IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EDWARD EARL ESTES, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**NO. 02-2925 B/An**
	)	
JOANNE BARNHART, COMMISSIONER OF SOCIAL SECURITY	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Edward Earl Estes, Jr. has appealed a decision of the Commissioner of Social Security for (1) denying his application for disability insurance benefits under sections 216(i) and 223 of the Social Security Act ("Act"), as amended, 42 U.S.C. §§ 401 *et seq* and (2) denying his application for supplemental security income ("SSI") benefits based on disability under Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq*. United States District Judge J. Daniel Breen referred this matter to the Magistrate Judge for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1). For the reasons set forth below, the Court recommends the Commissioner's decision be **AFFIRMED**.

PROPOSED FINDINGS OF FACT

Estes filed an application for supplemental security income on April 7, 2000 and filed for disability insurance benefits on April 10, 2000. Throughout these proceedings, Estes did not retain counsel but represented himself. (R. 11.) His applications were denied both initially on

May 23, 2000 and at reconsideration on October 27, 2000. Estes requested a hearing before an administrative law judge ("ALJ"), and his request was granted. A hearing was held on May 30, 2002 before Administrative Law Judge William R. Ingram. The ALJ denied Estes' applications for benefits on June 17, 2002. The appeals council denied Plaintiff's August 6, 2002 request for review of his application, making the ALJ's decision the final decision of the Commissioner. Plaintiff has filed this action alleging the Commissioner's decision was not based on substantial evidence and requesting reversal of the Commissioner's decision.

Estes was born on December 12, 1972. He was twenty-eight years old at the time he applied for benefits. Plaintiff did not graduate from high school but is studying to receive his GED. He completed eleventh grade. (R. 23.) He is 6'1" tall and weighs 273 pounds. (R. 166.) Estes testified he became disabled on March 6, 1998 as a result of lifting a 21 inch computer monitor that caused injury to his back and neck. (R. 11, 28.) In the past, Plaintiff held numerous jobs, including dishwasher, line cook, mechanic, shoe salesman, manager, receiving clerk, service technician, customer service representative, field service technician, janitor, truck driver, and materials handler for a lumber company. (R. 24-25). Estes' hobbies include building motors, riding one of his three motorcycles, or playing football with his children. (R. 42-43).

After the date of his disability, Plaintiff worked for various companies until May 9, 2002. (R. 12.) Estes has admitted that he wants to work, but whatever job he holds must allow him time to take a break and re-group whenever he begins having physical pain. (R. 42.) At the hearing, after discussing his work history, Estes was unsure how much weight he could lift. While he admitted "I'd probably try to lift 50 pounds," Estes was unsure if he could lift 20 pounds. (R. 38, 39.) The ALJ concluded Estes could lift between 20 to 50 pounds. (R. 14.)

Estes claims he can sit still for only ten to twenty minutes at a time before he experiences problems with numbness in his hands. (R. 39.) He has no major problems with standing for prolonged periods of time. (R. 39, 40.) He also would not have a problem with walking one mile. (R. 40.) Estes can squat, kneel, and crawl, but he is uncertain if he can climb a ladder or bend over from the waist. (R. 41.) Estes cannot run. (R. 42.)

Estes was injured in March 1998 while trying to lift a computer monitor. (R. 135.) Estes does not have a treating physician, but he saw multiple doctors after he sustained his injury. On June 26, 1998, Estes was examined by Dr. D. Hunt, an orthopedic surgeon. Dr. Hunt diagnosed Estes with cervical strain with nerve root irritation. (R. 137.) Dr. Hunt ordered Estes to undergo physical therapy. (R. 137.) Estes was also treated by Dr. Riley Jones, of the Memphis Orthopedic Group. Dr. Jones treated Estes until September 15, 1998, when Dr. Jones "discharged him from his care indicating that there was no impairment rating." (R. 137.) Dr. Jones noted that Estes was unresponsive to conservative measures, medications, and physical therapy. (R. 137.)

Estes saw Dr. Andrew K. Burt, an orthopedic surgeon, on October 19, 1999 for an evaluation. Dr. Burt examined Estes, reviewed medical records, and diagnosed Estes with chronic musculoligamentous neck pain and was of the opinion that Estes had achieved maximum medical improvement. (R. 13.) Dr. Burt concluded Estes lost around 50% of his pre-injury lifting capacity and noted Estes should be restricted from sustained overhead use of his left arm. (R. 139.) Dr. Burt also recommended Estes should not return to his former job as a computer installer, because of lifting and carrying requirements. (R. 140.)

Estes saw Dr. Thomas D. Schmitz, an orthopedic surgeon, on February 25, 2000. (R. 141.) Dr. Schmitz reviewed the medical records provided to him, including records from Dr. Jones and Dr. Burt. (R. 144-46.) Before he could rate Estes, Dr. Schmitz recommended a supplemental MRI be performed to determine if there is any nerve root impingement. Dr. Schmitz noted that Estes "would be a Qualified Injured Worker." (R. 146.) During the examination with Dr. Schmitz, Estes admitted "he would like to work in vocational rehabilitation or as a claims adjuster." (R. 146.)

On February 7, 2002, Estes was examined by Dr. James T. Galyon. (R. 166.) After an examination, Dr. Galyon noted Estes "has a full range of motion in the cervical spine" but complained of pain in the left arm when his head was tilted to the left side and compression was added to the neck. (R. 166.) Dr. Galyon also noted Estes had a full range of motion in all the upper extremities. (R. 166.) Dr. Galyon concluded Estes could easily lift 20 pounds regularly, could work with no limitations as far as standing and walking, and could sit for prolonged periods of time without restrictions. (R. 167.) Dr. Galyon also opined Estes should be restricted to occasional overhead activity, rather than frequent or continuous activity. (R. 167.)

Additional hospital and physician records note that Estes was treated for the following: burns on both hands in March 1999, neck muscle pain in May 1999, ankle pain in March 2000, and an eye examination in June 2000. (R. 147-55, 164-65.)

Entitlement to Social Security benefits is determined by a five-step sequential analysis as set forth in the Social Security Regulations. 20 C.F.R. §§ 404.1520, 416.920. First, if an individual is engaging in gainful activity, he or she will not be found to be disabled, regardless of medical findings. *Wyatt v. Sec'y of Health & Human Servs.*, 974 F.2d 680, 683 (6th Cir. 1992).

Second, if an individual does not have a severe impairment, he or she will not be found to be disabled. *Id.*; *see also* 20 C.F.R. §§ 404.1520(c), 416.920(c). Third, if a plaintiff is not working and has some severe impairment, the court should look to see if the claimant suffers from one of the listed impairments in Appendix 1 to subpart P of the regulations. *See Wyatt*, 974 F.2d at 683; 20 C.F.R. §§ 404.1520(d), 416.920(d). If the claimant does suffer from one of the listed impairments, benefits should be awarded. *See Wyatt*, 974 F.2d at 683. If the claimant does not suffer from one of the listed impairments, the Commissioner must follow steps four and five. Fourth, if the claimant can return to the job he previously held, benefits should not be awarded. *Id.* Fifth, if the claimant cannot return to the job previously held, the Commissioner should consider other factors to determine if other work can be performed, including age, education, past work experience and residual functional capacity. *Id.* at 683-84. Further review is not necessary if it is determined that an individual is not disabled at any point in this sequential analysis. 20 C.F.R. § 404.1520(a).

Using the five-step disability analysis, the ALJ first noted that Estes was engaged in substantial activity from the March 6, 1998 injury date until 2000. (R. 12.) The ALJ noted that "[g]ainful work activity is the kind of work usually done for pay or profit, whether or not a profit is realized," then the ALJ went on to detail Estes's jobs from March 1998 through September 15, 2000. (R. 12.) The ALJ concluded, under the first step, that Estes was not gainfully employed in either 2001 or 2002. (R. 12.)

Second, the ALJ concluded that Estes had a "severe" impairment. (R. 12.) The ALJ noted that Estes suffered from a bulging disc of the cervical spine and cervical strain with radiculpathy, which both cause more than a minimal effect on his ability to work. (R. 12.) At

the third step, the ALJ found that neither Estes's symptoms nor the objective medical evidence presented showed Estes had an impairment, as defined by the Act's regulations. (R. 15.) At the fourth step, the ALJ found that Estes could not return to his past relevant work, which involved lifting anywhere from 50 to 75 pounds. (R. 15.)

The ALJ relied on the testimony of Estes and Dr. William E. Jenkins, a vocational expert, when concluding Estes was unfit for his previous work. (R. 15.) The ALJ also examined Estes's age, education, and vocationally relevant past work experience in conjunction with the Medical-Vocational Guidelines of the regulations. (R. 15.) The ALJ concluded that Estes was capable of performing a significant range of light work, which involve lifting no more than 20 pounds at a time. (R. 15-16.) Although Plaintiff cannot perform the full range of light work, there are a significant number of jobs in the national economy that Plaintiff could perform, including a checker, a dispatcher, or an order caller. (R. 17-18.)

Plaintiff has asked the Court to review the ALJ's decision. More specifically, Plaintiff claims the Commissioner erred in denying his applications for benefits by (1) failing to properly consider the statements and medical findings of various doctors and by (2) the ALJ's bias against the Plaintiff.

PROPOSED CONCLUSIONS OF LAW

I. Standard of Review

Pursuant to 42 U.S.C. § 405(g), a claimant may obtain judicial review of any final decision made by the Commissioner after a hearing to which he was a party. "The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without

remanding the cause for a rehearing." 42 U.S.C. § 405(g) (2004); *see also Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990).

The court's review is limited to determining whether or not there is substantial evidence to support the Commissioner's decision. 42 U.S.C. § 405(g); *Drummond v. Commissioner*, 126 F.3d 837, 840 (6th Cir. 1997). Substantial evidence is less than a preponderance but more than a scintilla. *Kirk v. Sec'y of Health & Human Servs.*, 667 F.2d 524, 535 (6th Cir.1981). It is "evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In determining whether substantial evidence exists, the Court should examine the evidence in the record, taken as a whole, and take into account whatever the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. If substantial evidence is found to support the Commissioner's decision, the Court "may not even inquire whether the record could support a decision the other way." *Baker*, 40 F.3d at 794. The decision must be affirmed even if the reviewing court would have decided the case differently. *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983).

The Court is entitled to review whether the correct legal standards were applied. *Landsaw v. Sec'y of Health & Human Servs.*, 803 F.2d 211, 213 (6th Cir. 1986). The Court, however, may not decide questions of credibility or try the case *de novo*. *Cutlip v. Sec'y of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994); *Bradley v. Sec'y of Health & Human Servs.*, 862 F.2d 1224, 1228 (6th Cir. 1988).

II. The ALJ's Review of Estes' Condition

A. Relying on Testimony of Consulting Physicians

Estes first contends the ALJ did not give proper weight to the doctors who examined him since the injury date. If a claimant has a treating physician, the regulations instruct the Commissioner to "give more weight" to that treating physician's opinion. 20 C.F.R. § 404.1527(d)(2). "It is well-settled that opinions of treating physicians should be given greater weight than those held by physicians whom the Secretary hired and who only examined the claimant once." *Farris v. Sec'y of Health & Human Servs.*, 773 F.2d 85, 90 (6th Cir. 1985). In this case, however, Estes had no treating physician. (R. 36.) Instead, Estes has relied on the opinions of three separate physicians, one of which was a consulting doctor hired by the Commissioner to examine Estes. Even though no treating physician's testimony was presented, the Court "will evaluate every medical opinion we receive." 20 C.F.R. § 404.1527.

In his Memorandum to the court, Plaintiff notes that three physicians were of the opinion Plaintiff was disabled. First, Dr. Burt diagnosed Plaintiff with having chronic neck pain and precluded the Plaintiff from heavy lifting. Dr. Burt also stated that Plaintiff lost 50% of his pre-injury lifting capacity. Second, Dr. Schmitz noted that Plaintiff's MRI scan showed bulging of the C4-5 and C5-6 discs. Third, Dr. Galyon stated that Plaintiff's injury was related to a nerve root in the cervical spine with radiation into the left hand and arm. Dr. Galyon stated Plaintiff would be a candidate for medical treatment.

Because there was no treating physician, the ALJ considered the statements and findings of the consulting physicians in his decision. (R. 14.) The ALJ noted "[t]he state agency medical consultants found that the claimant had the residual functional capacity to perform medium work

. . . ." (R. 14.) The ALJ also concluded in his findings that objective medical evidence reflects Estes did not suffer from some impairment that would prevent him from light exertional activity. (R. 15.) From the record, the Court notes the ALJ weighed the evidence in this case, evaluating each medical opinion. As such, the Court finds that the ALJ gave appropriate weight to the medical source opinions and finds the Commissioner's decision that Estes was not disabled within the meaning of the Act is supported by substantial evidence.

B. Estes' Subjective Opinion

Estes also personally contends he is disabled, thus the Court will review the ALJ's findings with respect to Estes's testimony. In addition to statements by the physicians, Estes testified at his hearing and discussed his injury. During the course of the hearing, Estes stated he suffered from "numbness in his hands." (R. 39-40.) Additionally, in his medical reports, Estes indicated his pain started with his neck and "progressed to back, shoulders, hands and legs." (R. 111.) He complained of numbness and migraines and noted the pain is constant and can worsen when standing or sitting too long. (R. 111.) He claims to suffer headaches daily and is "stiff constantly." (R. 124.) At times, when the pain is severe, he sees double. (R. 116.) He noted "the pain is not getting better nor going away; it is getting worse from day to day." (R. at 114).

A claimant's statement of pain, taken alone, will not establish that he is disabled; instead, there must be objective medical findings that show the existence of a medical impairment that could reasonably be expected to give rise to the pain alleged. 20 C.F.R. § 404.1529(a). *Duncan v. Secretary of Health & Human Services*, 801 F.2d 847 (6th Cir. 1986), established a two part test for determining whether a claimant suffers from a disabling pain. First, the court must determine whether objective medical evidence of an underlying medical condition exists. *Id.* at

853. If it does, then the court must determine "(1) whether objective medical evidence confirms the severity of the alleged pain arising from the condition; or (2) whether the objectively established medical condition is of such severity that is can reasonably be expected to produce the alleged disabling pain." *Id.* When allegations of pain are at issue, credibility is crucial, and the ALJ should observe the demeanor of the plaintiff and should not be lightly disregarded. *Villarreal v. Sec'y of Health & Human Servs.*, 818 F.2d 461, 463 (6th Cir. 1987).

The ALJ concluded there was some underlying medical condition, since Estes "apparently has a bulging disc of his cervical spine." (R. 15.) The ALJ, however, determined Plaintiff's injuries were not as severe as the Plaintiff alleged. In making this determination, the ALJ looked at the objective medical evidence to determine if the Plaintiff's allegations of pain were consistent with the severity of his condition. In his decision, the ALJ noted "the objective medical evidence of record does not demonstrate the presence of an impairment . . . which would completely erode the claimant's ability to function at the light exertional level." (R. 15.)

Because he ruled there was no severe disability, the ALJ considered Estes's credibility, evaluating his work record and the physician reports as compared to the claimant's daily activities, the duration and frequency of the pain, precipitating and aggravating factors, functional restrictions, and the like. *See Felisky v. Bowen*, 35 F.2d 1027, 1039 (6th Cir. 1994). In his decision, the ALJ mentioned several reasons for discrediting Estes' subjective opinions. First, the ALJ noted Estes' work record. After the accident in March 1998, Estes held an active job for more than two years even though he was employed infrequently during 2001 and 2002. Work performed during any period in which a plaintiff alleges that he was under a disability can

demonstrate an ability to engage in substantial, gainful activity. *See* 20 C.F.R. §§ 404.1571, 416.971.

"[A]n ALJ's findings based on credibility of the claimant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a witness's demeanor and credibility." *Walter v. Commissioner of Social Security*, 127 F.3d 525, 531 (6th Cir. 1997). The Court finds that the ALJ relied on substantial evidence when reviewing Estes's personal testimony.

III. Bias By the ALJ

Estes finally contends the ALJ's decision should be overturned because the ALJ did not give him a "fair shot" to defend his position concerning the injury. In the Sixth Circuit there is a "presumption that policymakers with decisionmaking power exercise their power with honesty and integrity." *Navistar Int'l Transportation Corp. v. United States Environmental Protection Agency*, 941 F.2d 1339, 1360 (6th Cir. 1991). "The burden of overcoming the presumption of impartiality 'rests on the party making the assertion [of bias],' and the presumption can be overcome only with convincing evidence that 'a risk of actual bias or prejudgment' is present." *Id.* (citing *Schweiker v. McClure*, 456 U.S. 188, 196 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Generally, a claimant should assert a claim of bias as soon as he or she has a reason to believe the ALJ is biased. *See* 20 C.F.R. §§ 404.940, 416.1440. By asserting a claim of bias early in the proceedings, the Appeals Council could more adequately address whether another hearing should be entitled. *See Besaw v. Sec'y of Health & Human Servs.*, 966 F.2d 1028, 1030 (6th Cir. 1992).

In this matter, Estes did not assert the Commissioner was biased in his preliminary appeal to the Appeals Council or anywhere during the proceedings. Furthermore, even if the Court were to review his claim of bias, the Court finds there is no substantial evidence that the ALJ was biased in favor of not granting Estes disability benefits.

RECOMMENDATION

For the reasons set forth above, the Court recommends the decision of the Commissioner be **AFFIRMED**.

_____
S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date:_____