

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH**

WILLIAM DEMYER
Plaintiff

v.

No. 5:06CV-00071-J

JO ANNE B. BARNHART
Commissioner of Social Security
Defendant

**MAGISTRATE JUDGE'S REPORT
and RECOMMENDATION**

This matter is before the court upon the plaintiff's complaint seeking judicial review of the final decision of the Commissioner pursuant to 42 U.S.C. § 405(g). The plaintiff is represented by Frederick J. Daley, Jr. The fact and law summaries of the plaintiff and the defendant are at Docket Entry Nos. 12 and 19, respectively. This matter has been referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636.

The final decision of the Commissioner was rendered on July 28, 2004, by administrative law judge (ALJ) Denise McDuffie Martin. In support of her decision denying Title II benefits, Judge Martin entered the following numbered findings:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through December 31, 1998.

2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.

3. The claimant's degenerative disc disease, medial meniscus tear and arthroscopy are considered "severe" based on the requirements in the Regulations 20 CFR § 404.1520(c).

4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, of Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.

6. The claimant has the following residual functional capacity: to perform sedentary job tasks with no repetitive bending, lifting, pushing or pulling that is simple, low stress and requires an opportunity to sit/stand at will. The claimant's job activity should be free from loud background noises.

7. The claimant is unable to perform any of his past relevant work (20 CFR § 404.1565).

8. The claimant, on the alleged onset date was a "younger individual" (20 CFR § 404.1563).

9. The claimant has a "high school education and a college degree in biology" (20 CFR § 404.1564).

10. The claimant has no transferable skills from any past relevant work and/or transferability of skills is not an issue in this case (20 CFR § 404.1568).

11. The claimant has the residual functional capacity to perform a significant range of sedentary work (20 CFR § 404.1567).

12. Although the claimant's exertional limitations do not allow him to perform the full range of sedentary work, using Medical-Vocational Rule 201.20 as a framework for decision-making, there are a significant number of jobs in the (national) greater Chicago metropolitan economy that he could perform. Examples of such jobs include work as (200,000) 6000 bench assembly jobs reduced by 30 percent for sedentary requirements, (200,000) 6000 information clerk reduced by 10 percent due to an inability to frequently move his head and (267,000) 8000 clerk/cashier reduced by 10 percent with the option to sit/stand at will.

13. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date last insured for disability benefits on December 31, 1998 (20 CFR § 404.1520(g)).

(Administrative Record (AR), pp. 28-29).

Governing Legal Standards

1. The court has jurisdiction to examine the record that was before the Commissioner on the date of the Commissioner's final decision and to enter a judgment affirming, modifying, or reversing that decision. 42 U.S.C. § 405(g), sentence four. In exercising its "sentence four"

jurisdiction, the court is limited to determining whether the Commissioner's controlling findings are supported by substantial evidence and whether the Commissioner employed the proper legal standards in reaching her decision. *Richardson v. Perales*, 402 U.S. 389 (1971). Substantial evidence is more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Secretary of Health and Human Services*, 667 F.2d 524 (6th Cir., 1981). It has been described as a sufficient amount of evidence "to justify, if the trial were to a jury, a refusal to direct a verdict." *Sias v. Secretary*, 861 F.2d 475, 480 n. 1 (6th Cir., 1988). In determining whether the Commissioner's findings are supported by substantial evidence, the court must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Wyatt v. Secretary*, 974 F.2d 680 (6th Cir., 1992). However:

The substantial-evidence standard allows considerable latitude to administration decision makers. It presupposes that there is a zone of choice within which the decision makers can go either way, without interferences by the courts. An administrative decision is not subject to reversal merely because substantial evidence would have supported an opposite decision.

Mullen v. Secretary, 800 F.2d 535, 545 (6th Cir., 1986).

When conducting substantial evidence review, the court is restricted to a consideration of the evidence that was before the Commissioner on the date of the final decision. When the Appeals Council declines to review the ALJ's decision and render a new decision, the ALJ's decision becomes the Commissioner's final decision. *Cotton v. Secretary*, 2 F.3d 692 (6th Cir., 1993).

2. To be entitled to disability insurance benefits (DIB), a claimant must be under the age of 65 years, must meet the insured status requirements of Title II of the Social Security Act, and must be under a disability as defined by the Act.

3. Disability determination is a five-step sequential evaluation process, to-wit:

STEP #1 The claimant must not be engaged in substantial gainful activity.

STEP #2 The alleged disabling impairment must be “severe.” A “severe” impairment is one that “significantly limits” a claimant’s ability to do “basic work activities” that are “necessary to do most jobs” such as walking, standing, sitting, lifting, seeing, hearing, and speaking. 20 C.F.R. §§ 404.1521 and 416.921. Only a “slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual’s ability to work, irrespective of age, education and work experience” is “nonsevere.” *Farris v. Secretary*, 773 F.2d 85, 89-90 (6th Cir., 1985). Any physical or mental impairment that has more than a de minimis, or significant, effect on the claimant’s ability to work is “severe,” and the sequential evaluation should proceed to Step #3. In addition, the “severe” impairment must satisfy the so-called duration requirement, to-wit, the impairment must be expected to result in death or “must have lasted or must be expected to last for a continuous period of at least 12 months.” 20 C.F.R. §§ 404.1509 and 416.909.

STEP #3 If the claimant has a medical condition that meets or exceeds the criteria for an impairment defined in Appendix 1 of 20 C.F.R. Part 404, Subpart P of the regulations (“the Listing”), a conclusive presumption attaches that the claimant is disabled.

STEP #4 The claimant must not be able to perform his past relevant work either as he actually performed it or as it generally performed in the national economy.

STEP #5 If the claimant makes a prima facie showing that he cannot perform his past relevant work, the burden of going forward with evidence shifts to the Commissioner to show that a significant number of jobs exist in the national economy that the claimant can perform. *Born v. Secretary*, 923 F.2d 1168 (6th Cir., 1990). If the evidence supports a finding that the claimant's age, education, work experience, and residual functional capacity (used to determine the claimant's maximum sustained work capability for sedentary, light, medium, heavy or very heavy work as defined by 20 C.F.R. §§ 404.1567 and 416.967) coincide with all the criteria of a particular rule of Appendix 2 of Subpart P, the Commissioner must decide whether the claimant is disabled in accordance with that rule. Section 200.00(a) of Appendix 2; 20 C.F.R. §§ 404.1569a(b) and 416.969a(b).

If the claimant is found to have, in addition to the exertional impairments resulting in his maximum residual strength capabilities, nonexertional limitations, e.g., mental, sensory, or skin impairments, postural or manipulative limitations, and environmental restrictions; the Commissioner may rely on the particular rule only as a "framework for decisionmaking." Section 200.00(e)(1) and (2) of Appendix 2; 20 C.F.R. §§ 404.1569a(d) and 416.969a(d); *Kimbrough v. Secretary*, 801 F.2d 794 (6th Cir., 1986). Accordingly, the focus of judicial review in Step #5 cases is typically whether the controlling hypothetical posed to the vocational expert reflected all vocationally significant physical and mental limitations actually suffered by the claimant. *Varley v. Secretary*, 820 F.2d 777 (6th Cir., 1987).

Choice of Law

42 U.S.C. § 405(g) provides, in pertinent part, that complaints seeking judicial review of the Commissioner's final decision "shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business...." The plaintiff's disability claim was decided in July of 2004, by an administrative law judge (i.e., Judge Martin) who is associated with the Orland Park, Illinois, branch of the Office of Hearings and Appeals (AR, p. 19). Illinois is in the seventh federal judicial circuit. The plaintiff states that, after July of 2004, and prior to May 4, 2006, when the present complaint was filed, he moved to Kentucky and took up residency in Benton, Kentucky (Docket Entry No. 1, p. 2 and Docket Entry No. 12, p. 18). The Western District of Kentucky, where the present action was filed, is in the Sixth Circuit. Therefore, the issue arises whether this court should apply Sixth or Seventh Circuit case law in its review of Judge Martin's decision.

The magistrate judge has been unable to locate any controlling authority on this issue and, therefore, regards it as one of first impression. However, the best approach seems to be that expressed by the Tenth Circuit in *Smith v. Secretary*, 1993 WL 335806. There is a body of law known as choice, or conflicts, of law. The subject of that body of law typically is which state law should be applied either by a state or a federal forum. There are various relevant policies and factors for determining choice of law, including avoidance of forum shopping by plaintiffs. However, *Smith* rejected arguments based upon ordinary "choice of law" analyses because, when federal courts apply federal law, "ordinary conflict of laws principles have no relevance." *Smith* quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-103 (1971).

The plaintiff argues that this court should apply Seventh Circuit law to avoid forum shopping and has appended to his fact and law summary a copy of an unpublished disposition from the Eastern District of North Carolina in support of this position (Docket Entry No. 12, p. 18). *Lawrence v. Barnhart*, No. 5:03-CV-241-H1. The magistrate judge concedes that *Lawrence* does support the plaintiff's position. However, the plaintiff has failed to show that any actual forum shopping occurred in this case and, perhaps more fundamentally, has failed to show that there is any case-dispositive difference between Sixth and Seventh Circuit case law as applied to the facts of the present case. Accordingly, for the following reasons, the magistrate judge shall apply Sixth Circuit case law in conducting the present judicial review pursuant to 42 U.S.C. § 405(g):

1. There is a lack of controlling precedent for applying any other law.
2. There has been no showing that the "choice of law" issue is of case-dispositive significance herein.
3. This court's review will be expedited by its greater familiarity with Sixth Circuit law.

Statute of Limitations

A court action challenging the Commissioner's final decision is required to be brought within 60 days after notice of such final decision is received. See 42 U.S.C. § 405(g) and 20 C.F.R. § 422.210(c). Further, the date of receipt of notice of the Commissioner's final decision "shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary." 20 C.F.R. § 422.210(c). "Because the 60-day time limit defines that terms on which the United States waives its sovereign immunity and consents to be sued, it is strictly construed." *Bowen v. City of New York*, 476 U.S. 467, 479 (1986). Nevertheless, the 60-day period "is not jurisdictional, but rather constitutes a period of limitations" and was intended by Congress

to be “unusually protective of claimants.” *Id.* at p. 478. As such, the 60-day limitations period is waivable by the parties. *Weinberger v. Salfi*, 422 U.S. 749, 763-764 (1975).

In this case, the Notice of Appeals Council Action, which declined to review the Judge Martin’s decision, is dated January 6, 2006 (AR, p. 10). However, the plaintiff’s Complaint for Judicial Review was not filed until May 4, 2006 (Docket Entry No. 1). 20 C.F.R. § 422.210(c) provides, in part, that the 60-day time for filing a complaint seeking judicial review in federal court “may be extended by the Appeals Council upon a showing of good cause.” In his complaint, the plaintiff argued that he should be excused for his late filing because he filed two motions with the Appeals Council for extension of time to file his complaint herein, and the Appeals Council failed to rule on either motion. In her answer to the complaint, the Commissioner stated that the plaintiff’s allegations concerning his motions for extension of time are “moot because the Appeals Council has now granted the request for extension of time to file suit, and the extension is contained in the transcript of administrative proceedings filed with this answer” (Docket Entry No. 10, p. 1 referring to AR, pp. 8-9).

On January 6, 2006, the Appeals Council declined to review the ALJ’s decision, thereby rendering the ALJ’s decision the Commissioner’s final decision herein. *See Cotton v. Secretary*, 2 F.3d 692 (6th Cir., 1993). Hence, the plaintiff’s 65-day period commenced running on January 6, 2006, and would have expired on March 12, 2006. However, on February 28, 2006, the plaintiff’s original counsel faxed a request for a 30-day extension of time to the Appeals Council (Docket Entry No. 1, last page). Treating the request as having been granted nunc pro tunc, as the Commissioner apparently does, the 65-day period would have expired 30 days after March 12, 2006, on April 21, 2006. However, on April 3, 2006, present counsel faxed another request for extension

of time to the Appeals Council seeking “an extra 30 days, until May 6, 2006 (*sic.*)” (Docket Entry No. 1, next to last page). Treating the second request also as having been granted after the fact, the magistrate judge concludes that the present complaint was timely filed on May 4, 2006.

The Appeals Council Automated Processing System records are in the administrative record at AR, pp. 8-9. Although they appear to the undersigned to be somewhat ambiguous, the Commissioner’s position apparently is that they adequately indicate that as of May 26, 2006, both motions for extension of time had been granted.

The magistrate judge concludes that, because the Commissioner neither asserts in her answer that the action is barred by the statute of limitations nor raises the matter in her fact and law summary, the Commissioner has waived any otherwise available statute of limitations defense. See *Davis v. Bryan*, 810 F.2d 42, 44-45 (2nd Cir., 1987) (statute of limitations is an affirmative defense that is waived if not promptly pleaded and, absent extraordinary circumstances, should not be raised by the court sua sponte).

Discussion

The plaintiff sought Title II disability benefits. He was last insured for benefits on December 31, 1998. Therefore, the sole issue before the court is the plaintiff’s disability status prior to December 31, 1998.

This case was denied at the fifth and final step of the sequential evaluation process based upon testimony from a vocational expert (VE), Lee Knutson. The VE testified that an individual with the limitations in ALJ’s Finding No. 6 can perform the jobs in Finding No. 12, which exist in significant numbers in the national economy (AR, pp. 564-565). If the plaintiff identifies persuasive

evidence in the administrative record that, prior to the date last insured, he suffered from at least one vocationally-significant limitation not contemplated by the vocational hypothetical, substantial evidence does not support the ALJ's fifth-step denial decision. See *Varley v. Secretary*, 820 F.2d 777 (6th Cir., 1987).

The plaintiff argues that the hypothetical was deficient because the evidence reflects that, prior to December 31, 1998, he suffered from vocationally-significant migraine and muscle contraction headaches and a need to avoid rotational and torsional stressful forces to the lumbar area. We shall consider these alleged restrictions, which were not contemplated by the hypothetical, in turn.

Migraine and Muscle Contraction Headaches

The plaintiff alleges that he began experiencing severe migraines in or around May of 1989, when he suffered a work-related injury after 16 and a half years in the United States Air Force. At that time, the plaintiff was employed as an Air Force emergency room paramedic. He was standing on the back of a flat-bed truck. The truck suddenly took off and threw him to the ground. He testified that he hit his head and neck and ended upon with a skull fracture and a bone in the spinal canal (AR, pp. 526-527).

The plaintiff testified that he was medically discharged from the Air Force in 1989 (AR, p. 526). In January of 1990, long before his insured status expired in December of 1998, the Department of Veterans Affairs (VA) adjudicated him to be 10 percent disabled by migraine and muscle contraction headaches and 40 percent disabled by cervical nerve root compression syndrome with muscle spasms producing reversal lordotic curve and slight scoliosis (AR, p. 293). Subsequently in May of 1999, only shortly after his insured status expired, the VA found that his

migraine and muscle contraction headaches increased from 10 to 30 percent disabling and his cervical nerve root compression syndrome with muscle spasm increased from 40 to 60 percent disabling (AR, p. 249).

At the hearing, the plaintiff testified that the, prior to December 31, 1998, he suffered from a significant degree of headaches and neck pain on a daily basis that lasted from an hour to three days (AR, pp. 532 and 534). On a scale of 1 to 10, the pain was typically a 5. However, during a severe flare-up, it might be as high as a 10. A 10 is so bad that the plaintiff typically must throw up and lie down in a dark room. It “literally feels like somebody is beating on your head with a hammer” (AR, p. 533). More recently, the plaintiff testified that he has experienced blood coming from his ears in connection with his migraine headaches and high blood pressure (AR, p. 534). The VE testified that the plaintiff would be unemployable if he missed more than two days of work per month due to headaches or any other reason (AR, p. 566).

In his decision, the ALJ noted that the plaintiff “spent 16 years in the Air Force and was medically discharged in 1989” and that, in May of 1999, the VA found that his migraine and muscle contraction headaches increased from 10 to 30 percent disabling and his cervical nerve root compression syndrome with muscle spasm increased to 40 to 60 percent disabling (AR, pp. 24-25). The ALJ did not specifically acknowledge the VA’s prior decision in 1990, which was perhaps more pertinent to the period of time prior to December of 1998, when the plaintiff’s insured status expired. The ALJ found that, both before and after the date last insured, “there was no anatomic abnormality of the ... cervical, thoracic or lumbar spine” that would account for the disabling headaches and cervical nerve root compression syndrome found by the VA (AR, p. 25). The ALJ based this finding upon the fact that “the medical expert [ME Dr. William Newman] testified that there was no

objective evidence in the case file before him to show or support the Veterans Administration's ratings [which] are or could be based [solely] on the claimant's subjective complaints" (AR, p. 25).

At the hearing, the ME clarified that he was not stating that the VA did not "have something in their file ... to justify" their ratings and findings of 90 percent disability, such as "an x-ray of the neck [and] evidence of nerve root compression" (AR, p. 560). The ME's position was simply that he had no such evidence before him "in our file." The ME testified that his conclusion of no objective medical evidence for migraines was based, in part, upon a lack of treatment records by a neurologist since "people with migraine headaches ... will see a neurologist" (AR, p. 561). The ME stated that, from an objective standpoint, he "can't put too much" stock in the evidence of record containing results of range of motion studies and reports by the plaintiff of tenderness, pain, fatigue, weakness, and tingling, all of which "can be subjective things" (AR, p. 562).

Notwithstanding the ALJ's suggestion that he found no objective evidence for the plaintiff's cervical nerve compression syndrome, in identifying jobs in the national economy, it appears that the ALJ and the VE did, at least implicitly, acknowledge this impairment when they factored into their identification of jobs that the individual would have an "inability to frequently move his head." ALJ's Finding No. 12 and AR, pp. 568-569. The plaintiff's position is that, with respect to his migraine headaches, the ALJ failed to properly assess his credibility and failed to assess any resulting limitations and to present them to the VE (Docket Entry No. 12, pp. 19 and 23). The magistrate judge concludes that the argument is persuasive for the following reasons:

1. The plaintiff's testimony was that, in or around May of 1989, he suffered a work-related skull fracture and bone in the spinal canal and that, thereafter, he suffered vocationally-significant migraines and symptoms related to cervical nerve root compression, including inability to frequently

turn his head (AR, pp. 526-527). In January of 1990, long before the date last insured in December of 1998, the VA found that the plaintiff was 50 percent disabled by these impairments. In so finding, the VA implicitly found that the plaintiff's symptoms were at least partially credible and supported by sufficient objective medical data. In May of 1999, only shortly after the date last insured, the VA found that the plaintiff's symptoms had increased to the point of being 90 percent disabling. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Secretary*, 667 F.2d 524 (6th Cir., 1981). In light of the plaintiff's uncontradicted testimony and the VA findings, the ALJ's finding of no vocationally-significant limitation due to migraine headaches is not supported by substantial evidence.

2. The ME and ALJ appear to take refuge in the fact that the record contains no x-ray or other clinical test results that unequivocally support the VA findings of disability and/or the existence of an objective medical condition capable of causing either headaches or symptoms related to cervical nerve compression syndrome. The absence of such documentation does not terminate the ALJ's duty to develop the record if, as in the present case, in light of the medical and nonmedical evidence as a whole, it is highly likely that such an impairment, in fact, is present. On the contrary, the regulations provide, in pertinent part, as follows:

Before we make a determination that you are not disabled, we will develop your complete medical history ... for the 12-month period prior to [] the month you were last insured for disability insurance benefits....

When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination or a decision.

20 C.F.R. § 404.1512(d) and (e).

We will [] use a consultative examination to secure needed medical evidence the file does not contain such as clinical findings, laboratory tests, a diagnosis or prognosis necessary for decision.

A consultative examination may be purchased when the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim.

20 C.F.R. § 404.1519a(a)(2) and (b).

In light of the plaintiff's medical history and his uncontradicted testimony, any presently-existing bone fragment or other traumatic cervical spine condition that might (and, indeed, probably would be) revealed upon proper development of the treating and VA medical source records and/or an adequate consultative examination would logically be traceable to his injury in 1989, prior to the date last insured.

3. The ME asserted that the plaintiff did not receive the type of neurological treatment that one would expect from a person suffering from severe migraine headaches (AR, p. 561). However, the claimant testified that he saw a neuropsychiatrist, Dr. Myron (AR, p. 561).

4. The neurological bases for the plaintiff's migraines and cervical spine problems appear to stem from the same injury in 1989. On one hand, the ALJ found that there is no objective medical basis for the existence of these impairments. On the other hand, in identifying jobs in the national economy, the ALJ specifically took into account the plaintiff's "inability to frequently move his head." ALJ's Finding No. 12. These findings appear to be internally inconsistent and medically indefensible in that it is not apparent why the same neurological condition that results in limited ability to turn the head would not also result in migraine headaches.

Rotational and Torsional Stresses

After the Air Force, the plaintiff worked for the United States Postal Service as a mail processor. In May of 1996, prior to his date last insured in December of 1998, an automated mail tray containing mail that weighed between 80 and 100 pounds fell on his left foot (AR, pp. 132 and 528). As the tray fell, the plaintiff twisted and pulled away with his lumbar spine and knee in rotation. The plaintiff consulted his family physician, Frank Walton, D.O. An x-ray of the knee revealed a “tear involving the posterior horn, body and portions of the anterior horn of the medial meniscus” (AR, p. 191). In July of 1996, William Price, M.D., performed arthroscopic knee surgery. After surgery, the plaintiff resumed physical therapy but began experiencing increasing pain in the knee and low back. In October of 1996, an MRI of the knee raised questions of a re-tear (AR, p. 139). An MRI of the lumbar spine revealed protrusion of the L5-S1 disc, S1 nerve root impingement, and disc desiccation at the L4-L5 and L5-S1 levels (AR, pp. 139-140). In January of 1997, while lifting a ten pound box of mail, the plaintiff experienced a “popping sound” in his low back and immediately noticed a big knot (AR, p. 175). The plaintiff was eventually forced to quit working. An MRI of the lumbar spine from March of 1997, showed “moderate narrowing L5-S1 interspace with associated hypertrophic spurs” (AR, p. 148). Dr. Walton concluded that “Mr. DeMyer’s current low back complaints and history of radicular symptoms are consistent with lumbar disc and nerve root compression disease” (AR, p. 140).

The plaintiff filed an application for Title II benefits in June of 1998 (AR, p. 64). In that same month, at the Commissioner’s request, the plaintiff’s treating physician, Dr. Walton, completed a “spinal disorders” form. Among other things, Dr. Walton opined that the plaintiff is

“[r]estricted [from] heavy lifting/pushing/pulling due to low back. Limited prolonged standing or carrying due to knee and low back” (AR, p. 200). In his written decision, the ALJ uncritically acknowledged these findings by Dr. Walton (AR, p. 26). Furthermore, the controlling vocational hypothetical appears to be consistent with Dr. Walton’s findings (AR, p. 564).

Also in June of 1998, at the plaintiff’s request, Dr. Walton submitted a “physician’s statement.” Among other things, Dr. Walton opined that the plaintiff should avoid “any physical effort which includes rotational or torsional stressful forces to the lumbar area” because “[l]ifting of [even] reduced weight continues [to be] a significant threat to further injury of low back area if combined with such torsional forces” (AR, p. 196). At the hearing, the ALJ presented no hypothetical contemplating this additional restriction from the treating source. Nor did the ALJ analyze the restriction in his written decision.

The plaintiff argues that the ALJ erred in evaluating Dr. Walton’s opinions as a whole and that omission of Dr. Walton’s latter opinion rendered the vocational hypothetical deficient (Docket Entry No. 12, p. 24). 20 C.F.R. § 404.1527(d)(2) provides, in pertinent part, that “[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.” The magistrate judge concludes that the ALJ’s decision is deficient for failing to identify good reasons for discounting or implicitly discounting Dr. Walton’s opinion with respect to a need to avoid rotational and torsional stresses. Because the regulatory requirement of giving “good reasons” has been interpreted as granting claimants a substantial right, an ALJ’s failure to identify such reasons in his written decision is deemed to be a non-harmless, reversible error even if the court could, on its own motion or upon suggestion by the Commissioner,

identify such “good reasons” in the administrative record. See *Wilson v. Commissioner*, 387 F.3d 541 (6th Cir., 2004). Furthermore, it is not apparent that the jobs in Finding No. 12 require no significant rotational or torsional stressful forces to the lumbar area. Therefore, the magistrate judge finds the plaintiff’s objections to the ALJ’s lack of discussion in his written decision of all of Dr. Walton’s opinions to be persuasive.

Other Contentions

The plaintiff’s remaining contentions are unpersuasive. First, the plaintiff argues that “[t]he ALJ failed to account for DeMyer’s mental impairments” (Docket Entry No. 12, p. 27). The only probative medical evidence in this case is that the plaintiff “does not appear to have any psychiatric diagnosis at this point in time”; he is “good in all areas” of work-related activities; and he has “no psychologically/psychiatrically determinable impairment” (AR, pp. 123, 202, and 205). The plaintiff has failed to show that the ALJ erred in finding or implicitly finding that he has no mental impairment not accommodated by a need for “simple, low stress” work that is “free from loud background noises.” ALJ’s Finding No. 6.

Next, the plaintiff argues that “[t]he ALJ erroneously adopted vocational testimony that conflicted with the Dictionary of Occupational Titles [DOT]” (Docket Entry No. 12, p. 31). The ALJ restricted the plaintiff to “simple, low stress” work, and this restriction was given to the VE at the hearing. ALJ’s Finding No. 6 and AR, p. 565. A critical premise of the plaintiff’s argument appears to be an unsupported assertion that a restriction to “simple, low stress” work must be translated as a restriction to the lowest skill level of jobs recognized in the DOT, i.e., jobs with a specific vocational preparation (SVP) number of 1. The argument, then, is that, because all of the jobs in ALJ’s Finding No. 12, which the VE identified, are not defined as SVP-1 jobs in the DOT,

the VE's testimony conflicts with the DOT. The argument is unpersuasive because the plaintiff's premise is unsupported and, in fact, is contradicted by the VE's own assertion that his testimony is consistent with the DOT (AR, p. 565).

Finally, the plaintiff argues that "[t]he ALJ failed to consider Medical-Vocational Rule 201.12 and failed to comply with [Social Security Ruling] SSR 83-20" (Docket Entry No. 12, p. 33). The plaintiff was born on January 7, 1953 (AR, p. 64). Therefore, he turned 50 years old on January 7, 2003, long after his insured status expired on December 31, 1998. The plaintiff's argument begins with the observation that as of January 7, 2003, if he were still insured, he would be deemed disabled pursuant to Grid Rule 201.12 of Appendix 2 of the regulations. The Commissioner apparently does not disagree with this observation (Docket Entry No. 19, p. 10). In that limited sense, the plaintiff is currently "disabled." From this, the plaintiff reasons that the ALJ was required to infer an "onset of disability" date pursuant to the requirements of SSR 83-20. The argument is unpersuasive because the rules pertaining to inferring an onset date apply only if there has been an actual finding of disability by the Commissioner. In this case, there was neither an actual nor legally-mandated finding of disability.

RECOMMENDATION

The magistrate judge RECOMMENDS that this matter be REMANDED to the Commissioner for 1) further development of the medical evidence that supports the existence of a medical condition prior to December 31, 1998, that was capable of causing the plaintiff's alleged migraine and muscle contraction headaches and cervical nerve root compression syndrome, if any, consistent with the requirements of 20 C.F.R. §§ 404.1512(d) and (e) and 404.1519a; 2) a new decision identifying "good reasons" as contemplated by 20 C.F.R. § 404.1527(d)(2) for the weight given to the treating source's opinion that the plaintiff should avoid jobs requiring any physical effort which includes rotational or torsional stressful forces to the lumbar area that might pose a significant threat to further injury of the low back; 3) for supplemental vocational testimony contemplating the limitations found to exist; and 4) for any further proceedings deemed necessary and appropriate by the Commissioner.

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1), any party shall have a period of ten (10) days, excluding intervening Saturdays, Sundays, and/or legal holidays pursuant to Fed.R.Civ.P. 6(a), from the date of notice of electronic filing within which to file written objections to the foregoing report with the Clerk of the Court. Further and pursuant to Fed.R.Civ.P. 72(b), any party may file a response to objections filed by another party within ten (10) days, excluding Saturdays, Sundays, and/or intervening legal holidays, after being served with a copy of said objections. A period of three days shall be added to each ten (10) day period above pursuant to Fed.R.Civ.P. 6(e).

The court shall not conduct a de novo review of objections that are general, conclusory, or merely adopt previous pleadings. A copy of any objections and response thereto shall be served on the undersigned at Suite 330, 501 Broadway, Paducah, Kentucky, 42001. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).