

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAUL A. DEMELLO

vs.

OTIS R. BOWEN, M.D., Secretary
Health and Human Services

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C.A. No. 86-0735 L

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This matter concerns the issue of whether there exists substantial evidence on the record as a whole to support the Secretary's decision that plaintiff, as of April 1, 1986, was no longer "disabled" as defined by The Social Security Act, 42 U.S.C. § 416(i). The facts pertinent to deciding this issue are as follows.

In March of 1981, plaintiff slipped on some oil that was on the floor of his place of employment (Tr. 37). Immediately after his injury, plaintiff was unable to sit for more than one-half hour at a time, lift more than five pounds and was in a substantial amount of pain (Tr. 45-46). The record also indicates that in the early phases after plaintiff's injury, plaintiff suffered numbness in his legs and was unable to continue his hobbies which included playing softball, fishing and jogging (Tr. 48).

For the first few years after plaintiff's injury, he underwent conservative treatment including rest and traction at home (Tr. 277-278). In June of 1982, plaintiff underwent a lumbar laminectomy for pain radiating down his right leg. This was followed by several more draconian measures including a rhizotomy in March of 1984, and a lumbar fusion in November of the same year (Tr. 325).

After the fusion, plaintiff underwent some improvement, however, pain associated with clicking of ligaments against the Luque rod implanted in his back necessitated removal of the rod (Tr. 329-330). This procedure was performed on November 8, 1985. Thereafter, plaintiff's condition improved to a considerable degree. As of January, 1986, "the clicking in his back [had] cleared;" plaintiff was swimming, doing a lot of exercise, and "feeling much better." (Tr. 339).

Although plaintiff at this time was feeling some discomfort "on full flexion and extension" (Tr. 339); there was no difficulty in his continuing the well-structured exercise program he had been assigned. As of January 16, 1986, plaintiff's physician Dr. Phillip R. Lucas, an orthopedist, indicated:

We will see him back in two to three months. At that time we may consider allowing him to return to some form of light work.

(Tr. 339).

In April of 1986, Dr. Lucas reported that plaintiff was "getting along well." (Tr. 340). While plaintiff continued to suffer some discomfort with full extension and flexion, he was having no leg pain and had good lateral bend (Tr. 340).

Along with this examination, Dr. Lucas completed a physical capacity evaluation (PCE) with respect to Mr. DeMello (Tr. 331). In this evaluation, the doctor indicated that plaintiff could sit, stand and walk at one time for a total of two, three, and three hours respectively. The same figures were expressed concerning plaintiff's total ability to sit, stand and walk during an eight hour day. The same report also indicated that plaintiff could carry "6-10 lbs" "occasionally" or 1% to 33% of an eight hour work day.

In early May of 1986, plaintiff was involved in a substantial automobile accident (Tr. 347). A hospital report dated May 8, 1986, failed to reveal "evidence of acute fracture or subluxation." (Tr. 350). "All seven cervical vertebrae were of normal size contour and density;" the intervertebral spaces were reported as "well maintained." (Tr. 350).

At his disability benefit hearing on May 20, 1986, plaintiff claimed that his condition had deteriorated since the auto accident. This allegedly was due to a neck injury he had suffered in the accident. Plaintiff wore a cervical collar to the hearing in support of this claim (Tr. 16). In addition to these facts, plaintiff testified that he could sit for two hours, stand for one or two hours at a time (Tr. 44-45), and had to lay down for one hour in the morning and in the afternoon (Tr. 49).

Despite plaintiff's testimony, a vocational expert, Robert McGinn, maintained that there were a significant number of occupations in the regional economy; consisting of sedentary work, which plaintiff could perform (Tr. 61-62). Plaintiff rebutted this testimony. McGinn, plaintiff claimed, was in error because his evaluation was based upon a PCE that was filled out prior to the May auto accident. As a result of this divergence of opinion, the Administrative Judge (ALJ) agreed to leave the record open so that another report could be filled out which would reveal plaintiff's post-accident ability to carry out basic work activities.

Aside from testimony concerning plaintiff's capacity to perform sedentary work, there was an important exchange on the record between the ALJ and counsel for

plaintiff. The latter argued that the total plaintiff could sit, stand or walk per eight hour day referred to plaintiff's ability to perform either sitting, standing, or walking in one eight hour time period (Tr. 65). The ALJ, however, pointed out that a physician would naturally read the categories in combination with one another to arrive at a "total" amount of time that plaintiff could engage in the designated activities per eight hour period (Tr. 66).

In any event, a second PCE was completed by Dr. Lucas on May 23, 1986 (Tr. 359). When compared to the report of April 1, 1986, the May report decreased the amount of time plaintiff could sit, stand, and walk at one time to one, one and one hour, respectively. With respect to the entire eight hour time-period, the PCE decreased the former two and three hour figures to a similar amount of time. The only other alteration contained in the May report concerns the degree plaintiff could bend. This was decreased to "not at all" from the previously reported "occasionally." (Tr. 331, 359).

On June 2, 1986, Dr. Lucas examined plaintiff, apparently for the first time since April of 1986. At least there is no report in the record other than the May PCE to indicate such an evaluation. This examination revealed the following findings by Dr. Lucas.

Paul returns. He is having some discomfort radiating across the back and into the leg, but working hard at his exercise program. He will be seen back in follow-up in four to six months.

(Tr. 360).

Plaintiff applied for disability insurance benefits in August of 1985. After notice of initial determination, request and notice of request for disability reconsideration, plaintiff made a request for hearing on March 3, 1986. Hearing was held on May 20, 1986 before an ALJ. In a decision rendered on July 10, 1986, the ALJ found that from March 20, 1981 through March 31, 1986, plaintiff did not possess a residual functional capacity (RFC) to engage in sedentary work (Tr. 17-18), and was thus, "disabled" for this time period. The ALJ found, however, that as a result of several surgical procedures, plaintiff's RFC had increased considerably by April 1, 1986 (Tr. 19). Considering plaintiff's age, education and work experience, it was determined that plaintiff could perform sedentary work as of this date. Plaintiff, therefore, was found not to be under a "disability" as of April 1, 1986 as defined by the Social Security Act (Tr. 19).

On August 4, 1986, plaintiff filed a request for review of the ALJ's decision (Tr. 10). This request was denied on November 7, 1986, and the decision of the ALJ was

adopted as the final decision of the Secretary (Tr. 6). Plaintiff then filed a complaint in this Court pursuant to 42 U.S.C. § 405(g) alleging that the Secretary's decision was not supported by substantial evidence.

The matter was referred to the Magistrate who recommended that the Secretary's motion to affirm the decision of the Secretary be granted. Plaintiff objected and the matter was heard before this Court on September 24, 1987. After carefully scrutinizing the record in this case, the Court is prepared to render a decision upon the matter.

Plaintiff's objection is focused upon two areas. First, DeMello contends that there is no substantial evidence to support a finding that he was not disabled as of April 1, 1986. Secondly, even if there is such evidence, DeMello argues that there is no substantial evidence to support such a ruling as of May 8, 1986. As of this date, plaintiff contends the automobile accident he endured caused his condition to deteriorate to a state where he no longer possessed an RFC for sedentary work.

The weakness of the first of these contentions is revealed by two factors: plaintiff's concession at hearing that he did possess an RFC for sedentary work, and the substantial medical testimony evidence confirming this fact.

At the hearing on May 20, 1986, plaintiff's attorney conceded that if the April PCE were construed to mean plaintiff could sit for two hours, walk for three hours and stand for three hours for a total of eight hours of function per eight hour day, then plaintiff would possess an RFC for sedentary work. (Tr. 65).

This is indeed what that document means. As the ALJ pointed out, the PCE asks for a "total" for each of the listed functions: sitting, standing and walking. No reasonable doctor would interpret the requested amount per function as itself constituting the "total" per eight-hour time period. Were this the appropriate interpretation, the chart would in effect become a confusing conglomeration of several evaluations.

That plaintiff possessed an RFC for sedentary work as of April 1st, 1986, is also supported by the medical evidence on the record. In January of 1986, Dr. Lucas indicated that plaintiff was feeling better. The clicking in his back had cleared and he was swimming, doing a lot of exercise and feeling much better. While plaintiff's exam still showed some discomfort on full flexion and extension, plaintiff was to continue his "well structured" exercise program. Dr. Lucas concluded that plaintiff would be seen again in two to three months at which time it would be

considered whether to allow him to return to some "form of lightwork" (Tr. 339).

Plaintiff was seen again by Dr. Lucas in April of 1986. He was reported as "getting along well." (Tr. 340). Although plaintiff's back was still intermittently aching when he increased his activity, he was having no leg pain (Tr. 340). It was also reported that while plaintiff had some discomfort with full extension and flexion, he had good lateral bend. Plaintiff's lower extremities revealed reflexes were intact and there was no sensory or motor deficit (Tr. 340).

This medical evidence supports the Secretary's finding. By April 1, 1986, plaintiff's condition had improved to a degree where he could perform sedentary work. Were it otherwise, plaintiff would not have been "getting along well" with no leg pain or sensory deficit to return in "two to three months."

Dr. Lucas' medical evaluations, however, are not the only evidence which support the Secretary's decision. Testimony of vocational expert, Robert McGinn, for this time-period leads to the same conclusion.

McGinn testified that based upon the plaintiff's April PCE, there were "occupations that do allow some

fluctuating, as far as sitting or standing up to the individual." (Tr. 61).

The examples would be, you know, a retail clerk, in a variety of settings, a watchman, either at a booth or at a desk. A cashier, in a wide variety of settings.

(Tr. 62).

In addition, McGinn testified, as the regulations require, that these sedentary jobs existed in significant numbers in the regional economy. With respect to cashiers and retail clerks "you're literally talking in the thousands of jobs." (Tr. 62). When this testimony is considered along with the medical evidence extant around the April 1st cut-off date, one can only conclude that there is substantial evidence to support the Secretary's finding as of that date.

Plaintiff, however, contends that the April PCE, even as interpreted by the ALJ, does not support the Secretary's finding because it does not satisfy the regulation's definition of "sedentary work." That definition is as follows.

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). Plaintiff contends that under the regulation a claimant must be able to sit for approximately six hours per eight hour work-day in order to be classified as possessing an RFC for sedentary work. Since plaintiff could only sit for a total of two hours per eight hour work day, plaintiff argues that he was unable to perform sedentary work as of April 1, 1986. Lacking this capacity, plaintiff concludes that he was still "disabled" as of that date.

Although the regulation would seem to require somewhat more "sitting" than plaintiff could manage in an entire eight hour day, it cannot be deemed a bright-line requirement which, when not fulfilled, automatically results in a finding that plaintiff does not possess an RFC for sedentary work. Rather, the tenor of the regulations is to require examination of claimant's entire medical record. 20 C.F.R. § 404.1545 This includes medical assessments outside the mere number indicated upon the PCE.

As the Court has already outlined, the medical evidence concerning plaintiff's condition revealed steady improvement prior to April 1986. This improvement appeared to culminate as of the first of that month when it was reported that plaintiff was "getting along well." (Tr. 340).

A disability determination is also a function of the claimant's age, education and prior work experience. 20 C.F.R. § 404.1560. Again, as has already been discussed, there was testimony that given plaintiff's attributes in these areas, along with the April PCE results, there were a significant number of jobs in the regional economy that plaintiff could perform. This testimony, combined with the previously alluded to medical evidence, constitutes substantial evidence to support the disability decision of the Secretary regarding the April 1st cut-off-date. This is so even though one figure reported in the April PCE may be some evidence to the contrary.

Plaintiff's second contention is that the May 8, 1986 automobile accident caused his condition to deteriorate, so at least as of that date, he was "disabled" again within the scope of the Act. Supporting this position, plaintiff points to the May PCE which clearly reflects that he was unable to perform sedentary work during this time-period.

The Court finds, however, that the Secretary was entitled to give less credence to the results contained in the May PCE even though it was the only such document completed after the accident had occurred. The May PCE regarding plaintiff's post-accident condition is of no value

for two reasons. First, there is no evidence to indicate that Dr. Lucas examined plaintiff when he filled out this PCE. The April PCE is accompanied by the typewritten note of April 7th in which Dr. Lucas assesses plaintiff's medical condition as of that date. A similar log entry is absent from the record regarding the May PCE. The only evaluation by Dr. Lucas for this time-period is that of June 2, 1986. As will be seen, this note appears to reiterate the doctor's April finding: that plaintiff's condition had substantially improved.

The May PCE is suspect for another reason. It was completed by Dr. Lucas on May 23, 1986, three days after the hearing was held. Peculiarly enough, the results reflecting the hours plaintiff could sit, stand and walk "at one time" and "during an eight hour day" were reduced so that even in combination there could be no dispute that plaintiff was unable to perform sedentary work. This, however, was precisely plaintiff's attorney's position at the hearing. It is logical then to conclude that these figures were reduced, as the Secretary believed, "to assist the claimant in maintaining his entitlement to benefits." Accordingly, the Court holds that the Secretary appropriately accorded the May PCE little or no weight.

The final question remains whether there exists substantial evidence on the record to support a finding that plaintiff was not disabled after May 8, 1986. The Court finds there is such evidence.

Plaintiff was examined immediately after the May 8th auto accident at Rhode Island Hospital. Although plaintiff complained of neck and lower back pain (Tr. 348), x-rays failed to reveal anything other than a "normal examination." (Tr. 350). There were no "fractures or dislocations" in his lumbo-sacral spine. Nor were there any evidence of "acute fracture or subluxation" noted from the cervical spine series. All seven cervical vertebrae were visualized and were of normal size, contour and density. Intervertebral disc spaces were well-maintained. (Tr. 350).

In addition to this normal post-accident examination, plaintiff was examined by Dr. Lucas on June 2, 1986. From this examination Dr. Lucas noted the following:

Paul returns. He is having some discomfort radiating across the back and into the leg, but working hard at his exercise program. He will be seen back in follow-up in four to six months.

(Tr. 360).

Two conclusions can be drawn from this note. Had plaintiff's condition drastically deteriorated as a result

of the accident as plaintiff claims, Dr. Lucas would not have merely desired a follow-up in four to six months. Moreover, the degree of discomfort felt by plaintiff, the fact that plaintiff was working hard on his exercise program, as well as the time set for follow-up are remarkably similar to the remarks made by Dr. Lucas in January of 1986 (Tr. 339).

Paul is feeling better. The clicking in his back has cleared and he is swimming, doing a lot of exercise now and feeling much better. His exam still shows some discomfort on full flexion and extension. He is to continue with his well-structured exercise program. We will see him back in two to three months. At that time we may consider allowing him to return to some form of light work.

Of course, it was these observations which in large part prompted the Secretary to rule that plaintiff was not disabled as of April 1st. The post-accident medical evidence, thus, shows that plaintiff's condition did not deteriorate significantly after May 8, 1986.

Given this conclusion, the testimony of McGinn for the April time-period is also applicable to the post-accident time-period as well. Combining the latter testimony with the post-accident medical evidence one can easily conclude there exists substantial evidence on the

record as a whole that plaintiff was not under "disability" after May 8, 1986 within the meaning of the Act.

For all the above reasons, the Report and Recommendation of the Magistrate is adopted and the Secretary's motion to affirm his decision is granted.

It is so Ordered.



Ronald R. Lagueux
United States District Judge

12/8/87
Date