

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

WILLIAM H. GANN,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security

Defendant.

CIVIL ACTION

No. 03-2571-CM

MEMORANDUM AND ORDER

This is an action for judicial review of a final decision of defendant Commissioner of Social Security denying plaintiff William H. Gann's claim for a period of disability and disability insurance benefits under Title II of the Social Security Act as amended. This matter is before the court on plaintiff's Motion for Judgment (Doc. 5).

On November 13, 2000, plaintiff protectively filed his application for disability, alleging disability beginning February 4, 1993, due to a knee replacement, shoulder replacement, arthritis, depression, burns, a broken wrist, and pain. Plaintiff's application was denied initially and upon reconsideration. On April 16, 2003, an administrative hearing was held, and the ALJ entered a decision on June 27, 2003, finding plaintiff was not entitled to a period of disability or disability insurance benefits. On August 15, 2003, plaintiff requested a review of that hearing decision by the

Appeals Council. On September 17, 2003, that request was denied, thereby rendering the ALJ's decision the final decision for the Commissioner.

I. Background

Plaintiff, currently 55 years old, was 45 years old on February 3, 1993, the date he alleges his disability began. Plaintiff receives income from the Navy in the amount of \$2,310 a month due to 100% disability. Plaintiff medically retired from the Navy in 1970, due to two accidents occurring while in the Navy; one involving his right knee and the other involving a severe burn to his left shoulder. He was first rated 60% disabled, however, plaintiff was later found 100% disabled and received 100% disability retroactive to 1992.

At the hearing before the ALJ, plaintiff testified about his impairments and resultant limitations. Plaintiff was diagnosed with arthritis in the late 1980's. Plaintiff specifically suffers osteoarthritis in his right knee. Plaintiff underwent several knee surgeries beginning in December 1992, and finally underwent a total knee replacement in February 1993. Prior to undergoing surgery, plaintiff received cortisone injections every couple of months.

Plaintiff also suffered a fracture of his right wrist with complications. Plaintiff slipped on ice and fractured his right wrist, which is his dominant hand. Plaintiff underwent three surgeries on his right wrist over the course of a year.

Plaintiff further suffered an injury to his left shoulder due to a burn while serving in the Navy. He experienced pain, loss of motion, and loss of strength, as well as limitation in his ability to lift or reach overhead with this shoulder. Plaintiff underwent two surgeries to address these limitations.

Plaintiff testified that he also suffers depression. Plaintiff testified that, since 1992, he has received psychiatric treatment once a month with medication therapy. Plaintiff testified that his medications changed throughout the years because of his symptoms.

For purposes of benefits under Title II, plaintiff is required to show the existence of a disability on or before the December 31, 1993, expiration of his insured status. The ALJ noted that the vast majority of the medical evidence from the Veterans' Administration Medical Center covered a period after plaintiff's date last insured. Accordingly, in considering the relevant medical evidence, the ALJ determined that plaintiff had the following severe impairments through his date last insured: deformity of the humeral neck, left shoulder, with sclerosis, status post fracture; osteoarthritis of the right knee, status post multiple arthroscopic debridements; and status post fracture of the right wrist.

In determining whether plaintiff had a residual functional capacity to perform work through plaintiff's date last insured, the ALJ found that plaintiff's testimony was not supported by the objective, medical, clinical, laboratory, and radiological findings contained in the record. The ALJ determined plaintiff's residual functional capacity and posed those restrictions to the vocational expert in the form of a hypothetical question. The ALJ concluded that plaintiff could not return to his past relevant work. However, based upon the vocational expert's testimony, the ALJ found that plaintiff could have worked as a surveillance systems monitor and an information clerk, thereby concluding that plaintiff was not disabled at the date last insured.

II. Standards

Pursuant to 42 U.S.C. § 405(g), a court may render “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.” The court reviews the decision of the Commissioner to determine whether the record as a whole contains substantial evidence to support the Commissioner’s decision. *Castellano v. Sec’y of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). The Supreme Court has held that “substantial evidence” is “more than a mere scintilla” and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389 (1971). In reviewing the record to determine whether substantial evidence supports the Commissioner’s decision, the court may neither reweigh the evidence nor substitute its discretion for that of the Commissioner. *Qualls v. Apfel*, 206 F.3d 1368, 1371 (10th Cir. 2000). Although the court is not to reweigh the evidence, the findings of the Commissioner will not be mechanically accepted. *Graham v. Sullivan*, 794 F. Supp. 1045, 1047 (D. Kan. 1992). Nor will the findings be affirmed by isolating facts and labeling them substantial evidence, as the court must scrutinize the entire record in determining whether the Commissioner’s conclusions are rational. *Holloway v. Heckler*, 607 F. Supp. 71, 72 (D. Kan. 1985).

The court also reviews the decision of the Commissioner to determine whether the Commissioner applied the correct legal standards. *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir. 1994). The Commissioner’s failure to apply the proper legal standard may be sufficient grounds for reversal independent of the substantial evidence analysis. *Id.* The court thus reviews the decision of the Commissioner to determine whether the record as a whole contains substantial

evidence to support the Commissioner's decision and whether the correct legal standards were applied. *Hamilton v. Sec'y of Health & Human Servs.*, 961 F.2d 1495, 1497 (10th Cir. 1992).

III. Discussion

The ALJ believed plaintiff's testimony was not supported by the objective medical and clinical findings, and the ALJ believed plaintiff's activities of daily living were inconsistent with disability. However, in reaching these conclusions, the ALJ failed to take into account the fact that plaintiff was found by the Veterans Administration (VA) to be 100% disabled beginning in 1992.

In *Richter v. Chater*, 900 F. Supp. 1531 (D. Kan. 1995), Judge Crow specifically addressed the extent to which an ALJ must consider the VA's finding of disability. In *Richter*, the ALJ inquired of Richter's source of income and learned of his receipt of monthly VA disability pension, but the ALJ did not follow up with any inquires or requests for additional information about the VA proceeding. Furthermore, in the ALJ's final decision, he treated the VA disability pension as nothing more than a source of income. The ALJ's decision did not show he considered the disability pension to be a disability finding by the VA or that he accorded the finding any weight.

“Although findings by other agencies are not binding on the Secretary, they are entitled to weight and must be considered.” *Baca v. Dep't of Health and Human Servs.*, 5 F.3d 476, 480 (10th Cir. 1993) (quoting *Fowler v. Califano*, 596 F.2d 600, 603 (3rd Cir. 1979)). Noting that circuits differ over how much weight to afford other agency findings,¹ the court in *Richter* pointed

¹*McCormick v. Shalala*, 872 F. Supp. 392, 398 n. 3 (E.D. Mich.1994) (citing *Havas v. Bowen*, 804 F.2d 783, 786 n. 1 (2nd Cir. 1986) (some weight), *Kane v. Heckler*, 776 F.2d 1130, 1135 (3rd Cir. 1985) (substantial weight), *Rodriguez v. Schweiker*, 640 F.2d 682, 686 (5th Cir. 1981) (great weight), *Smith v. Secretary of HEW*, 587 F.2d 857, 862 (7th Cir. 1978), *Falcon v. Heckler*, 732 F.2d 827, 831 (11th Cir. 1984) (great weight)).

to the Third Circuit's decision in *Fowler*, which the Tenth Circuit cited in *Baca*, that a VA disability finding is "critically relevant and material in a parallel Social Security case." *Fowler*, 596 F.2d at 603 (citations omitted). The court went on:

Though it is not clear what evidentiary weight other agency findings carry in the Tenth Circuit, it is beyond dispute that they must be considered and given some weight. *See, e.g., Thomas v. Weinberger*, 398 F. Supp. 1034, 1036 (D. Kan. 1975) (100% disability benefits from VA is "persuasive" evidence "of the fact of disability."). A passing reference to another agency's disability finding or a perfunctory rejection of it will not suffice.

Richter, 900 F. Supp. at 1538.

In this case, the ALJ elicited during the administrative hearing information about plaintiff's veterans benefits and, in response to questions presented by the ALJ, plaintiff testified that he was originally determined to have a 60% disability, but that determination was later increased to 100%, retroactive to 1992. The Commissioner points to the fact that the ALJ stated in his decision that he considered "all" of the evidence of record and that the ALJ discussed his review of the VA medical records in two separate segments of his opinion.

In *Richter*, the court determined that the ALJ's passing reference to the VA disability pension as a source of income did not show that the ALJ considered the disability finding in his evaluation of the evidence, nor did such a reference indicate what weight the ALJ gave to this "important fact." *Id.* In the present case, the ALJ failed to make even a passing reference to plaintiff's receipt of 100% disability benefits from the VA. The ALJ's failure to acknowledge he considered these benefits at all is in error and requires remand for application of the appropriate legal standard with respect to this evidence. In addition, the ALJ should attempt to discover the

factual basis and the medical evidence on which the VA's finding of disability was made. The court remands this case with directions to consider and give at least some weight to the VA's disability determination in ruling upon plaintiff's credibility.

Because the court must remand the case, the court will address plaintiff's other argument summarily. Plaintiff contends that the hypothetical question posed to the vocational expert by the ALJ was insufficient.

The ALJ determined plaintiff's residual functional capacity and, based upon that determination, the ALJ posed a hypothetical question to the vocational expert. Hypothetical questions must include a full description of a claimant's impairments in order for the testimony elicited by such questions to constitute substantial evidence to support the ALJ's decision. *See Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991).

When presented with the initial hypothetical question, the vocational expert indicated plaintiff would be unable to perform his past relevant work. The vocational expert then identified the position of surveillance monitor and information clerk as available. However, the vocational expert testified that, according to the Dictionary of Occupational Titles (DOT), the position of information clerk requires some handling, which plaintiff would be unable to perform. The ALJ then questioned the vocational expert about whether this position could be performed without handling, in contradiction to the standard manner in which it is performed according to the DOT. The vocational expert testified that, as it is actually performed, the information clerk position did not require handling.

Social Security Ruling 00-4p, 2000 WL 1898704, explains that “[w]hen a VE . . . provides evidence about the requirements of a job or occupation, the [ALJ] has an affirmative responsibility to ask about any possible conflict between that [VE] evidence and information provided in the DOT.” *Id.* at *4. “If the VE’s . . . evidence appears to conflict with the DOT, the [ALJ] will obtain a reasonable explanation for the apparent conflict.” *Id.*

In this case, there appeared a possible conflict between the job requirements for an information clerk as set forth in the DOT and the impairments as set forth in the hypothetical posed to the vocational expert. However, upon questioning by the ALJ, the vocational expert concluded that the job of an information clerk did not require handling and could therefore be performed by plaintiff. Thus, the ALJ properly followed SSR 00-4p. The hypothetical question posed by the ALJ was proper.

IT IS THEREFORE ORDERED that plaintiff’s Motion for Judgment (Doc. 5) is granted to the extent that the court remands the case for additional proceedings consistent with this opinion.

Dated this 24 day of June 2004, at Kansas City, Kansas.

s/ Carlos Murguia

CARLOS MURGUIA
United States District Judge

