

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES YOUNG,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

ORDER

02-C-0257-C

In an order entered on August 30, 2004, I denied plaintiff James Young's petition for an award of fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, after finding that defendant's position in the case was substantially justified. Plaintiff has moved for alteration or amendment of the judgment pursuant to Fed. R. Civ. P. 59(e).

Plaintiff bases his motion on Golembiewski v. Barnhart, 382 F.3d 721 (7th Cir. 2004), in which the court of appeals overturned the district judge's determination that the government's position in a social security case was substantially justified. Nothing in that case persuades me that it was error to deny plaintiff's petition for fees in this case.

In Golembiewski, the court of appeals reversed the district court because it had failed

to give weight to the court of appeals' findings that the administrative law judge had "insufficiently explained why he discredited Golembiewski's testimony, mischaracterized the medical evidence, and ignored evidence of Golembiewski's disability," Golembiewski v. Barnhart (Golembiewski I), 322 F.3d 912, 913 (7th Cir. 2003), and had failed to consider "the *aggregate* effect of [plaintiff's] entire constellation of ailments — including those impairments that in isolation are not severe." Id. at 918. In remanding the case to the district court for remand to the commissioner, the court of appeals urged the commissioner to assign a new administrative law judge to handle any additional proceedings deemed necessary. Id.

On appeal from the denial of attorney fees, the court of appeals found that the lower court had abused its discretion, in light of the "[s]trong language against the government's position in [the appellate court's] opinion discussing the merits of a key issue." Golembiewski II, 382 F.3d at 724. The court pointed out that it had found that the administrative law judge and commissioner "violated clear and long judicial precedent and violated the Commissioner's own mandate of SSR 96-7p and court precedent." Id. Moreover, the court continued, "the body of the ALJ's decision contained no discussion of credibility and [] he failed to apply the factors for evaluating symptoms set forth in Social Security Ruling 96-7p." Id.

In the appeal of this case, by contrast, the court of appeals did not urge the

commissioner to assign the case to a different administrative law judge on remand and it found against plaintiff on the issue he had highlighted throughout his prosecution of this case: that it was error for the administrative law judge to discount Dr. Varvil-Weld's opinion concerning plaintiff's cognitive and memory problems. Young v. Barnhart, 362 F.3d 995, 1001-02 (7th Cir. 2004). Plaintiff's two other challenges were to the hypothetical the administrative law judge put to the vocational expert and to his credibility assessment. As to the hypothetical, plaintiff argued that it was inadequate because it did not include plaintiff's difficulties with impulsivity and his deficiencies in concentration, persistence or pace and that it was erroneous because it started with the assumption that plaintiff could perform simple, unskilled, routine, repetitive, low stress work with limited contact with co-workers and the public. The court of appeals agreed with plaintiff that the hypothetical was inadequate and added another reason for its inadequacy: plaintiff's limitations in his ability to respond to criticism from supervisors, which was an issue plaintiff had never identified as a ground for overturning the commissioner's decision. In addition, the court found that the administrative law judge had not reconciled two conflicting limitations: plaintiff's difficulty in accepting instruction and criticism and his difficulty in making plans independently. Id. at 1002. The court did not discuss plaintiff's assertion that the administrative law judge had erred by failing to make an explicit credibility finding and explain the basis for it. I cannot tell from the record whether plaintiff dropped this issue on

appeal or the court found it unnecessary to discuss it. In either event, plaintiff cannot argue, as Golembiewski could, that the court affirmed him on every issue he had raised during the prosecution of his case.

As I noted in the August 30 opinion, this was a case in which there was a “genuine dispute” and reasonable people could differ about the outcome of the case. Aug. 30, 2004 Op. & Order, dkt. #24, at 9. The record included substantial evidence to support the conclusion that plaintiff’s temperament problems would not prevent him from performing unskilled, routine, low stress, repetitive work that did not involve significant contact with the public or with co-workers. Therefore, I concluded that the commissioner had met her burden of showing that she had substantial justification to reach the conclusion that she did and to defend that conclusion in the court. I am not persuaded that I erred in reaching this conclusion.

ORDER

IT IS ORDERED that plaintiff James Young’s motion for alteration or amendment of the order entered on August 30, 2004, denying his motion for an award of attorney fees

is DENIED.

Entered this 5th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge