carrying 10 pounds frequently and 20 pounds occasionally, standing and walking 6 hours in an 8-hour workday and sitting 6 hours in an 8-hour workday, with the added restriction that he should avoid concentrated pulmonary irritants. Tr. 31. In reaching this conclusion the ALJ determined that the conclusory statements of Huffman's treating physicians were not persuasive and accorded them little weight.

Huffman's primary physician, Dr. Ghanhem, wrote notes on October 3, 2005 (Tr. 206) and again on May 25, 2005 just before the hearing (Tr. 170) stating that Huffman has permanent physical disabilities, including cervical & lumbar

⁷ The record also contains a January 21, 2004 spirometry report which shows Huffman had a premedicated FEV1 of 3.15, or 85% of the predicted value, which is within normal range. Tr. 159.

radiculopathy. However, numerous tests indicate the Huffman's cervical and lumbar spine are essentially normal with mild abnormalities. *See* Tr. 149-50 (March 11, 2004 sensory nerve conduction threshold test indicating "mild hyperesthetic condition); 221 (5/19/05 "unremarkable CT examination of cervical spine"); 228 (4/21/05 MRI of cervical spine); 250 (8/6/04 MRI of the lumbar spine showing mild disc desiccation with lumbar vertebral bodies normally aligned and normal marrow signal); 318 (9/5/03 exam showing normal vertebral body and interspacing, very minimal anterior end plate spondylosis); 320 (9/5/03, "unremarkable MRI examination of the lumbar spine"). Dr. Al-Khadour indicated in a medical release statement signed July 7, 2004 that Huffman could not lift or carry *any* weight, or engage in *any* normal work activities like standing , climbing, kneeling, pushing or pulling, for *any* period of time in an 8-hour workday. Tr. 171. Again, this report is not supported by any objective medical evidence.

In the face of conflicting medical evidence, the ALJ was not obligated to accept the unsupported reports of Huffman's physicians. *Newton v. Apfel*, 209 F.3d 448, 456 (5th Cir. 2000) ("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

techniques, or is otherwise unsupported by the evidence.”). The ALJ did not err in finding Huffman maintains the residual functional capacity to do light work.

5. Ability to Perform Other Work Existing in Significant Numbers in National Economy.

Huffman contends that the ALJ erred in not including all functional limitations supported by the record in his hypothetical question to the vocational expert. The ALJ is entitled to rely on the testimony of a vocational expert in making his ultimate conclusion of non-disability at step 5 of the sequential analysis. The vocational expert’s testimony constitutes substantial evidence unless it is based on a defective hypothetical question. *Bowling v. Shalala*, 36 F.3d 431, 436 (5th Cir. 1994). Here, the ALJ included all Huffman’s functional limitations that are supported by the record in his hypothetical question to the vocational expert. The vocational expert identified three jobs that exist in significant numbers in the regional economy, (small parts assembler, ticket taker, and library page), that Huffman could perform based on his limitations, age, education and experience. The ALJ did not err at step 5 of the sequential analysis.

CONCLUSION

The court concludes that the ALJ applied proper legal standards and the August 25, 2005 decision is supported by substantial evidence. Therefore, the court

recommends that the Commissioner's motion for summary judgment (Dkt. 21) be granted, and Huffman's motion for summary judgment (Dkt. 20) 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 January 3, 2008.



Stephen Wm Smith
United States Magistrate Judge