

give proper weight to the evidence of Jennings' pain, failed to consider the combined effects of Jennings' impairments, and applied the Medical-Vocational Guidelines or "grid" when his nonexertional limitations made the grid inapplicable. For the reasons set forth below, the court recommends that the decision of the Commissioner be affirmed.

I. PROPOSED FINDINGS OF FACT

Jennings first applied for Supplemental Security Income (SSI) and disability benefits June 25, 1998, alleging disability since March 30, 1998, due to high blood pressure, chronic obstructive pulmonary disease (COPD), vascular problems, bilateral carpal tunnel syndrome, and a rotator cuff injury. He was denied those benefits on October 13, 1998 and did not appeal the decision. On June 28, 1999, Jennings again applied for disability insurance and SSI benefits. On October 25, 1999, Jennings was notified that he was again denied benefits. His application for reconsideration was denied on December 13, 1999. Jennings appealed the denial of benefits and requested a hearing before an administrative law judge. His request was granted, and the hearing was held on December 5, 2000, before Administrative Law Judge (ALJ) Anthony Fava. The ALJ denied Jennings' application for benefits on December 19, 2000.

Jennings appealed this decision to the Appeals Council, and on

May 9, 2001, the Council denied his request for review, leaving the ALJ's decision as the final decision. On May 25, 2001, Jennings filed this suit pursuant to 42 U.S.C. § 405(g) and 5 U.S.C. § 706 to review a final decision, alleging that several of the Commissioner's findings were not based on substantial evidence and that the Commissioner committed errors of law by applying improper or incorrect legal standards.

Jennings was born on June 19, 1953. He was forty-six years old at the time he applied for benefits. Jennings has a high school education, he has attended barber college, and he has taken a few vocational computer courses at Southwest Tennessee Community College in conjunction with his prior employment. He is 6'1" tall and weighs approximately 255 pounds.¹ Jennings stated that he had a history of alcoholism and had received treatment twice.

Jennings testified that his last job was as a warehouseman, and he had worked as a warehouseman for the last twenty-five years. (R. 31.) The job involved frequent heavy lifting and carrying, as well as excessive walking and standing.

At the hearing, Jennings testified that he could not return to his previous occupation as warehouseman due to the pain in his

¹ Jennings testified that he had obeyed his doctor's instructions regarding weight loss and had lost about twenty-five pounds.

hips, knees and feet. (R. 31.) He further testified that he had trouble sitting for long periods of time due to peripheral vascular disease, which caused swelling and discomfort in his lower extremities and had already resulted in two angioplasties to remove clots in his legs. He testified that he has had surgery on both feet with the residual problem of a recurring staph infection. (R. 34.) Jennings explained that he was currently receiving a pension from Veteran's Affairs due to osteoarthritis in his knees, vascular disease, carpal tunnel syndrome in both hands and possible heart damage. (R. 34.) When the ALJ asked him hypothetically if he could perform a sedentary job, lifting no more than fifteen pounds, and possibly involving typing, Jennings said he could not perform such a job. He explained that the carpal tunnel syndrome in his hands prevented him from typing for long periods of time, and he could not sit for more than half an hour. (R. 39.)

He stated that a normal day for him began when he woke up around 5:30 or 6 a.m. He watched the morning news, listened to the radio and read the newspaper. He took walks in the afternoon per his doctor's orders. He took a nap for about an hour and would drift in and out of sleep most of the night, watching television when he woke up. Jennings testified that he was able to do housework and cook for himself, though he has diminished gripping ability in his hands. (R. 35.) He further stated that he went to

the grocery store with the aid of his female companion, but no longer attended church or participated actively in the community.

(R. 36.) Jennings explained that he no longer drove a car and had two prior DUI's from the 1980's. He stated that he could stand for approximately one hour before he had to sit and rest. (R. 38.) He informed the ALJ that he was unable to sit for more than twenty or thirty minutes; any larger amount of time would cause his legs to become stiff and painful. (R. 38.)

Jennings testified that his most serious physical limitation was his inability to stand, sit, lift or bend, in addition to the general weakness in his lower extremities and his carpal tunnel syndrome in his hands. He further testified that all of the doctors who had examined his carpal tunnel syndrome advised him to avoid repetitive motions with his hands and gripping or carrying heavy objects. (R. 40.) He also stated that he had problems with his rotator cuff stemming from an injury he sustained while in the military many years ago. Jennings admitted that he still smoked, but had cut his cigarette intake from a pack or more a day to less than half a pack a day. (R. 53.) He also admitted that he still drank beer occasionally to help him get to sleep. (R. 32.)

The medical evidence in this case consists of medical reports of several treating physicians, hospital records and Jennings' prior medical history. All of Jennings' medical treatment was

administered through the Veteran Affairs Medical Center (VA) or its outpatient services.

Notwithstanding Jennings' alleged disability onset date of March 30, 1998, the administrative record contains a significant amount of medical evidence pertaining to Jennings' physical status prior to that time period. Dr. Lawrence Madlock at Veterans Affairs Medical Center examined Jennings on May 28, 1996 and treated him for depression, alcohol abuse, and suicidal thoughts. (R. 149.) Dr. Madlock noted that Jennings had been in treatment for alcohol abuse previously and that he suffered from hypertension. He was released from the hospital three days later and was prescribed Quinapril (for hypertension), Maxzide (for hypertension) and Zoloft (for depression).

On July 29, 1996, still before the alleged onset of disability, Jennings was admitted to the hospital after a blood clot was discovered in his right leg. Dr. Lundberg, the treating physician, had the clot removed through angioplasty. (R. 152-53.) On December 9, 1997, he returned to the VA for a second angioplasty procedure for another clot, supervised by Dr. Trieffing. (R. 154.) The doctor noted that Jennings had reduced his cigarette smoking from two packs a day to a half pack a day. (R. 156.) His cardiology report showed a report of peripheral vascular disease and a possible enlarged heart. (R. 157.) His rheumatology report

diagnosed Jennings with rotator cuff tendinitis, carpal tunnel syndrome and knee crepitus. The rheumatology physician ordered an orthopaedics consult for a cane and wrist splints. (R. 160.)

On June 10, 1999, Jennings saw Dr. Scott at the VA, a radiologist, who detected bone spurring, degenerative changes and possible calcification in the rotator cuff. (R. 171.) He also found degenerative changes in Jennings' left foot and both knees. (R. 172-74.) A neurology test revealed carpal tunnel syndrome in both wrists, which seemed to be worse in the right wrist. (R. 177.)

On June 11, 1999, Dr. Thai at the VA saw Jennings for a general medical exam. He noted a past surgery to Jennings's left foot in 1979, which involved the fusion of Jennings' fourth and fifth toes, and a similar surgery on his right foot without fusion. He also noted a prior injury to Jennings' right shoulder. He observed that Jennings was in a fragile emotional state and burst into tears easily regarding his inability to work. He documented "tenderness on palpitation" of Jennings' knees, shoulder and feet. (R. 166.) Dr. Thai recorded Jennings' medication as including atenolol (for hypertension), guaifenesin (for cough), ranitidine (for stomach irritation), lisinopril (for hypertension), triamterene, (for hypertension), niacin (for lipidemia), capsaicin (for knees), nitroglycerin (for heart), aspirin (for pain),

salsalate (for inflammation), docusate (for constipation), beclomethasone (nasal inhaler), cetirizine (for nasal allergy), and Tylenol (for pain). (R. 162.)

Dr. Katz of Tennessee Disability Determination Services examined Jennings without the benefit of medical records on September 21, 1999. Dr. Katz determined that Jennings suffered from knee pain, peripheral vascular disease and carpal tunnel syndrome. Based on his observations, Dr. Katz determined that Jennings would be able to walk two to four hours a day and to frequently lift amounts less than twenty-five pounds, but to rarely lift amounts weighing twenty-five pounds. (R. 184.) Two different psychiatric evaluations found Jennings to be mentally stable, though somewhat depressed. (R. 189-205.)

On October 19, 1999, Jennings was evaluated under the government's physical residual functional capacity assessment. The examiner determined that Jennings could lift frequently up to ten pounds and occasionally up to twenty pounds. The examiner further determined that Jennings could both walk and sit for up to six hours a day and had no postural or manipulative limitations. (R. 206-13.)

Jennings' primary care physician, Dr. Burnette, documented much of what has been described above. In addition, she prescribed Lipitor (for hypertension) for Jennings and discontinued his use of

Prazosin. (R. 240.) A rheumatology entry on August 21, 2000, reconfirmed Jennings' rotator cuff tendinitis, osteoarthritis in his knees and carpal tunnel syndrome. (R. 238.) In that same notation, the physician also commented that Jennings' pain in his wrists due to the carpal tunnel syndrome subsided once he cut carbohydrates from his diet, though the pain in his knees and shoulder persisted. (R. 238.) During Dr. Burnette's nine-month treatment of Jennings, there are few reports of pain or discomfort in her entries in the medical record. (R. 229-41.)

On October 7, 2000, Jennings was taken to the emergency room after he suffered chest pains at a nearby casino. The treating physician noted that Jennings had a blood alcohol level of 0.16. Jennings stated that he had some drinks with dinner. (R. 244.)

After considering the record and the testimony at the hearing, the ALJ concluded that Jennings was not disabled within the meaning of the Social Security Act. (R. 20.) The ALJ prefaced his findings with a summary of the medical evidence. (R. 16-18.) He noted inconsistencies in the record with Jennings' testimony. (R. 17-18.) Using the five-step disability analysis,² the ALJ

² Entitlement to Social Security benefits is determined by the use of a five-step sequential analysis set forth in the Social Security Regulations. 20 C.F.R. §§ 404.1520 and 416.920. First, the claimant must not be engaged in substantial gainful activity for a period of not less than twelve months. 20 C.F.R. § 404.1520(c). Second, a finding must be made that the claimant

concluded first that Jennings was not engaged in a substantial gainful activity. (R. 15.) Second, the ALJ concluded that Jennings had medical impairments which would persist for at least twelve months, consisting of mild carpal tunnel syndrome and osteoarthritis of the knees. (R. 15.) At the third step, the ALJ found that none of these impairments alone or in any combination met or equaled the impairments listed by the Commissioner in the regulations and therefore did not qualify Jennings as "disabled." (R. 18.) At the fourth step, the ALJ found that Jennings could not perform his past employment positions as a warehouseman, which involved heavy lifting. (R. 18.) The ALJ relied most heavily on the Disability Determination Service's assessment of Jennings' residual functional capacity. He concluded that Jennings could perform light work, which would involve standing or sitting for six

suffers from a serious impairment. *Id.* In the third step, the ALJ determines whether the impairment meets or equals the severity criteria set forth in the Listing of Impairments contained in the Social Security Regulations. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the impairment satisfies the criteria for a listed impairment, the claimant is considered to be disabled. On the other hand, if the claimant's impairment does not meet or equal a listed impairment, the ALJ must undertake the fourth step in the analysis and determine whether the claimant has the residual functional capacity to return to any past relevant work. 20 C.F.R. § 404.1520(e). If the ALJ finds the claimant unable to perform past relevant work, then at the fifth step the ALJ must show that the claimant can perform other work existing in significant numbers in the national economy. 20 C.F.R. § 404.1520(f).

hours a day and that Jennings could lift twenty pounds occasionally and ten pounds frequently. (R. 18.)

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

Judicial review of the Commissioner's decision is limited to whether there is substantial evidence to support the decision, and whether the Commissioner used the proper legal criteria in making the decision. See 42 U.S.C. § 405(g); *Barker v. Shalala*, 40 F.3d 789, 794 (6th Cir. 1994); *Abbott v. Sullivan*, 905 F.2d 918, 922 (6th Cir. 1990).

Substantial evidence is more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Secretary of Health and Human Servs.*, 667 F.2d 524, 535 (6th Cir. 1981). In determining whether substantial evidence exists, the reviewing court must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight. *Abbott*, 905 F.2d at 923. If substantial evidence is found to support the Commissioner's decision, however, the court must affirm that decision and "may not even inquire whether the record could support a decision the other way." *Barker*, 40 F.3d at 794 (citing *Smith v. Secretary of Health and Human Servs.*, 893 F.2d 106, 108 (6th Cir. 1989)). If supported

by substantial evidence, the Commissioner's decision must be affirmed even if the reviewing court would have decided the case differently and even if substantial evidence supports the opposite conclusion. *Kinsella v. Schweiker*, 708 F.2d 1058, 1059 (6th Cir. 1983). Similarly, the court may not try the case *de novo*, resolve conflicts in the evidence, or decide questions of credibility. *Cutlip v. Secretary of Health and Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994).

B. The ALJ's Credibility Assessment of the Claimant's Allegations of Pain

_____Initially, Jennings asserts that the ALJ erred in evaluating his subjective complaints of pain and the evidence in the record of his pain.

The ALJ found that the evidence in the record of pain was not sufficient to support Jennings' subjective assertions of extremely severe pain and that Jennings' testimony on this point was less than fully credible, given inconsistencies regarding what tasks he was able to perform, his alcohol consumption, and his subjective complaints of pain in comparison with his medical treatment. The ALJ's assessment of credibility is accorded great weight and deference, and his assessment need only be supported by substantial evidence. *Walters*, 127 F.3d at 530. "Discounting credibility to a certain degree is appropriate where an ALJ finds contradictions

among the medical reports, claimant's testimony, and other evidence." *Id.* at 531.

The ALJ first noted that Jennings still smoked against his doctor's orders, which is inconsistent with allegations of severe pain, given his documented condition of peripheral vascular disease. *Sias v. Secretary*, 861 F.2d 475, 480 (6th Cir. 1988).

Another inconsistency in the record involved the daily activities Jennings was able to perform. In his Disability Determination Fatigue Questionnaire, Jennings stated that no one helped him with his grocery shopping. (R. 91.) At the hearing, however, Jennings stated that his companion did the grocery shopping and that he either waited in the car or he accompanied her if she assisted him in the store.³ (R. 36.)

Additionally, the ALJ found Jennings' statements regarding his alcohol consumption to be inconsistent. Jennings told Dr. Burnette, his primary care physician, that he currently was not drinking alcohol. (R. 240.) Just a month later, however, Jennings was brought to a hospital complaining of chest pains and had a

³ The ALJ found, however, that Jennings testified at the hearing that he did none of the cooking or housework. Jennings, in fact, testified to just the opposite. (R. 18, 35.) Although the ALJ erroneously concluded that Jennings' testimony at the hearing regarding his ability to do housework and cooking tasks was inconsistent with his prior statements, Jennings' testimony regarding grocery shopping was indeed inconsistent.

blood alcohol level of 0.16. (R. 242.) He admitted he had some drinks with dinner. (R. 244.) He also admitted he drank beer daily to help him sleep.

Further, there is substantial evidence in the record supporting the ALJ's conclusion that Jennings' allegations of pain of such severity as to preclude all light work is not credible. In *Duncan v. Secretary of Health and Human Services*, 801 F.2d 847 (6th Cir. 1986), the Sixth Circuit established the following framework for evaluating a claimant's assertions of disabling pain:

First, we examine whether there is objective medical evidence of an underlying medical condition. If there is, we then examine: (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 a severity that it can reasonably be expected to produce the alleged disabling pain The standard does not require, however, "objective evidence of the pain itself."

Id. at 853 (quoting *Green v. Schweiker*, 749 F.2d 1066, 1071 (3d Cir. 1971)). The *Duncan* analysis requires the Commissioner to determine first whether there is an underlying medical condition which could reasonably be expected to produce the symptoms alleged. In satisfaction of the first prong, the ALJ expressly found the existence of underlying medical conditions that could reasonably produce the alleged symptoms - carpal tunnel syndrome and

osteoarthritis of the knees.⁴ (R. 15.)

The second determination under the *Duncan* analysis consists of two parts: whether objective medical evidence confirms the severity of the alleged pain, or whether the objectively established condition is of such severity that it can reasonably be expected to produce the alleged pain. According to Dr. Burnette's records, which document Jennings' most recent treatment, at a rheumatology exam Jennings reported that after he cut carbohydrates from his diet, the pain in his wrists subsided. (R. 238.) In addition, it was noted that Jennings was scheduled to have surgery on his wrists to relieve the carpal tunnel syndrome, but the surgery had to be rescheduled due to contact dermatitis. (R. 238.) After this entry, the surgery was not rescheduled.⁵

While there is evidence in the record to support a finding of

⁴ The ALJ failed to note, however, the diagnosed condition of peripheral vascular disease, which causes pain and stiffness in the legs. MERCK MANUAL, *Peripheral Vascular Disorders* 1784 (1999). However, due to the infrequency in which the medical record reflects serious complications or severe pain associated with the vascular disease, there is substantial evidence to conclude that the disease did not severely impair Jennings in his daily activities. Dr. Burnette made no notations in the record that Jennings' vascular problems made it difficult to sit or walk, aside from an occasional cramp in his leg. (R. 231.)

⁵ It is also noteworthy that at the hearing, when the ALJ inquired as to the need for surgery for his carpal tunnel syndrome, Jennings stated that the doctors informed him that surgery was of no use. (R. 39.)

pain in the knees, Jennings remains on low-level pain medication such as salsalate, Tylenol and capsaicin topical cream. (R. 239.) No additional medicines for pain are prescribed. Dr. Burnette also reported no evidence of active arthritis. (R. 239.)

____ While Jennings may indeed experience a high level of pain, his intermittent recent medical visits and mild medications do not support his subjective assertions of pain to the degree that he alleges. Given the lack of evidence in the record of severe pain, Jennings' allegations cannot be corroborated. Accordingly, substantial evidence supports the ALJ's decision regarding Jennings' credibility and his allegations of pain.

C. Application of the Medical-Vocational Guidelines or "Grid"

Once the ALJ determined that Jennings was not capable of returning to his past relevant work, the final issue to be decided was the level of Jennings' residual functional capacity. Specifically, the ALJ had to determine whether the severity of Jennings' medically determinable impairment, or combination of impairments, prevented him from performing a significant number of jobs which would be consistent with his functional limitations, age, education, and work experience. It is a long standing judicial view that at this step the burden shifts to the Commissioner. See *Walker v. Bowen*, 834 F.2d 635 (7th Cir. 1987). When a claimant's limitations are exertional in nature, the

Commissioner may carry the burden of demonstrating the claimant's ability through the use of Medical-Vocational Guidelines or "grid." The grid exists to assist the fact finder in deciding whether a claimant is disabled by setting out the appropriate interaction between various factors such as age, education and work experience with whatever the ALJ determines to be the claimant's exertional limitations.⁶ After the ALJ has made specific findings with respect to these four factors, he or she simply "plugs" these into the framework set out in the guidelines and the grid dictates a conclusion of "disabled" or "not disabled."

_____ Here, Jennings argues that use of the grid was improper because the claimant suffered from various nonexertional impairments, such as severe pain and carpal tunnel syndrome, which would limit his ability to perform the entire range of jobs at the light work level. He asserts that a vocational expert should have been appointed to determine his ability to work.

The use of the grid to help make the disability determination when a claimant presents with both exertional and non-exertional limitations has been approved by the Sixth Circuit under certain circumstances. *Cole v. Secretary*, 820 F.2d 768, 771-72 (6th Cir. 1987); *Kimbrough v. Secretary*, 667 F.2d 524, 528 (6th Cir. 1981).

⁶ Jobs are classified according to their physical exertional requirements: sedentary, light, medium, heavy or very heavy.

Specifically, if the fact finder decides that a claimant's non-exertional impairment does not significantly limit his ability to do a full range of work at a designated level, then the grid may be used. It is only when the alleged non-exertional impairment is severe enough to prevent the claimant from doing a full range of work that the application of the grid is precluded. In other words, if the claimant's non-exertional impairment is found to significantly limit his ability to perform other work, then the use of the grid is inappropriate, and the ALJ would have to rely on expert testimony to establish the claimant's ability to perform other work. See *Kirk v. Secretary*, 677 F.2d 524, 531 (6th Cir. 1981).

The record reflects very little evidence that Jennings' pain or carpal tunnel syndrome would significantly affect his ability to work at the light work level. None of the doctors note a need for Jennings to alternate between sitting and standing to treat his peripheral vascular disease; rather, they encouraged him to walk as far as he was able to relieve stiffness in his legs. (R. 35.) In addition, Jennings admitted that the pain in his wrists due to carpal tunnel syndrome subsided once he cut carbohydrates from his diet. (R. 238.) He argues that he has lost some of the gripping ability in his hands due to carpal tunnel, yet on August 20, 2000, he was found to have a "5/5" grip, indicating no weakness in his

hands or wrists. (R. 238.) Finally, the pain in his knees and shoulder has been treated with three different mild pain medications which have produced "reasonably good" results. (R. 239.)

Because of this assessment and the other entries noted above, there was no need to consult a vocational expert regarding Jennings' abilities to work at the light work level. Substantial evidence supports the ALJ's use of the grid.

CONCLUSION

For the reasons set forth above, the court recommends that the decision of the Commissioner be affirmed.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

Date: November 20, 2001