

IP 06-0193-C Y/K Morris v Astrue  
Judge Richard L. Young

Signed on 03/20/07

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

GENE W. MORRIS,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:06-cv-00193-RLY-TAB
	)	
JO ANNE B. BARNHART,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

GENE W. MORRIS, )  
(Social Security No. XXX-XX-0198), )  
 )  
Plaintiff, )  
 )  
v. ) 1:06-cv-193-RLY-TAB  
 )  
MICHAEL J. ASTRUE, COMMISSIONER )  
OF SOCIAL SECURITY,<sup>1</sup> )  
 )  
Defendant. )

**MEMORANDUM DECISION AND ORDER**

**I. Statement of the Case**

Plaintiff, Gene W. Morris, seeks judicial review of the final decision of the agency, which found him not disabled and, therefore, not entitled to Disability Insurance Benefits (“DIB”) or Social Security Income (“SSI”) under the Social Security Act (“the Act”). 42 U.S.C. §§ 416(i), 423(d), 1381(a); 20 C.F.R. § 404.1520(f). The Court has jurisdiction over this action pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

Plaintiff filed applications for SSI and DIB effective November 7, 2001, alleging that he became disabled on July 8, 2001, due to stroke, a history of myocardial infarction, and a cardiac arrhythmia. (R. 67-70). Both applications were denied initially and upon reconsideration. (R. 50-62). On December 10, 2003, Plaintiff appeared with counsel and testified at a hearing before Administrative Law Judge (“ALJ”) Robert E. Hanson. A vocational expert (“VE”) and medical expert

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<sup>1</sup>On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Michael J. Astrue, in his official capacity only, is substituted as the Defendant in this action.

(“ME”) also testified. (R. 577-629). On January 24, 2005, the ALJ issued a decision in which he found that, as of July 18, 2004, Plaintiff was disabled under the Act and entitled to SSI because he had reached advanced age; however, he was not disabled prior to that date and therefore not entitled to DIB as his insured status had expired as of December 31, 2003. (R. 17-30). The Appeals Council denied Plaintiff’s request for review, leaving the ALJ’s decision as the final decision of the Commissioner. (R. 7-9). 20 C.F.R. §§ 404.981, 416.1481.<sup>2</sup> Plaintiff then filed a Complaint on February 6, 2006, seeking judicial review of the ALJ’s decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

## II. Medical Evidence

Plaintiff was hospitalized in July 2001 with complaints of left-sided weakness and a seizure. (R. 146). Plaintiff’s CT scan suggested posterior parietal lobe right-sided infarction. (R. 147). A toxicology screen was positive for cocaine and marijuana. (R. 157). However, Plaintiff denied ever using cocaine or recently using marijuana. (R. 192). During his hospital stay, Plaintiff developed visual hallucinations and became psychotic. (R. 144-45). He was diagnosed with a possible stroke, coronary artery disease, vascular insufficiency to the left leg, hyperlipidemia, alcohol withdrawal seizure, and delirium tremens. (R. 143).

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<sup>2</sup>The regulations governing the determination of disability for DIB are found at 20 C.F.R. § 404.1501 *et seq.* The SSI regulations are substantially identical to the DIB regulations and are set forth at 20 C.F.R. § 416.901 *et seq.* For convenience, only the DIB regulations will be cited henceforth in this memorandum.

Plaintiff was enrolled in substance abuse treatment in August 2001. (R. 183, 197). However, he did not maintain regular attendance and, a few weeks later, asked to be discharged. (R. 183).

In October 2001, Plaintiff was seen for evaluation of left calf pain. (R. 179). Plaintiff stated that he could walk a half mile before requiring rest. Tests were suggestive of superficial femoral artery disease with moderate distal ischemia. (R. 179).

Plaintiff was hospitalized in November 2001 due to a focal seizure with generalization and subsequent encephalopathy. (R. 265-66). Plaintiff gave a history of taking his medication, but his doctors did not believe him. (R. 267). Compliance with medication following discharge was regarded as Plaintiff's "biggest problem." (R. 268). Although Plaintiff denied alcohol use, he tested positive for marijuana and Benzodiazepines. (R. 266).

In January 2002, Plaintiff underwent a psychological evaluation at the request of the state agency. (R. 277-82). With regard to energy level, Plaintiff reported that if he exerted himself too much, it "drained" him. (R. 278). Plaintiff stated that he could not focus on anything for a long period of time. (R. 278). Upon memory testing, Plaintiff was able to remember five out of five words on immediate recall and one out of five words after a five-minute delay with one substitution. (R. 280). He could repeat six numbers forward and reverse three digits. (R. 280). He could perform simple mathematical calculations. (R. 280). Plaintiff stated that he took a shower every other day, cooked outside, cleaned, did laundry, and shopped. (R. 281). Plaintiff watched six to eight hours of television per day. (R. 282). Nancy A.M. Ingwell, Ph.D., diagnosed alcohol dependence in remission and cannabis abuse and assigned a global assessment of functioning ("GAF") score of 60 to 70, indicating mild to moderate psychological symptoms. (R. 282). Dr. Ingwell further noted that Plaintiff's mental trend was normal, his memory appeared to be within normal limits, and he had roughly average intelligence. (R. 281).

In February 2002, Plaintiff reported having two to three recurrent episodes of seizures since

2001. (R. 283). His Dilantin level was not therapeutic at the time. (R. 285). Plaintiff stated that he had been free of chest pain since his bypass grafting in 1991. (R. 283).

In March 2002, Plaintiff had another seizure, possibly due to alcohol withdrawal (R. 287); his Dilantin level was described as markedly subtherapeutic (R. 289). The physician noted it was hard to be sure of Plaintiff's compliance with medications, and therefore his diagnoses included probable noncompliance. (R. 288-89). Plaintiff's past seizures were felt to have been due to alcohol withdrawal. (R. 288). The probable reason for the current seizures was low levels of anticonvulsant medication. (R. 290).

On March 25, 2002, F. Montoya, M.D., a state agency physician, reviewed the medical evidence of record. (R. 297-304). Based on his review, Dr. Montoya opined that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand and/or walk for six hours in an eight-hour workday, sit for six hours in an eight-hour workday, and perform unlimited pushing and pulling. (R. 298). Dr. Montoya opined that Plaintiff should avoid all exposure to hazards and should not drive. (R. 301).

In early April 2002, Plaintiff described a seizure three weeks before, but his level of serum medication at the time of the report was low. (R. 169, 305). The following week, Plaintiff had no seizure activity, as his Dilantin level was therapeutic. (R. 167). Plaintiff had three seizures later in April 2002, after a day of drinking, with positive drug screens; he was hospitalized. (R. 305, 312). Plaintiff alleged that he was taking Dilantin, but his levels were very low, and he tested positive for cocaine and marijuana. (R. 305, 328, 337). Noncompliance was again assessed as a factor. (R. 163). Plaintiff returned to his baseline level with a greatly improved mental status on the morning following admission. (R. 307). At the time of discharge, he promised not to use drugs again. (R. 307).

In June 2002, Plaintiff reported no seizure activity since April 2002 and, although he described having a constant mild headache, he claimed good Dilantin compliance. (R. 380).

On September 26, 2002, a state agency psychologist reviewed the medical evidence of record and found that Plaintiff did not have a severe mental impairment. (R. 345-58). The psychologist further opined that Plaintiff did not have any functional limitations as a result of a psychological impairment. (R. 355).

In September 2002, Plaintiff was hospitalized for status epilepticus (recurrent seizure). (R. 372). Plaintiff reported no chest pains. (R. 467). His urinalysis was positive for cocaine and marijuana, and his wife indicated both that Plaintiff was poorly compliant with medication and that he had had a few drinks that evening. (R. 373). Plaintiff's Dilantin level was subtherapeutic. (R. 491). At the time of the admission, Plaintiff's history of noncompliance was noted. (R. 458). On this occasion, the seizures were deemed most likely due to alcohol and drug use. (R. 460). The admitting physician noted the similarity of Plaintiff's presentation to his post-drug-ingestion seizures of April 2002. (R. 373). The seizures improved with medication in the hospital (R. 482-83), and Plaintiff promised that he would try in the future to do better at abstaining from substances and in being consistent with his medications. (R. 374).

On September 10, 2002, M.N. Rao, M.D., wrote a letter indicating that Plaintiff had diagnoses of high blood pressure, coronary artery disease, and a history of stroke and seizures. (R. 254). Dr. Rao noted that Plaintiff was on multiple medications and could not undertake gainful employment due to his medical problems. (R. 254).

In October 2002, Plaintiff reported no new seizure activity and that he was compliant with his medications. (R. 388, 478). In February 2003, Plaintiff alleged that his last seizure was in December 2002 (R. 452, 477), and in March of 2003, Plaintiff denied recent seizures (R. 449). Plaintiff denied any angina. (R. 449).

In August 2003, Plaintiff admitted to alcohol use and recent cocaine use, but also claimed that he was compliant with his medication. (R. 443). Plaintiff reported no side effects from

his medication. (R. 443). Upon examination, Plaintiff had normal motor strength in all extremities, and he was able to heel, toe and tandem walk. (R. 444).

### **III. Standard of Review**

An ALJ's findings are conclusive if they are supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); see also *Perkins v. Chater*, 107 F.3d 1290, 1296 (7th Cir. 1997). This standard of review recognizes that it is the Commissioner's duty to weigh the evidence, resolve material conflicts, make independent findings of fact, and decide questions of credibility. *Richardson*, 402 U.S. at 399-400. Accordingly, this Court may not re-evaluate the facts, weigh the evidence anew, or substitute its judgment for that of the Commissioner. See *Butera v. Apfel*, 173 F.3d 1049, 1055 (7th Cir. 1999). Thus, even if reasonable minds could disagree about whether or not an individual was "disabled," the Court must still affirm the ALJ's decision denying benefits. *Schmidt v. Apfel*, 201 F.3d 970, 972 (7th Cir. 2000).

### **IV. Standard for Disability**

In order to qualify for disability benefits under the Act, Plaintiff must establish that he suffers from a "disability" as defined by the Act. "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). The Social Security regulations set out a sequential five step test the ALJ is to perform in order to determine whether a claimant is disabled. See 20 C.F.R. § 416.920. The ALJ must consider whether the claimant: (1) is presently employed; (2) has a severe impairment or combination of impairments; (3) has an impairment that meets or equals an impairment listed in the regulations as being so severe as to preclude substantial gainful activity; (4) is

unable to perform his past relevant work; and (5) is unable to perform any other work existing in significant numbers in the national economy. *Id.* The burden of proof is on Plaintiff during steps one through four, and only after Plaintiff has reached step five does the burden shift to the Commissioner. *Clifford v. Apfel*, 227 F.3d 863, 868 (7th Cir. 2000).

## **V. The ALJ's Decision**

The ALJ began by concluding that Plaintiff met the disability insured status requirements only through December 31, 2003. (R. 28). Plaintiff also had not engaged in substantial gainful activity since the alleged onset date. (R. 28). The ALJ continued by finding that, in accordance with 20 C.F.R. § 416.920(b), Plaintiff had five impairments that are classified as severe: a history of cerebrovascular accident with subsequent seizures; coronary artery disease; hypertension; superficial femoral artery disease; and polysubstance abuse. (R. 28). The ALJ also concluded that Plaintiff had one non-severe impairment – a liver impairment. (R. 28). The ALJ concluded that none of these impairments met or were substantially similar to any of the impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (R. 29). Additionally, the ALJ opined that Plaintiff's allegations regarding the extent of his limitations and his complaints of pain were not fully credible, especially prior to July 17, 2004. (R. 29).

Consequently, the ALJ concluded that Plaintiff retained the residual functional capacity ("RFC") to perform simple and repetitive light work with the lifting of 20 pounds occasionally and ten pounds frequently, stand and/or walk about six hours during an eight-hour work day with only ten minutes of walking per hour, and no driving, work at unprotected heights, or operation of dangerous moving machinery. (R. 29). The ALJ determined that, because of these limitations, Plaintiff could not perform his past work. (R. 29). The ALJ found that Plaintiff's 55th birthday was July 18, 2004, and Plaintiff was therefore at the "advanced age" level from that date forward, but that from Plaintiff's alleged onset date to July 17, 2004, Plaintiff was "closely approaching advanced age." (R. 29). The ALJ went on to

conclude that, based on his limitations, Plaintiff retained the RFC to perform a limited range of light work existing in substantial numbers in the regional economy during the “closely approaching advanced age” timeframe. (R. 29). The ALJ concluded by finding that Plaintiff was not under a disability during this timeframe. (R. 29). However, the ALJ concluded that at the point when Plaintiff reached age 55 (July 18, 2004), he was disabled. (R. 29).

## VI. Issues

The Court concludes that Plaintiff has essentially raised two issues. The issues are as follows:

1. Was the ALJ's RFC supported by substantial evidence?
2. Did the ALJ give proper consideration to Plaintiff's (and his wife's) complaints of fatigue?

### **Issue 1: Was the ALJ's RFC supported by substantial evidence?**

Plaintiff's primary argument is that the ALJ failed to properly consider Plaintiff's non-exertional impairment of fatigue in reaching his conclusion about the Plaintiff's RFC. The ALJ gave some weight to Plaintiff's allegations of fatigue and provided an RFC assessment for Plaintiff that included a limitation of no walking for more than ten minutes an hour. Plaintiff raises two concerns about this RFC: he argues that the RFC is faulty because it relied on the flawed testimony of the ME, Dr. Paul Boyce, and he argues that the ALJ found moderate limitations in concentration, persistence or pace.

With regard to Plaintiff's first concern, it is true that Dr. Boyce testified at Plaintiff's administrative hearing that a patient who had tachycardia (or an increased heart rate) could experience fatigue. (R. 618). Dr. Boyce also testified that a person with tachycardia who is taking metoprolol (because it is a beta blocker) should see a decreased heart rate which will limit the fatigue. (R. 618-19). Plaintiff's complaint is that Dr. Boyce assumed that Plaintiff was not taking metoprolol when his elevated heart rate was observed, and that he was in fact taking metoprolol at that time and still experienced an elevated heart rate. (Plaintiff's Brief at 5). However, what Plaintiff fails to point out is that the record that he cites to support his argument (R. 321) suggests that he had a positive screen for cocaine, which Dr. Boyce opined could cause tachycardia as well. (R. 620). In addition, there was evidence that Plaintiff was not being compliant with his seizure medication, Dilantin, which could lead to the reasonable conclusion that Plaintiff was: (1) not being compliant with his medications; and (2) not being honest about his condition. Hence, there was nothing flawed about the ALJ's reliance on the

testimony of Dr. Boyce.

As for Plaintiff's second concern. The ALJ found a moderate limitation in Plaintiff's concentration, persistence or pace. (R. 21). Plaintiff alleges that, because of this finding, the ALJ should have found that Plaintiff could not perform even simple repetitive tasks. However, a moderate limitation in concentration, persistence or pace does not preclude simple repetitive work. *See Jens v. Barnhart*, 347 F.3d 209 (7th Cir. 2003). The ALJ more than compensated for Plaintiff's "moderate" limitations by limiting him to no more than ten minutes of walking an hour and lifting no more than ten pounds frequently, and by limiting him to simple repetitive jobs.<sup>3</sup>

The Court concludes that the ALJ's RFC assessment is supported by substantial evidence and is, therefore, affirmed.

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<sup>3</sup>The ALJ reasonably found that plaintiff "may reasonably experience enough fatigue based on these combined conditions that he should not do the lifting or the walking inherent in work above the light level of exertion." (R. 22). Plaintiff argues in his brief that the ALJ's limitations "made no sense" (Plaintiff's Brief at 5) because the limitations were "only" to walking. We read the ALJ's limitations based on fatigue to encompass more than walking by virtue of this sentence in the record.

**Issue 2: Did the ALJ give proper consideration to Plaintiff's (and his wife's) complaints of fatigue?**

Plaintiff's second, and final, argument is that the ALJ failed to credit his testimony and the testimony of his wife concerning his fatigue. An ALJ's credibility determination will be upheld so long as it is not patently wrong. *Sims v. Barnhart*, 309 F.3d 424, 431 (7th Cir. 2002). The ALJ, in this instance, properly assessed Plaintiff's credibility in accordance with SSR 96-7p. The ALJ reasonably relied on several different factors in finding that Plaintiff's complaints of fatigue were not fully credible. First and foremost it is important to note that Plaintiff did have a symptom (tachycardia) that could reasonably be expected to produce fatigue. However, Dr. Boyce opined that Plaintiff's fatigue would greatly resolve with the use of metoprolol. (R. 618-19). And, there is evidence in the record that Plaintiff's cocaine use could precipitate his tachycardia, in addition to evidence that Plaintiff was being noncompliant with his use of medication. It is, therefore, questionable whether Plaintiff truly has a medical condition that, when treated properly and when not aggravated by cocaine use, could reasonably be expected to produce the symptoms he alleges. Yet, even without this complicating variable, the ALJ's credibility determination would not have been patently wrong. The ALJ examined the record and reasonably concluded that Plaintiff had engaged in household activities which contradicted his claim of severe fatigue. (R. 28). The ALJ also noted Plaintiff's lies to his doctors about his drug usage and compliance with medications. (R. 22-23, 25). An additional factor that the ALJ considered was Plaintiff's inaccurate recollection, during his hearing, of the amount of time he was employed while he was alleging disability. (R. 26). Based on these factors, the ALJ's credibility determination was not patently wrong. It was perfectly reasonable for the ALJ to conclude that Plaintiff was not fully credible given the fact that he was dishonest in other areas of his life and given the fact that he was not complying with treatment regimens that could relieve many of his symptoms. Given that the ALJ's credibility determination was not patently wrong, it is affirmed.

## VII. Conclusion

The ALJ's decision is supported by substantial evidence and is, therefore, **AFFIRMED**.

Plaintiff's Complaint is **DISMISSED, with prejudice**.

**SO ORDERED.**

**Dated:** March 20, 2007.

*s/ Richard L. Young*

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