

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

KURTIS NICKOLA,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART,
Commissioner of Social Security,

03-C-622-C

Defendant.

REPORT

This is an appeal of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). On December 27, 2001, after a hearing, an administrative law judge issued a decision finding plaintiff Kurtis Nickola not disabled and therefore not entitled to Disability Insurance Benefits under sections 216(i) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(i) and 423(d). The ALJ found that in spite of his severe degenerative joint disease, cervical stenosis, chronic obstructive pulmonary disease and irritable bowel syndrome, Nickola could perform a significant number of sedentary jobs. That decision became the final decision of the commissioner when the Appeals Council denied Nickola's request for review.

Because it is unclear from the ALJ's decision that he properly considered important evidence that supported Nickola's claim that he is disabled, namely, Nickola's testimony regarding limitations imposed by his irritable bowel syndrome, I am recommending that this case be remanded to the commissioner for a new evaluation of the evidence.

FACTS

I. Legal and Statutory Framework

Under the Social Security Act, a disability is the "inability to engage in any substantial gainful activity by reason of any 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. § 1382c(a)(3)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(C).

The commissioner has promulgated regulations setting forth the following five-step sequential inquiry to determine whether a claimant is disabled:

- (1) Is the claimant currently employed?
- (2) Does the claimant have a severe impairment?
- (3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?
- (4) Can the claimant perform his or her past work? and
- (5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. § 416.920. The inquiry at steps four and five requires an assessment of the claimant's "residual functional capacity," which the commissioner has defined as "an

assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id.*

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, the burden shifts to the commissioner to show that plaintiff was able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

II. Administrative Hearing and ALJ's Decision

Nickola, then 47 years old, filed an application for disability insurance benefits on February 9, 2000, alleging that he had been disabled since November 5, 1999 as a result of pulmonary fibrosis, asbestosis, chronic back pain and chronic diarrhea. After his claim was twice denied by the local disability agency, Nickola presented his claim to an administrative law judge. At the administrative hearing, Nickola testified that he had had a section of his bowel removed in 1998 for treatment of abdominal pain and cramping caused by diverticulitis. He testified that although he had about six good months after the surgery, his stomach problems returned in 1999. At the time, he was employed as a manager of a heating and cooling department. Nickola testified that he began to miss work frequently

because of stomach pain, diarrhea and vomiting. By November 1999, he had missed so much work that his employer terminated him.

Nickola testified that since then, his symptoms had gotten worse. According to Nickola, his doctors had characterized his symptoms as irritable bowel syndrome and had told him that there was little they could do to treat it. Nickola testified he sometimes had weeks when he felt okay, but other weeks he might be sick for three or four days with stomach cramps, diarrhea and vomiting. He testified that on a day when he is sick, all he can do is drink fluid and lay in bed. A vocational expert who testified at the hearing stated that an individual who would miss one to two hours of work twice a week because of illness was incapable of competitive employment.

Nickola also testified that he has shortness of breath with exertion and develops frequent bronchitis as a result of his asbestosis, which he developed as a result of breathing dust from brake linings when he was employed as an auto mechanic. In addition, he has low back pain, neck pain and right arm pain for which he takes Oxycontin. He testified that his daily activities consist of watching television and reading.

After hearing this testimony and reviewing the medical and other relevant evidence, the ALJ issued a decision finding Nickola not disabled. Although the ALJ found that Nickola suffers from severe impairments, namely, degenerative joint disease, cervical stenosis, chronic obstructive pulmonary disease and irritable bowel syndrome, he found that none of these impairments singly or in combination satisfied the criteria for any impairment that the

commissioner has presumed to be disabling. (These impairments, known as “the Listings” are found at 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4.) Furthermore, the ALJ found that in spite of his impairments, Nickola was able to perform sedentary work that did not require climbing or crawling; more than occasional stooping, bending, crouching or overhead reaching with the right hand; or exposure to dust, fumes, smoke, chemicals or noxious gas.

On the basis of vocational expert testimony presented at the hearing, the ALJ found that this residual functional capacity precluded Nickola from returning to his past relevant work as an automobile mechanic, service technician, manager or working manager. However, he found that there were still a significant number of other jobs in the national economy that Nickola could perform, including production coordinator, traffic clerk, assembler and other jobs.

ANALYSIS

Nickola challenges the ALJ’s conclusion at step five, contending that the ALJ’s assessment of his residual functional capacity failed to account for all of his limitations, namely, the recurrent diarrhea, constipation and vomiting caused by his bowel condition. I agree.

Before addressing this argument, however, I must dispense with Nickola’s incorrect suggestion that the ALJ erred by concluding that Nickola had the stamina to perform sedentary work. Nickola was treated by four doctors: Dr. Slattery, who treated him for his

stenosis and neck and back pain; Dr. Sehloff, who treated him for his lung condition; Dr. Singaram, who treated him for his bowel condition; and Dr. Johnson, who was Nickola's family physician and treated him for all of the above.

Three of these physicians, Dr. Slattery, Dr. Sehloff and Dr. Johnson, completed disability forms on which they indicated that Nickola was capable of performing sedentary work.¹ Even Nickola's own description of his abilities was consistent with the exertional ability to perform sedentary work, which requires mostly sitting and lifting no more than 10 pounds. *See* 20 C.F.R. § 404.1567(a).

This evidence provides substantial support for the ALJ's conclusion that Nickola is physically and mentally able to perform a limited range of sedentary work in spite of his documented impairments. Nonetheless, the ALJ's overall conclusion that Nickola is not disabled cannot be sustained. The ALJ's decision does not indicate that he considered Nickola's testimony concerning his bowel-related symptoms and their effect on his ability to work on an eight-hour-a-day, five-day-a-week basis. Although Nickola's testimony at the hearing indicated that he would be unable to sustain competitive employment because of

¹ Although Dr. Johnson later stated that Nickola was "totally disabled," the ALJ explained that he was not giving much weight to this changed opinion because it was inconsistent with notes by Dr. Johnson in which he stated that Nickola's condition had not changed over the past three years, and inconsistent with other objective evidence in the record. This was an adequate basis upon which to reject Dr. Johnson's more restrictive opinion. *See* 20 C.F.R. § 404.1527(d)(2) (opinion of treating source that is not well-supported or is inconsistent with other substantial evidence in record need not be given controlling weight).

frequent vomiting, stomach cramps and diarrhea, the ALJ did not mention any of this testimony except indirectly, when he found that

[t]he claimant's subjective complaints and allegations about his limitations and impairments are not fully credible and, when considered in light of all the objective medical evidence and clinical findings as well as the record as a whole, do not reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful activity. 20 CFR 404.1529 and SSR 96-7p.

A.R. 19-20.

The problem with this boilerplate conclusion is that it fails to explain *what* objective or other evidence led the ALJ to conclude that Nickola's bowel symptoms were not severe enough to prevent him from working on a regular and continuing basis.

According to the commissioner's rulings, "[t]he RFC assessment must include a discussion of *why* reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical and other evidence." SSR 96-8p (emphasis added). Furthermore, in evaluating the credibility of statements supporting a Social Security application, an ALJ must comply with the requirements of Social Security Ruling 96-7p. *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003). According to that ruling, whenever a claimant's statements about his limitations are not substantiated by objective medical evidence, an ALJ must making a finding on the credibility of the individual's statements by considering the entire record, including evidence concerning the individual's daily activities; the location, duration and frequency of pain or other symptoms;

factors that precipitate or aggravate the symptoms; medication and its side effects; and treatment or pain relief measures. In addition, SSR 96-7p requires ALJs to articulate the reasons behind credibility evaluations:

The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision. It is not sufficient to make a conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." . . . The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

1996 WL 374186, at *4 (S.S.A. July 2, 1996). As the Seventh Circuit has explained, “[w]ithout an adequate explanation, neither the applicant nor subsequent reviewers will have a fair sense of how the applicant's testimony is weighed.” *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002).

The ALJ’s purported analysis of the SSR 96-7p factors fails to explain how the ALJ weighed plaintiff’s testimony concerning his bowel symptoms. The ALJ merely recites various pieces of evidence without explaining their significance. For example, the ALJ noted that “On 2-10-00, the claimant stated that he had been fired from his last job because he missed too much work.” AR 17. Why does the ALJ think this fact is important? Perhaps he means to imply that Nickola is a slacker whose testimony should not be trusted. But he never says so, and in any event, the record would not support such an implication because

Nickola explained at the hearing that the reason he had missed so much work was because of his bowel problems.

As a second example, the ALJ notes that Nickola told one doctor that “he enjoyed watching television, reading, and fishing. He stated that he drove a vehicle.” AR 17. Okay, but how do those statements contradict Nickola’s testimony that he vomits on an average of three to four days a week?

The ALJ made several other observations, but they are all in a similar vein. None of the evidence recited by the ALJ, even considered collectively, is so patently inconsistent with Nickola’s testimony as to have relieved the ALJ of his burden to provide the explanation demanded by SSR 96-7p. *See Zurawski v. Halter*, 245 F.3d 881, 887 (2001) (where claimant’s activities are “not of a sort that necessarily undermines or contradicts a claim of disabling pain,” ALJ may not simply list activities but must explain why they are inconsistent with claimant’s complaints of pain).

With all respect for the commissioner’s post-hoc attempts to explain the ALJ’s thought process, I can glean only one possible explanation for the ALJ’s failure to discuss plaintiff’s testimony: the ALJ must have concluded that such a discussion was unnecessary because each of Nickola’s physicians opined, individually, that Nickola could perform sedentary work. Again, the ALJ doesn’t actually *say* this, so my exegesis is mere conjecture. But even if my gloss is correct, it would not provide substantial support for the ALJ’s conclusion.

The forms that Nickola's doctors completed asked them to describe Nickola's physical restrictions. There is nothing to suggest that, in opining that Nickola could perform sedentary work, Nickola's doctors were opining that Nickola could perform that work for 40 hour every week on a regular, ongoing basis. Perhaps more importantly, each doctor addressed only the condition in which that doctor specialized: each reported on the condition of a tree, none reported on the condition of the forest. Dr. Slattery's report addressed only Nickola's spine condition; Dr. Sehloff's report addressed only Nickola's lung condition; it is not clear from the reports of the state agency physicians that they accounted for plaintiff's bowel condition; Dr. Chan's report indicates that he considered only plaintiff's stenosis and pulmonary fibrosis; and Dr. Crennan did not provide any rationale in support of her opinion. Not one of these reports necessarily contradicts plaintiff's testimony concerning his bowel symptoms because it is not clear that any of these doctors were aware of those symptoms or their alleged severity.

The only doctor whose report clearly accounted for Nickola's bowel condition was Dr. Johnson, who opined in his December 1999 report that although Nickola could perform sedentary work, he would "frequently miss days due to diarrhea, pain."² AR 156.

² Although the ALJ credited Dr. Johnson's opinion that Nickola could perform sedentary work, the ALJ did not mention Dr. Johnson's qualifying statement regarding Nickola's frequent absences. His failure to do so, combined with his failure to mention in his decision Nickola's testimony concerning his bowel problems, suggests that the ALJ might have ignored this evidence intentionally.

In sum, the ALJ erred by ignoring Nickola's testimony concerning the frequency and severity of his bowel-related symptoms. Although the ALJ does not need to discuss every piece of evidence or testimony in his decision, he must acknowledge evidence that is potentially dispositive. *Stephens v. Heckler*, 766 F.2d 284, 288 (7th Cir. 1985). The ALJ must "sufficiently articulate his assessment of the evidence to assure us that [he] considered the important evidence ... [and to enable] us to trace the path of [his] reasoning." *Rohan v. Chater*, 98 F.3d 966, 971 (7th Cir. 1996) (internal quotation omitted). The ALJ failed to do that in this case. Accordingly, I am recommending that this case be remanded to the Commissioner.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner denying plaintiff Kurtis Nickola's application for disability insurance benefits be REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 7th day of June, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge