UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAINE MCKELLER o/b/o DALLAS MCKELLER, deceased Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	)))))))))))	Civil No. 1:04cv00692 **Honorable Susan J. Dlott** U.S. District Court Judge

ORDER

The above-captioned case, having been fully briefed and the Court fully appraised of all issues, the Court does not adopt the recommended decision of the Magistrate Judge, finds in favor of Plaintiff and grants her Motion for Summary Judgment.

Plaintiff, Dallas McKeller, filed applications for Social Security Disability benefits alleging disability since June 9, 1995, due to a stroke and its residual effects. (R. 117-22). His applications were denied administratively and he filed a request for a hearing. A hearing was held in Dayton, Ohio, before an Administrative Law Judge (ALJ) who issued a decision on May 15, 1997, denying benefits. Plaintiff appealed the ALJ's decision to SSA's Appeals Council on July 1, 1997, and on July 30, 1997, while he was awaiting a decision from the Appeals Council, he filed a new application for disability benefits. The new application found McKeller disabled since May 16, 1997 (the day after the ALJ denial). Meanwhile, Plaintiff's first application was remanded by the Appeals Council on January 16, 1999, for re-evaluation of the period from June 9, 1995 to May 16, 1997. Mr. McKeller died on January 8, 1999, due to sepsis and renal failure. (R. 480).

Upon remand, a hearing was held at which Plaintiff's counsel was not permitted to participate telephonically and on March 30, 2000, the ALJ issued his decision denying benefits during the period of time at issue. Plaintiff appealed the March 30, 2000 denial to SSA's Appeals Council and on October 27, 2000, the Appeals Council issued its second remand order with specific directions to the ALJ. (R. 530-60).

On August 6, 2002, a third hearing was held in Dayton, Ohio, before a new ALJ, Melvin A. Padilla, and a Vocational Expert. (R. 39-55). Post-hearing Plaintiff's counsel provided a detailed memorandum to the ALJ (R. 588) and on September 26, 2002, ALJ Padilla issued an unfavorable decision denying Plaintiff benefits for the closed period. (R. 13-33). Plaintiff filed a timely appeal and, on August 26, 2004, the Appeals Council denied Plaintiff's request for review making ALJ Padilla's decision the final decision of the Commissioner. (R. 7-12) On October 12, 2004, Plaintiff filed a Complaint with this Court.

History and Evidence

In August of 1994, Plaintiff suffered a stroke. (R. 214). On January 11 1995, he again suffered multiple strokes on his left side, and he had residual problems such as decreased abilities to perform calculations, decreased memory and concentration (R. 200). He had some initial treatment and therapy while hospitalized for a month following his stroke, but continued to have a mild left hemiparesis with the most difficulty being with his left hand. (R. 220, 224, 261-2). On February 20, 1995, Dr. Gastrone G. Celesia opined that Plaintiff was unable to perform any work, had limitations in bending, climbing, walking, stooping, and lifting with a 15 to 30% reduced capacity. (R. 262).

On May 1, 1995, Dr. Adam Korwatowicz, a psychiatrist, evaluated Plaintiff for treatment and found him to have high anxiety and mood swings with difficulty handling his temper. (R. 286). Furthermore, it was noted that he couldn't type or write well, and had trouble getting along with his supervisors. (R. 286). Plaintiff was determined to have an organic mood disorder. (R. 283-5). On May 5, 1995, Plaintiff was seen at Loyola University Hospital's Emergency Room due to a kidney abnormality (proteinuria). (R. 178-9). Notably, Mr. McKeller's death 44 months later was due, in part to renal failure.

In June 1995 Dr. Korwatowicz reported reduced concentration, memory, frustration tolerance, self-confidence, patience, and ability to control his emotions, as well as mood swings, anger outbursts, and paranoia. (R. 201). Dr. Korwatowicz prescribed Depakote and noted a mood disorder as well as Class 4 physical impairments with a 60 to 70% reduced capacity, limitations in performing even sedentary work, and some gait impairment. (R. 201-2). Dr. Korwatowicz then wrote a letter stating that Plaintiff was permanently disabled for work, and that it was doubtful he would regain his prior level of functioning. (R. 200). At Loyola Hospital Plaintiff was noted to have retinopathy, hypertension, diabetes mellitus, renal insufficiency, increased cholesterol, and CVA. (R. 199). On June 9, 1995, Plaintiff underwent a renal ultrasound because of renal failure (R. 194).

On August 18, 1995, Plaintiff underwent a consultative evaluation by an SSA-selected doctor, Dr. C.J. Wonais, who found him to have a history of strokes, hypertension, and diabetes. (R. 222-3). Dr. Wonais also noted Plaintiff to have a slight limp, to use a cane, to be unable to walk on his heels and toes, and to have decreased left-

sided strength. (R. 223). On October 13, 1995, Plaintiff underwent a consultative psychiatric evaluation by SSA-selected doctor, Dr. Elouise V. Dizon, who spent 40 minutes with him and found him to have an adjustment disorder; however, she noted he had trouble controlling his emotions and felt like hurting others in the past. (R. 224-7). In September 1995, Dr. Korwatowicz noted that Plaintiff was doing better, but that he to continue to have "rage attacks." (R. 273).

On December 7, 1995, Dr. Audrey Geannopoulos, Plaintiff's treating doctor at Loyola Medical Center, stated that he could only stand and walk 2 to 3 hours a day, only occasionally lift and carry 6 to 10 pounds, frequently lift and carry no more than 5 pounds, could not use his left hand for fine manipulations, could not use his left foot or both feet to push and pull, and could not squat, crawl, and climb. (R. 268-9). Dr. Geannopoulos added that Plaintiff was moderately limited in his ability to work in extreme temperatures and humidity, or while being exposed to dust, gases, and fumes, and he was totally precluded from working around machinery, at unprotected heights, and from driving. (R. 269).

On January 29, 1996, Plaintiff was evaluated by Dr. Babu V. Gupta, who noted that he had severe stressors with loss of functionality due to strokes, a personality disorder, possible bipolar and dysthymic disorders, and alcohol and cocaine abuse in early remission. (R. 251). It was noted that Plaintiff was suicidal in October of 1995. Dr. Gupta also reported that Plaintiff was oddly dressed and disheveled. (R. 250).

On February 23, 1996, Dr. Korwatowicz reported that Plaintiff had an organic mood disorder with memory impairment, perceptual or thinking differences, change in personality, disturbance in mood, and emotional lability and impairment in impulse

control. (R. 288-9). Dr. Korwatowicz opined that Plaintiff had marked limitations in daily activities, social functioning, and frequent deficiencies in concentration, persistence, and pace as well as continual episodes of deterioration or decompensation. (R. 294). Furthermore, Dr. Korwatowicz stated that Plaintiff's symptoms have resulted in an inability for him to function independently outside the area of his home. (R. 295). Dr. Korwatowicz also reported that Plaintiff was markedly limited in the ability to remember locations and work-like procedures; the ability to understand, remember, and carry out both simple and detailed instructions; the ability to maintain attention and concentration for extended periods; the ability to work in coordination with or proximity to others without being distracted by them; the ability to complete a normal workday or workweek; the ability to accept instructions and criticism; and to get along with co-workers. (R. 296-7). Dr. Korwatowicz reported additional "moderate" limitations, including the ability to make simple work-related decisions, the ability to sustain an ordinary routine, to ask simple questions, interact appropriately with the public, maintain socially appropriate behavior, and adapt to changes in a work setting, be aware of normal hazards, travel in unfamiliar places, and set realistic goals. (R. 297).

On August 1, 1996, Dr. Jeffrey S. Zollett reported that Plaintiff was permanently disabled noting in another report that he suffers from left hemiparesis, hypertension, diabetes, psychoses, sarcoidoses, and cognitive deficits that may never improve. (R. 308-9).

On August 30, 1996, Plaintiff underwent psychological testing by Dr. Robert M. Stutz and Mr. Thomas M. Dunn who noted Plaintiff to be obese, walk with a cane with a considerable amount of effort needed to do so, have difficulty getting in and out of a

chair and a slightly unusual gaze, rarely use his left hand, and that he used an unusually large number of obscenities when speaking. (R. 301). Testing revealed a Full Scale IQ of 80, a Verbal IQ of 90 and a Performance IQ of 71, which is in the low average range. (R. 302). The Stroop Color-Word test and Trail Making Tests, Part A & B, indicated that Plaintiff had extreme problems with attention, concentration, and distractibility, (R. 303), while the Groove Pegboard test showed Plaintiff to have difficulty with his fine motor ability. The doctors reported that Plaintiff's allegations of mental difficulties were supported by testing and that he is more severely debilitated than is first apparent. (R. 304-5).

In October 1996, Dr. Zollett noted that Plaintiff suffered from hallucinations and affective lability. (R. 310-6). Social worker, Roy Ferguson, at the Middletown Area Mental Health Center reported severe psychostressors. (R. 316, 411-3) and Middletown Regional Hospital confirmed auditory hallucinations. (R. 400-6). On January 28, 1997, and again on March 22, 1997, Dr. Zolett stated that Plaintiff is totally and permanently disabled. (R. 427-8).

Vocational Evidence

Charlotta Ewers appeared and testified at the third hearing as a vocational expert ("VE"). (R. 39-55). The VE testified that Plaintiff's past work as a computer repair person was light and skilled, counselor was light and skilled, and city manager was sedentary and skilled. (R. 43).

The ALJ's hypothetical to the VE was of a younger individual of Plaintiff's past work experience and education that was limited to lifting 20 pounds occasionally and 10 pounds frequently, standing 15 minutes at a time with a total of two hours a day with no

continuous walking, pushing and pulling only 20 pounds or less, no continuous use of the dominant left hand for handling or fingering, and no repetitive crawling, crouching, stooping, kneeling, or climbing stairs. (R. 43). Furthermore the hypothetical individual would be further restricted from climbing ladders, working with machinery or at unprotected heights, restricted from all public contact and allowed only minimal supervisor and co-worker contact. (R. 44). Finally, the ALJ stipulated that the individual could not be required to perform work requiring extended periods of concentration on a single task for more than 15 minutes at a time, is limited to low stress work, cannot be required to fulfill quotas or have above-average pressure for production, and needs to use a hand-held assistive device to walk a few feet around the premises. (R. 44). In response to this hypothetical, the VE responded that the individual would not be able to return to any of Plaintiff's past work, but could perform work as a type copy examiner, surveillance system monitor, weight tester, and microfilm document preparer, which she stated came up to approximately 3800 jobs. (R. 45). The VE indicated that this testimony was consistent with the DOT. (R. 45). The ALJ then asked if the VE's testimony would change if the individual would need to alternate between different positions throughout the day; the VE replied no. (R. 45).

The VE was then questioned by counsel, who elicited the fact that the VE had never placed anyone who required the use of a cane to walk in any of the jobs cited. (R. 47). The attorney then questioned how the VE considered the low stress part of the hypothetical when giving her opinion to which the VE stated that she was "making an assumption based upon prior hearings with [the] Judge" that low stress was included in

restriction from the public and assembly line work. (R. 47). The VE testified she was not considering low stress as a separate entity in the hypothetical. (R. 47-8).

Counsel then asked if the VE would find jobs for an individual as stated above, but with further limitations to only occasional fine manipulations with the left hand, slowed ability to function due to dizziness, an ability to only use a pencil up to one third of the day, 8 to 10 minutes of being off-track a day, limited contact with the public, supervisors, and co-workers, and the ability to only concentrate on one task for 15 minutes before moving on to another task. (R. 48-9). The VE then responded that there would be no jobs for that individual. (R. 49). The VE stated that the elimination of a significant ability to use the left hand and the limited amount of time devoted to a task was what precluded Plaintiff from being able to perform any jobs. (R. 50).

Counsel then discovered that the VE had not reviewed Dr. Korwatowicz's functional assessment forms. (R. 50, 187-99). Looking at the limitations given by Dr. Korwatowicz and using counsel's definitions (of Marked meaning "frequent" difficulty and Moderate meaning "often" having difficulties), the VE stated that Plaintiff would not be able to perform any work with those limitations. (R. 52).

The ALJ's Decision

On September 26, 2002, ALJ Padilla issued an unfavorable decision denying Plaintiff benefits for the closed period. (R. 13-33). The ALJ found that the only severe impairments were some left-sided hemiparesis with cognitive deficits and an adjustment disorder. (R. 24). The ALJ found that between 1995 and 1997, Mr. McKeller *lacked the residual functional capacity (RFC) to:*

> 1) lift more than ten pounds frequently or twenty pounds occasionally; 2) stand longer than fifteen minutes at a time or two hours total in a work

> day; 3) do any significant or continuous walking as a part of regular job duties; 4) push or pull objects weighing over twenty pounds; 5) do any job requiring continuous use of the dominant left hand for handling or fingering; 6) repetitively crawl, crouch, stoop, kneel, or climb stairs; 7) climb ladders or scaffolds; 8) work at unprotected heights or operate moving machinery; 9) have more than limited contact with public, supervisors, or co-workers; 10) concentrate on a single task for more than fifteen minutes at a time (but remaining free to turn his attention to other tasks thereafter); 11) do other than low stress job activity (i.e., no job involving *above average* pressure for production); or 12) do any work that would not allow for use of hand-held assistive device while walking more than a few feet at a time.

(R. 26-32). The ALJ then stated that with this less than sedentary RFC, Plaintiff was unable to perform past work, but was able to perform work as a timekeeping clerk, office clerk, and surveillance systems monitor, which exist in the amount of 3800 jobs according to the VE. (R. 32-3).

Errors Raised By Plaintiff

Plaintiff argues that the ALJ's decision was not based upon substantial evidence, specifically: 1) the ALJ's RFC finding is not supported by substantial evidence and wrongly dismisses treating evidence of record; 2) the ALJ failed to assess Plaintiff's mental impairment in accordance with the Commissioner's Rulings and erroneously dismissed treating evidence of record; and 3) the ALJ failed to meet her burden at Step Five burden. Alternatively, whether the ALJ's decision contained errors of law, which mandates a sentence four remand under 42 U.S.C. § 405(g) (2003). Plaintiff's arguments are well taken.

The ALJ's RFC finding is not supported by substantial evidence. In making this RFC finding, the ALJ stated that he relied upon the findings of Drs. Geannopoulos and Kelley. (R. 26). However, the ALJ's RFC is not consistent with the opinions of these doctors. The ALJ wrongly dismissed evidence from treating doctors without rationale as

to why, and there is no evidence in the record that supports his RFC finding. The ALJ states that he relied upon the opinions of Drs. Geannopoulos and Kelley in making his physical RFC finding; however, he opted to pick and choose those limitations provided by the doctors that fit his RFC and ignored without explanation evidence that was favorable to Plaintiff and would have found him more severely restricted than he ultimately found. (R. 26-7). The ALJ appears to have taken a results-oriented approach to formulating his RFC finding. In Jones v. Heckler, 583 F.Supp. 1250, 1253 (1984), Judge Shadur of the Northern District of Illinois, expressed strong opposition to such action on the part of the Commissioner: "[w]hat appears to be happening is that benefits are being denied by [the] Secretary not on the merits in individual cases, but on a more restrictive policy that is result-oriented rather than justice-oriented."

Although he states he relied on her findings, the ALJ then proceeds to dismiss Dr. Audrey Geannopoulos's December 7, 1995 RFC, which stated that Plaintiff could only stand and walk 2 to 3 hours a day, only occasionally lift and carry 6 to 10 pounds, frequently lift and carry 5 pounds and under, could not use his left hand for fine manipulations, could not use his left foot or both feet to push and pull, and could not squat, crawl, and climb. (R. 268-9). Indeed, it seems the only thing that the ALJ took from this RFC was Dr. Geannopoulos's opinions that Plaintiff is moderately limited in the ability to work in extreme temperatures, humidity, dust, gases, and fumes, and is totally precluded from working around machinery, at unprotected heights, and from driving. (R. 269). The ALJ states this is because Dr. Geannopoulos's opinion conflicts with the findings of Dr. Wonais. (R. 26), however; Dr. Wonais only saw him for a one-time short consultative evaluation at which time he noted Plaintiff to have a slight limp,

to use a cane, to be unable to walk on his heels and toes, and to have decreased left-sided strength. (R. 223). The ALJ does give any indication how Dr. Geannopoulos's opinion that Plaintiff cannot use his hand for fine manipulations is inconsistent with Dr. Wonais's opinion. (R. 26-7). Indeed, it is not inconsistent and Dr. Geannopoulos's opinion should have been given more weight than that of a one-time non-treating non-specialist doctor. *See* 20 C.F.R. § 404.1527(d)(2), (4), & (5). This is especially true when the evidence comes from a treating physician, as the regulations and case law provide the Commissioner must always give good reasons for disregarding the medical opinion of a treating source. 20 C.F.R. § 404.1527(d)(2); SSR 96-2p.

The ALJ also stated that he relied upon the report of November 11, 1995, by the non-treating non-examining state Agency physician, Dr. William R. Kelley, in making his RFC finding. (R. 26). Dr. Kelley completed a physical RFC by checking off boxes indicating that Plaintiff had the ability to perform medium work with occasional postural limitations, but did not review any treating evidence of record before coming to this conclusion, as he attests on the RFC form. (R. 252-60). Not only should this opinion be given very little weight because it is not consistent with the other evidence of record, but also because it was not based upon any evidence from treating doctors. SSR 96-6p.

The ALJ also impermissibly ignored other opinions of treating doctors given prior to May 16, 1997, such as the opinions of treating Drs. Zollett and Gillingham. (R. 27). Because the ALJ erred initially by ignoring medical evidence his RFC determination and Step Five finding were also affected. The RFC cannot be valid if all of Plaintiff's medically determinable impairments, and their symptoms, are not considered to determine what type of work Plaintiff could possibly perform. SSR 96-8p requires that

the ALJ "consider all allegations of physical and mental limitations or restrictions" and "consider limitations and restrictions imposed by all of an individual's impairments, even those that are not 'severe.' " 20 C.F.R. § 404.1523.

Not only did the ALJ fail to take into consideration all of the evidence from the doctors of record, but also failed to look at Plaintiff's condition as a whole. *See* 20 C.F.R. §404.1545, SSR 96-8p. The ALJ also erred in stating, without an evidentiary basis that Mr. McKeller's death in January 1999 due to sepsis and renal failure was apparently unrelated to the problems that were the subject of his disability from 1995 through 1997. (R. 27). However, the ALJ failed to consider the evidence of Plaintiff's diabetes and renal involvement as early as May 1995 (R. 178-79).

The ALJ's findings with regard to Plaintiff's mental impairments are also flawed. The ALJ improperly rejected the evidence provided by Dr. Korwatowicz, Plaintiff's longest treating psychiatrist, because it was purportedly inconsistent with his treating notes; however, that finding is not borne out by the record. (R. 24-5, 28). Dr. Korwatowicz's opinions are also very consistent with the findings of Dr. Stutz and Mr. Dunn. Dr. Stutz and Mr. Dunn found Plaintiff to have many mental deficits, which were demonstrated by clinically accepted tests, yet rejected by the ALJ without a logical explanation. (R. 28).

Furthermore, the ALJ ignores the treatment notes from Dr. Babu V. Gupta. On January 29, 1996, Plaintiff underwent a psychiatric evaluation with Dr. Gupta, who noted him to have a GAF of 50, severe stressors with loss of functionality due to strokes, a personality disorder, possible bipolar and dysthymic disorders, and alcohol and cocaine abuse in earl remission. (R. 251); *see also* Boston v. Chater 1995 WL 708552 (E.D. PA

Nov. 28, 1995)(GAF of 50 is considered evidence of a finding of disability). Dr. Gupta noted that Plaintiff had been suicidal in October of 1995, to have irregular speech, tangential thoughts, and difficulty with organization. (R. 244-50). These findings are consistent with the findings of Dr. Korwatowicz and the medical evidence in general which shows Plaintiff to have had an organic mental disorder following his stroke that was immediately severe and only worsened with the onset of hallucinations and psychosis in October of 1996.

In addition to the errors already noted above, the ALJ's finding at step five of the Commissioner's sequential was also deficient. Counsel raised the issue of conflict between the VE's testimony and the DOT but the ALJ failed to follow the requirements of SSR 00-4p. It is the Commissioner's burden at the fifth step of the sequential evaluation to come forward with substantial evidence of other jobs existing in significant numbers that the hypothetically situated individual could sustain. Rather than follow the requirement of SSR 00-4p, the ALJ stated in his decision that the basis of the VE's testimony was her "knowledge and experience," which is contrary to the Ruling, *and see* McKinnie v. Barnhart, 368 F.3d 907 (7th Cir. May 24, 2004) (the court vacated the ALJ's decision that McKinnie could perform a significant number of jobs where the ALJ accepted VE testimony that lacked evidence of reliability). Here, VE Ewer's testimony lacked evidence of reliability and, thus, could not provide substantial evidence upon which the Commissioner can deny McKeller's claim. The ALJ erred in relying upon the VE's testimony, which was given without a reasonably reliable foundation and was not sufficiently specific to avoid conflict with the DOT, thus, it is not harmless error that the

ALJ did not follow SSR 00-4p because the burden is on the Commissioner at Step Five and the ALJ made an erroneous Step Five determination.

As noted above, the ALJ's decision was significantly deficient. Since there have already been three administrative hearings; giving the Commissioner yet another chance when she has failed to meet her burden after three attempts is a waste of resources; rather a remand for an award of benefits is warranted. The ALJ failed to follow the law and the record is fully developed and supports a finding of disability, thus, a fourth hearing serves no useful purpose.

IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security denying disability benefits from June 9, 1995, to May 16, 1997, is reversed and remanded pursuant to sentence four of 42 U.S.C. §405(g) for calculation and award of benefits.

Dated this _______ day of ______________, 2006, at Cincinnati, Ohio.

BY THE COURT:

S/Susan J. Dlott
HONORABLE SUSAN J. DLOTT
United States District Judge