

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

Plaintiff James Young has moved to vacate the court's order entered on December 17, 2002, and the judgment entered on December 18, 2002. The motion will be GRANTED. It was error to adopt the magistrate judge's recommendation on the assumption that plaintiff had not filed objections to that recommendation, when in fact he had.

Accompanying plaintiff's motion to vacate is a memorandum in support of his timely filed objections, enlarging on plaintiff's objections to the magistrate judge's recommendation. Plaintiff argues that the magistrate judge erred in recommending affirmance of defendant's decision denying plaintiff Social Security benefits. In plaintiff's opinion, the administrative law judge made a number of erroneous decisions. First, he dismissed the opinion of a Social

Security consulting physician, Dr. Varvil-Weld; second, he gave the vocational expert an incomplete hypothetical that rendered the expert's opinion insufficient; and third, he did not articulate a proper assessment of plaintiff's credibility.

The magistrate judge addressed each of the matters to which plaintiff objects and did so comprehensively and convincingly. Nothing in plaintiff's memorandum in support of the objections persuades me that the magistrate judge's recommendation is erroneous. I understand that plaintiff believes it was error for the administrative law judge to dismiss Varvil-Weld's report without at least giving the doctor a chance to explain the considerable discrepancy between the results of the memory tests he administered to plaintiff in 2000 and the ones that Dr. Hathaway administered in 1990. As the magistrate judge explained, the administrative law judge set forth his reasons for not placing any reliance on Varvil-Weld's results: Hathaway's tests were given closer in time to plaintiff's accident, the results jibed with Dr. Ostrowski's evaluations of plaintiff in 1994 and 1998, no intervening event could explain the decline in the test scores and plaintiff had an incentive to respond poorly to Varvil-Weld's tests. Plaintiff argues that the administrative law judge could not ignore Varvil-Weld's results because he was the one who ordered plaintiff to see Varvil-Weld for evaluation. However, plaintiff cites no law that requires defendant to accept the opinions of any consultant it retains.

As did the magistrate judge, I conclude that it is irrelevant whether Varvil-Weld's

results related back to the time of plaintiff's application. The issue is whether Varvil-Weld's results were reliable, not whether they represented plaintiff's condition two years earlier. Plaintiff argues that the magistrate judge misunderstood Soc. Sec. Ruling 83-20 when he held it inapplicable to plaintiff's situation, in which there is no finding of disability. I have reviewed the ruling and agree with the magistrate judge that it does not provide plaintiff any assistance.

Second, plaintiff argues that the administrative law judge erred in framing a hypothetical question to the vocational expert because he did not ask specifically about the availability of work for an individual like plaintiff who has "some difficulties with impulsivity and often has deficiencies of concentration, persistence, or pace." Instead, the administrative law judge asked about jobs for a person capable of simple, routine, repetitive, low stress work with limited contact with coworkers and the public. The magistrate judge found that the hypothetical was erroneous because it was not framed in terms of plaintiff's limitations but he held that it was a harmless error. "The ALJ accounted for plaintiff's impulsiveness by limiting his contact with coworkers and the public. And there is ample support in the record for his conclusion that plaintiff would be able to perform simple, routine, repetitive, low stress work despite his limitations in concentration, persistence and pace." Rep., dkt. #12, at 22. I agree with the magistrate judge's determination. It is unnecessary to remand this case to enable the administrative law judge to formulate a better

hypothetical when the one he did use captured the essential limitations that plaintiff needed in a job.

Finally, plaintiff objects to the administrative law judge's failure to make an explicit credibility finding and explain the basis for it. The magistrate judge was correct to reject this argument. The bases for the administrative law judge's finding can be drawn from his decision. See Rep., dkt. #12, at 24. Plaintiff argues that the magistrate judge erred in stating that part-time work cannot be used as evidence that a claimant is capable of performing substantial gainful work unless the part-time work was substantial gainful work itself. Again, as the magistrate judge pointed out, 20 C.F.R. § 404.1571 allows defendant to consider work that falls short of being substantial gainful work as evidence that a claimant may be able to do more work. Id. at 25.

ORDER

IT IS ORDERED that plaintiff James Young's motion for vacation of the December 17, 2002 order and the December 18, 2002 judgment is GRANTED. FURTHER, IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge on December 3, 2002, is ADOPTED and the decision of defendant Commissioner Jo

Anne B. Barnhart is AFFIRMED.

Entered this 27th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge