

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

CHARLES C. SMITH,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commission of Social Security,

Defendant.

ORDER

05-C-0026-C

Defendant Charles C. Smith has filed objections to the report entered by the United States Magistrate Judge on July 27, 2005, in which the magistrate judge recommended affirmance of defendant Jo Anne Barnhart's decision to deny plaintiff disability income benefits. Defendant contends that the magistrate judge erred in four respects: (1) in concluding that sufficient evidence supported a finding that plaintiff's impairments did not meet Listing 1.02; (2) in determining that the administrative law judge's credibility finding was supported by the record; (3) in finding that the administrative law judge's error at Step 5 was harmless; and (4) in determining that the administrative law judge's lack of specificity about the frequency with which plaintiff would need to change positions while working was

harmless error.

After reviewing the record, briefs, objections and the magistrate judge's report, I conclude that plaintiff has failed to show that the magistrate judge's recommendation is erroneous in any respect. I agree that it is a close question whether plaintiff meets the criteria of Listing 1.02. In finding that he did not, the administrative law judge overlooked the finding by plaintiff's physicians that x-rays of plaintiff's hips in 1989 and 1992 showed "narrowing of the superior joint space." Listing 1.02(A) includes as one criterion, "medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s)." Satisfaction of this criterion in combination with a finding of inability to ambulate effectively would satisfy the Listing. Plaintiff has had assistive devices prescribed for him and a doctor examining him for disability purposes concluded that he could not ambulate or stand for extended distances, did not move his right leg well when ambulating and would have difficulty getting up and down stairs and walking around the block or around an average size grocery store. However, as the administrative law judge noted, the doctor did not find that plaintiff could not walk at least a block. Moreover, at the time of the hearing before the administrative law judge, plaintiff was apparently capable of getting to and from his part-time job without using assistive devices and he did housework and garden and lawn chores. The agency's consulting physicians were persuaded that plaintiff could perform the exertional requirements of sedentary work. This evidence was sufficient to allow the

administrative law judge to find that plaintiff did not meet the criteria of Listing 1.02.

As to the other objections that plaintiff has made, I am persuaded that the magistrate judge addressed them thoroughly and carefully and that he reached the correct decision.

ORDER

IT IS ORDERED that the magistrate judge's report is ADOPTED as the court's own. FURTHER, IT IS ORDERED that the decision of defendant Commissioner of Social Security denying plaintiff Charles C. Smith's application for Disability Insurance Benefits is AFFIRMED.

Entered this 9th day of September, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge