

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

EMILY STEMPER,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE BARNHARDT,
Commissioner of Social Security,

04-C-838-S

Defendant.

Plaintiff Emily Stemper brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying her Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI). She asks the Court to reverse the decision.

Plaintiff filed an application for DIB and SSI on May 1, 2001 alleging disability since January 12, 2000 due to diabetes, personality and mood disorders and low intellectual functioning. Her application was denied initially and upon reconsideration. A hearing was held on June 11, 2003 before Administrative Law Judge (ALJ) Arthur Schneider. In a written decision dated July 24, 2003 the ALJ found plaintiff not disabled. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on September 24, 2004.

FACTS

Plaintiff Emily Stemper was born in 1975. She attended special education for math classes and regular classes for all other subjects. After graduating, she received certification as a nursing assistant from Augusta Technical College in Georgia. Plaintiff's past relevant work includes nursing assistant, dietary aide, cleaner/laundry attendant and dishwasher.

Plaintiff has low academic achievement with reading scores at the eighth grade level, spelling at the sixth grade level and arithmetic at the third grade level. On psychological testing she scored in the borderline range of intellectual functioning with a performance IQ of 74 and full scale IQ of 79. She has a verbal IQ in the low average range at 87.

Plaintiff received extensive assistance from the Department of Vocational Rehabilitation regarding job training and job coaching. On March 1, 2000 Dr. Michael Nelson performed a consultative psychological examination of plaintiff for the Wisconsin Division of Vocational Rehabilitation. He concluded plaintiff was "mildly cognitively compromised," and did not have a functionally debilitating anxiety or depressive disorder. Dr. Nelson doubted that plaintiff could function independently as a nurses aide in Wisconsin but "might do well in a less taxing position," such as assistant housekeeper.

In June 2000 plaintiff began seeing Dr. Jon S. Matthews, a clinical psychologist in June 2000. He initially diagnosed her with adjustment disorder, emotional dependency and anger control problems and gave her a score of 52 on the Global Assessment of Functioning (GAF) scale indicating moderate symptoms.

Plaintiff was diagnosed with insulin dependent diabetes when she was five years old. She began seeing Dr. Alan K. McKenzie, an endocrinologist with the Marshfield Clinic, for treatment of insulin-dependent diabetes in November 2000. In early January 2001 plaintiff was admitted to the hospital with markedly elevated blood sugar, vomiting and dehydration. On January 20, 2001 plaintiff was admitted to the hospital with elevated glucose levels due to non-compliance with taking insulin.

On February 2, 2001 plaintiff was admitted to the hospital complaining of abdominal pain and experiencing diabetic ketoacidosis. While in the hospital she told her doctors that she did not check her blood sugars regularly and did not follow a diabetic diet.

On March 31, 2001 plaintiff was admitted to the hospital and placed on an insulin drip for diabetic ketoacidosis. On April 16, 2001 Dr. McKenzie noted that plaintiff has been "somewhat noncompliant" with her diabetes.

On May 6, 2001 plaintiff went to the emergency room complaining of epigastric discomfort. She was transferred to the

hospital due to her severe diabetic ketoacidosis. At a follow up examination on June 20, 2001 Dr. McKenzie stated that plaintiff's previous bouts of ketoacidosis were "probably related to her haphazard approach in noncompliance to her program." He noted that she was doing routine home glucose monitoring and keeping a log book of daily blood sugars for the first time in her life.

During a physical examination on October 10, 2001, Dr. McKenzie noted that plaintiff had not experienced any recent episodes of ketoacidosis and that "she has been more conscientious about her program and is quite proud of it."

On September 18, 2001 Jack Spear, Ph.D., a state agency psychological consultant concluded plaintiff was moderately limited in her ability to understand and remember detailed instructions; carry out detailed instructions; maintain attention and concentration for extended periods; work in coordination with or proximity to others without being distracted by them; complete a normal workday and work week without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods; interact appropriately with the general public; accept instructions and respond appropriately to criticism from supervisors; and get along with coworkers or peers without distracting them or exhibiting behavioral extremes.

A. Matkom, Ph.D., another state agency medical consultant reviewed plaintiff's claim on November 30, 2001. He agreed with Dr. Spears' opinion.

Pat Chan, M.D., a State Agency medical consultant, reviewed plaintiff's record on September 19, 2001 and concluded she could perform light work. Robert Callear, M.D., another State Agency medical consultant, reviewed plaintiff's record on November 29, 2001 and agreed that plaintiff could perform light work.

On March 10, 2002 plaintiff went to the hospital complaining that she had the flu for two days and her blood sugar was high. Tests showed that she had moderate ketoacidosis. She was admitted, hydrated and placed on an insulin drip. Dr. McKenzie determined that influenza had precipitated the ketoacidosis.

On August 8, 2002 plaintiff went to the hospital with vomiting and high blood sugar. She was diagnosed with mild ketoacidosis. Plaintiff saw Dr. McKenzie on October 14, 2001² and November 22, 2002.

On January 3, 2002 Dr. McKenzie wrote a letter supporting plaintiff's application for benefits stating that plaintiff had been unable to maintain consistent employment because of her diabetes-related hospitalizations. He stated that it was his "professional judgment that Ms. Stemper would be unable to work outside the home and also maintain the self-management of her diabetes with her medications, diet and monitoring."

On August 8, 2002 plaintiff was refereed to Dr. Suanne Reed of the Marshfield Clinic for a psychiatric consultation. Dr. Reed diagnosed plaintiff with a mood disorder, a personality disorder with prominent borderline features and borderline intellectual functioning. She prescribed her a mood stabilizer (Seroquel). On August 12, 2002 a psychiatric social worker Patricia Faber gave plaintiff a GAF score of 55. Dr. Reed saw plaintiff on October 14, 2002 and March 28, 2003.

On April 2, 2003 Dr. Reed completed a Mental Impairment questionnaire. She concluded that plaintiff had slight restrictions in her activities of daily living; moderate difficulties in maintaining social functioning; often experienced deficiencies in concentration and experienced repeated episodes of decompensation.

On April 21, 2003 Dr. McKenzie referred plaintiff to Dr. Andrew Vo for a disability evaluation. Dr. Vo referred her for a functional capacity evaluation by Robert Peterson, Jr., an occupational therapist at the Marshfield Clinic. He concluded that plaintiff should never engage in floor-level lifting because she could not do it safely but she could lift and carry 20 pounds rarely and five pounds frequently and walk frequently. He found plaintiff could stand for only 2 hours in an 8 hour work day.

At the June 11, 2003 hearing before the ALJ plaintiff appeared with counsel and testified that she was fired from her last job as

a CNA because she became sick with diabetes and was a hazard in lifting residents. She asserted she had no medical problems other than the diabetes and the bipolar disorder. She testified that she could lift 15-20 pounds over her head and carry the same weight. She regularly walked five blocks to and from work and had a driver's license. Plaintiff was working 20-30 hours a week as a prep cook at a fast food restaurant.

Plaintiff's mother testified that she had problems following instructions, concentrating and staying on task. She further testified that plaintiff was easily fatigued if she was to work several days in a row.

Dr. James A. Armentrout, a psychologist, testified at the hearing as medical expert. He testified that plaintiff had a mood disorder and a personality disorder and did not meet any of the criteria for a listed mental retardation impairment. He further testified that her activities of daily living were mildly limited, and that she was moderately limited in maintaining social functioning. He also concluded that she was moderately limited in her ability to maintain concentration, persistence or pace but had experienced no extended periods of decompensation.

Jerrold W. Odness, a vocational expert, was present at the hearing and had reviewed the record. He testified that plaintiff's past work as dietary aide, cleaner/laundry attendant and dishwasher was unskilled light work and that her work as a nursing assistant

was semi-skilled medium work. The expert testified that an individual with plaintiff's residual functional capacity could perform plaintiff's past work as a cleaner/laundry attendant as she had previously performed. He also testified that such a person could perform a significant number of jobs that existed in the regional economy, including maid (5,059 jobs), assembler (27,495 jobs), production inspector (7,706 jobs), grader/sorter (2,331 jobs) and hand packager (7,453 jobs).

In his July 24, 2003 written decision the ALJ concluded that plaintiff had severe impairments due to complications of diabetes, a separated shoulder, carpal tunnel syndrome, borderline intellectual functioning and a mood disorder but none of them singly or in combination met or equaled a listed impairment. He also concluded that plaintiff retained the residual functional capacity to lift and carry twenty pounds occasionally and ten pounds frequently, to sit six hours in an eight hour work day and to stand six hours in an eight hour work day. The ALJ found that her ability to do light work was restricted to simple, routine, repetitive and low stress work with limited co-worker contact. He then found that plaintiff was not disabled because she could perform her past relevant work.

The ALJ made the following findings:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and

appears to meet the insured status requirements through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.

3. The claimant has an impairment or a combination of impairments considered "severe: based on the requirements in the Regulations 20 CFR §§404.1520(b) and 416.920(b).

4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding her limitations are not fully supported by the medical and other evidence, as shown by the reasons set forth in the body of the decision.

6. The undersigned has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairments (20 CFR §§ 404.1527 and 416.927).

7. The claimant has the residual functional capacity to lift and carry 20 pounds occasionally and 10 pounds frequently. She can sit six out of eight hours and stand six out of eight hours. She is only available for simple, routine, repetitive, and low stress work and she should have only limited contact with coworkers.

8. The claimant's past relevant work as a cleaner/laundry attendant did not require the performance of work related activities precluded by her residual functional capacity (20 CFR §§404.1565 and 416.965).

9. The claimant's medically determinable type II diabetes mellitus; borderline intellectual functioning; mood disorder; personality disorder with borderline traits; and status-

post left carpal tunnel release and ganglion cyst removal do not prevent the claimant from performing her past relevant work.

10. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR §§ 404.1520(e) and 416.920(e)).

OPINION

This Court must determine whether the decision of the Commissioner that plaintiff was not disabled is based on substantial evidence pursuant to 42 U.S.C. § 405(g). See Arbogast v. Bowen, 860 F.2d 1400, 1402-1403 (7th Cir. 1988). 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).

Disability determinations are made pursuant to a five-step sequential evaluation procedure. 20 CFR § 404.1520(a)-(f). First, the claimant must not be performing substantial gainful activity. Second, the claimant must have a severe, medically determinable impairment. Third, a claimant will be found disabled if his or her impairment is equal in severity to a listed impairment in 20 C.F.R. Subpart P, Appendix 1. Fourth, if the claimant does not meet the third test, he/she must not be able to perform his/her past work. Fifth, if the claimant cannot perform his/her past work, he or she must not be able to perform any existing jobs available in the national economy given his or her educational background, vocational history and residual functional capacity.

The ALJ found that plaintiff had had severe impairments due to complications of diabetes, a separated shoulder, carpal tunnel syndrome, borderline intellectual functioning and a mood disorder but none of them singly or in combination met or equaled a listed impairment. He also concluded that plaintiff retained the residual functional capacity to lift and carry twenty pounds occasionally and ten pounds frequently, to sit six hours in an eight hour work day and to stand six hours in an eight hour work day but that she was restricted to simple, routine, repetitive and low stress work with limited co-worker contact. He then found that plaintiff was not disabled because she could perform her past relevant work.

Plaintiff argues that the ALJ erred when he did not find that plaintiff's borderline intellectual functioning equaled the listed impairment of 12.05 or that a combination of her impairments equaled a listed impairment. There is substantial evidence in the record to indicate that plaintiff's borderline intellectual functioning did not meet or equal the Listing of 12.05 for mental retardation. Plaintiff has not shown that she has deficits in adaptive behavior which is necessary for a plaintiff with an IQ above 70 to establish medical equivalency. See Newland v. Apfel, 97-4339, 1999 WL 435153.

The regulations (20 C.F.R. §§ 404.1526, 416.926) provide as follows:

If you have more than one impairment, and none of them meets or equals a listed impairment, we will reviews the symptoms, signs and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment.

Plaintiff argues that her diabetes, borderline intellectual functioning and affective disorder taken together equal a listed impairment, specifically Listing §9.08. In her brief the Commissioner fails to address this argument. The ALJ does not provide any reasoning for finding that plaintiff's combined impairments equaled a listed impairment. There is evidence in the record that plaintiff's affective disorder and borderline intellectual functioning affected her ability to manage her diabetes. The Court will remand this action to the Commissioner for further proceedings to specifically determine whether the combination of plaintiff's impairments equals a listed impairment.

Plaintiff also contends that the ALJ did not apply the correct legal standard regarding the opinions of plaintiff's treating physicians, Dr. McKenzie and Dr. Reed. The regulations require that the findings of the treating physicians as to the severity of the impairment be accorded controlling weight if they are well-supported by medically accepted clinical and laboratory diagnostic techniques and are not inconsistent with the other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2); SSR 96-8p. She also argues that the ALJ did not properly consider the findings

of Dr. Michael Nelson or the functional capacity evaluation performed by Robert Peterson. On remand the Commissioner is advised to reconsider these opinions and findings pursuant to the regulations in determining whether plaintiff's combined impairments equal a listed impairment and if not whether she is able to perform her past relevant work.

This case will be remanded to the Commissioner for those further proceedings described herein.

ORDER

IT IS ORDERED that the above entitled matter is REMANDED to the Commissioner for further proceedings consistent with this opinion.

Entered this 14th day of April, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge