

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

MARY MARA,

Plaintiff,

OPINION AND ORDER

v.

05-C-0097-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

Title II of the Social Security Act, 42 U.S.C. §§ 401-434, provides for payment of insurance benefits to disabled workers who have contributed to the Social Security Program. Like other disability insurance programs, a person claiming entitlement to benefits under Title II must show not only that she is unable to work, but must also show that she was insured by the program at the time she became disabled. 42 U.S.C. §§ 416 (i)(3), 423(a)(1)(A) & (c)(1). Under Title II, a person's insured status is calculated based on the earnings that a worker has reported to the Social Security Administration. 20 C.F.R. §§ 404.132-141.

In this case, plaintiff Mary Mara's insured status expired on December 31, 1998, more than three years before she applied for disability insurance benefits. Reviewing plaintiff's application, defendant Commissioner of Social Security concluded that plaintiff was not entitled to benefits because her rheumatoid arthritis had imposed no more than

minimal limitations on her ability to work before December 31, 1998. Plaintiff, proceeding *pro se*, appeals that determination pursuant to 42 U.S.C. § 405(g). Because I conclude that the commissioner's determination is supported by substantial evidence in the record, I must affirm the decision.

The following facts are drawn from the administrative record ("AR").

FACTS

Plaintiff applied for disability insurance benefits on April 22, 2002, alleging that she had been unable to work since January 1, 1994 because of rheumatoid arthritis. She had past relevant work experience as a retail assistant manager and an assembler. The last date on which plaintiff was insured for disability benefits was December 31, 1998. Medical records obtained on plaintiff's behalf by the local disability agency show that during the five-year time period under consideration, plaintiff received very little medical treatment. On July 6, 1994, plaintiff's doctor, Robert Stoy, M.D., noted that he was seeing plaintiff for the first time in three years. He reported that plaintiff was taking Ridaura and Naprosyn for her arthritis and the medications were working "great." He noted that plaintiff's joints were not swollen or tender and she had normal range of motion in her fingers. AR 111. Dr. Stoy next saw plaintiff over a year later, on October 25, 1995, for a medication refill and routine lab testing. Dr. Stoy did not note any objective findings, but reported that plaintiff seemed to

be doing quite well. Id. A year later, on October 2, 1996, Dr. Stoy noted again that plaintiff was doing well on Ridaura and Naprosyn. AR 110.

The next record of any medical treatment is a note from Dr. Stoy on December 27, 2000. Dr. Stoy noted that he had not seen plaintiff for four years. AR 109. Plaintiff reported that the Naprosyn was losing its effectiveness in controlling her arthritis. Subsequent medical records show that plaintiff's arthritis worsened and began spreading to more joints in the years that followed. On August 26, 2002, Dr. Stoy noted that plaintiff had pain, weakness and loss of mobility in her hands and a lot of joint pain in her ankles. AR 116. In February 2003, he noted that plaintiff had loss of range of motion and tenderness in her right elbow, which he attributed to her arthritis. AR 115.

On August 26, 2002, February 18, 2003 and January 8, 2004, Dr. Stoy wrote letters in support of plaintiff's application for disability benefits, in which he opined that plaintiff was disabled because of her pain, inability to walk comfortably and weakness in her hands and ankles caused by what he described as "significant and progressive" rheumatoid arthritis. AR 113, 114, 123. Dr. Stoy did not offer any opinion as to when plaintiff first became disabled.

On April 22, 2002, plaintiff applied for disability insurance benefits. After having plaintiff's claim reviewed by its consulting physicians, the local disability agency denied it initially and on reconsideration, finding that plaintiff's rheumatoid arthritis was not severe enough to be disabling at any time between her alleged onset date and her date last insured.

AR 33, 38. Plaintiff requested a hearing before an administrative law judge. On December 4, 2003, plaintiff received a notice from Administrative Law Judge Paul Tierney informing her that her hearing was scheduled for January 16, 2004. Among other things, the notice told plaintiff that she should be prepared to prove that she was disabled on or before the date on which she was last insured for disability insurance benefits, December 31, 1998. AR 54-58.

Plaintiff appeared at the hearing with her husband. Judge Tierney asked plaintiff several questions about her work history, her limitations and daily activities. He also asked plaintiff's husband to describe what he had observed about plaintiff's condition during "the last year or two." AR 150. Judge Tierney did not ask plaintiff or her husband any questions pertaining to her condition on or before December 31, 1998, and neither plaintiff nor her husband provided such information. A vocational expert, testifying in response to a hypothetical question posed by Judge Tierney, said that an individual who could perform work at the light exertional level but who could not perform fine manipulation or full extension of the right arm and who required the ability to change positions from sitting to standing as needed throughout the day could not perform plaintiff's past work. The vocational expert also found that plaintiff had no skills that were transferable to jobs within that residual functional capacity. After the vocational expert testified, Judge Tierney stated:

Ms. Mara, it appears that based on the testimony, that your impairment does meet the criteria for disability under the Social Security regulations, so I'm going to find according [sic]. That decision will be in writing.

AR 153.

However, on April 1, 2004, Judge Tierney issued a decision finding that plaintiff was not disabled. In his written decision, Judge Tierney focused on the time period before plaintiff's insured status expired on December 31, 1998, finding that the evidence of record showed that plaintiff's impairment at that time had had no more than a minimal impact on her ability to work. He noted that the medical records showed that during the five-year period under consideration, plaintiff's arthritis was well-controlled with medication, with no documented reports of pain or physical abnormalities and no medication changes from 1996 through 2000. Judge Tierney noted that plaintiff and her husband had testified that plaintiff had limited mobility and use of her hands and required help with housework, cooking and laundry; however, he pointed out that the record contained no objective findings or reports of symptoms or functional limitations on or before December 31, 1998. In addition, Judge Tierney observed that plaintiff's husband worked full time during the relevant time period and there was nothing in the record suggesting that plaintiff had needed help when she was alone during the day. Finally, Judge Tierney disregarded Dr. Stoy's opinion that plaintiff was disabled, noting that the joint pain and arthritic changes on which Dr. Stoy had based his opinion were not documented in the medical records predating December 31, 1998. Accordingly, Judge Tierney agreed with the state agency medical consultants that plaintiff was not entitled to disability insurance benefits because her condition was not "severe" on or before December 31, 1998. AR 25-28.

Plaintiff filed a request for review with the Appeals Council. On November 26, 2004, the council issued an order denying plaintiff's request for review, making Judge Tierney's decision the final decision of the commissioner. The council explained that although Judge Tierney had stated at the hearing that plaintiff was disabled, he probably was not aware at the time that plaintiff was insured for disability insurance benefits only through December 31, 1998. AR 8.

OPINION

I. LEGAL AND STATUTORY FRAMEWORK

To be entitled to disability insurance benefits under the Social Security Act, a claimant must establish that she is under a disability. The Act defines "disability" as 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. § 404.1520.

The claimant bears the burden of coming forth with evidence proving that a severe impairment prevents her from performing past relevant work. In addition, as noted previously, the evidence must establish that she was disabled during the time she was insured for benefits. See 42 U.S.C. § 423(a)(1)(A) and (c)(1); 20 C.F.R. § 404.131. If she can show this, the burden shifts to the commissioner to show that the claimant was able to perform other work in the national economy despite the severe impairment. Stevenson v. Chater, 105 F.3d 1151, 1154 (7th Cir. 1997); Brewer v. Chater, 103 F.3d 1384, 1391 (7th Cir. 1997).

II. THE STEP TWO INQUIRY

The administrative law judge denied plaintiff's application at step two of the sequential evaluation process, finding that although she had rheumatoid arthritis, the

evidence did not establish that her impairment was “severe” before her insured status expired on December 31, 1998. The applicable regulation states:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. § 404.1520(c); see also 20 C.F.R. § 404.1521(a) ("An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities."). "Basic work activities" are "the abilities and aptitudes necessary to do most jobs," including walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; capacities for seeing, hearing and speaking; understanding, carrying out and remembering simple instructions; exercising judgment; responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521(b).

The step-two “severity” inquiry has been described as a *de minimis* screening device to dispose of groundless claims. Bowen v. Yuckert, 482 U.S. 137, 153-154 (1987). An impairment or combination of impairments can be found "not severe" only if the medical evidence establishes a slight abnormality or a combination of slight abnormalities that have "no more than a minimal effect on an individual's ability to work." SSR 85-28, 1985 WL 56856, at *3. The commissioner’s regulations and rulings make clear that the determination at step two is made solely upon evaluation of the medical evidence. Id.; see also 20 C.F.R. § 404.1508 (impairment must be established by medical evidence); SSR 86-08, 1986 WL

68636, at *2 (“A finding of ability to engage in [substantial gainful activity], therefore, may be justified on the basis of medical considerations alone when a medically determinable impairment(s) is found to be not severe”). Reasonable doubts on severity are to be resolved in favor of the claimant. SSR 85-28,1985 WL 56856, at *4. Unless a finding of “not severe” is clearly established by the medical evidence, the adjudicator must proceed with the sequential evaluation process. Id.

This court must affirm the commissioner’s step two decision if it is supported by “substantial evidence.” 42 U.S.C. § 405(g). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). When reviewing the commissioner’s findings under § 405(g), this court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the administrative law judge regarding what the outcome should be. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, id., and the decision cannot stand if it lacks evidentiary support or “is so poorly articulated as to prevent meaningful review.” Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002).

Having carefully reviewed plaintiff's submissions and the administrative record, I conclude that substantial evidence supports the administrative law judge's conclusion that plaintiff's arthritis was not "severe" from her alleged onset date of January 1, 1994 until her insured status expired on December 31, 1998. As Judge Tierney observed, the medical records showed that until December 2000, plaintiff's arthritis was well-controlled by her medications. The pertinent medical records did not document any reports of pain or other limitations; to the contrary, the one physical examination during the relevant time period showed that plaintiff had no joint tenderness or swelling and had normal range of motion in her fingers. Although plaintiff complains in her briefs that Dr. Stoy did not adequately document her complaints and kept refilling her medications without requiring her to come in for an office visit, it is reasonable to assume that plaintiff would have asked to be seen if her medications were not controlling her symptoms.

Moreover, medical records from the year 2000 forward show that Dr. Stoy did document plaintiff's complaints when she made them. See AR 115-116. As for Dr. Stoy's 2002 opinion that plaintiff was disabled, the administrative law judge properly found that it was not material to plaintiff's claim because Dr. Stoy based his opinion upon abnormalities and pain that were not present before December 31, 1998. Indeed, by plaintiff's own admission in her statements to her doctors and to the administrative law judge, her arthritis was "in remission" during the relevant time period. See AR 125, 142. Overall, the evidence provided a reasonable basis for the administrative law judge's

conclusion that plaintiff's arthritis imposed only a slight limitation on her ability to work from 1994 to the end of 1998.

Understandably, plaintiff is upset that Judge Tierney stated at the hearing that she was entitled to benefits but then issued an order reaching the opposite conclusion. It is clear from Judge Tierney's failure at the hearing to ask plaintiff or her husband any questions about plaintiff's condition on or before December 31, 1998 that he was not aware at that time that plaintiff's eligibility for disability insurance benefits had expired. Apparently, when writing his decision, Judge Tierney reviewed plaintiff's file and realized that the issue in plaintiff's case was not whether she was disabled at the time of the hearing in January 2004, but rather whether she had been disabled some seven years earlier. Upon realizing his error, it would have been more prudent for Judge Tierney to have notified plaintiff of his mistake, reopened the hearing and allowed plaintiff to testify about her pre-December 31, 1998 condition. However, his failure to do so is not reversible error. As noted previously, the determination of impairment severity at step two is based on medical considerations alone. Because the medical evidence showed clearly that plaintiff's arthritis was well-controlled with medication during the time period between January 1, 1994 and December 31, 1998, Judge Tierney could deny the claim without considering plaintiff's statements about her condition.

It is worth noting that plaintiff did not work from 1994 until the fall of 2000, which could explain why she was not experiencing any difficulties with her arthritis during that

time. However, it would be entirely speculative to conclude that plaintiff *could not* have performed the basic requirements of work during this time period. In reaching his decision, the administrative law judge was limited to considering the evidence that was before him. That evidence showed that during the relevant time period, plaintiff's rheumatoid arthritis essentially was inactive. Accordingly, he reasonably denied plaintiff's claim at step two of the sequential evaluation process.

III. ADDITIONAL EVIDENCE

Plaintiff has submitted various medical reports that she contends support her claim of disability. Some of the documents are duplicates of those that were in the administrative record at the time of the administrative hearing. The remaining reports can be divided into two categories: 1) those relating to the time period from 1986-1990; and 2) those relating to the time period from 2003 to the present. With respect to the medical reports that were not before the administrative law judge, this court cannot consider them in reaching the question whether the administrative law judge's decision is supported by substantial evidence. Eads v. Sec'y of Dept. of Health and Human Services, 983 F.2d 815, 817 (7th Cir. 1993) (correctness of administrative law judge's decision depends on evidence that was before him). However, this court can consider the evidence for the purpose of deciding whether this case should be remanded to the Social Security Administration for

consideration of the new evidence, as authorized by the sixth sentence of 42 U.S.C. § 405(g). Id.

To be entitled to a remand under sentence six of § 405(g), a plaintiff must show that “there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” Putting aside the issues of newness and good cause, plaintiff is not entitled to a remand under this provision because the additional evidence she has submitted is not material. Evidence is “material” if it gives rise to a "reasonable probability" that the commissioner would have reached a different conclusion had the evidence been considered. Perkins v. Chater, 107 F.3d 1290, 1296 (7th Cir. 1997). To be material, new evidence must relate to the claimant's condition "during the relevant time period encompassed by the disability application under review." Kapusta v. Sullivan, 900 F.2d 94, 97 (7th Cir. 1990).

None of the additional medical reports speak to plaintiff’s condition during the relevant time period from January 1, 1994 to December 31, 1998. The medical reports from 1986-1990 relate to plaintiff’s initial diagnosis with rheumatoid arthritis. Plaintiff suggests that these reports are important because they show that she had been diagnosed with arthritis before her disability insurance expired. However, the administrative law judge did not dispute that plaintiff had rheumatoid arthritis; he denied her claim on the ground that the impairment was not “severe” during the time period in question. The additional records do not undermine the administrative law judge’s conclusion insofar as they predate January

1, 1994, which is the date plaintiff alleged she became unable to work. Moreover, the records from 1986-1990 show that although plaintiff had pain and swelling in her fingers during that time period, by mid-1989 her symptoms were under control with medication. In May 1989, Dr. Jeffrey Felt noted that plaintiff had had an “excellent” response to Ridaura and Naprosyn and that her joint exam was normal except for some residual synovitis in the finger of the left hand. This evidence is consistent with the reports discussed by the administrative law judge showing that plaintiff’s arthritis was essentially in remission (with medication) during the relevant time period.

The remaining medical reports show that plaintiff’s arthritis flared up again in 2000 and that her condition has been worsening ever since. These reports are not material to plaintiff’s condition between 1994 and 1998. See Godsey v. Bowen, 832 F.2d 443, 445 (7th Cir. 1987) (“The evidence here was immaterial . . . since the fact that her condition had deteriorated by 1986 does not show that in 1983 it was otherwise than found at the administrative hearing.”). Although the recent reports leave little doubt that her rheumatoid arthritis has now progressed to the point where she can no longer work, plaintiff can collect disability insurance benefits only if she can establish that she had a severe impairment that prevented her from working while she was still insured under Title II of the Social Security Act. Because the additional medical records submitted by plaintiff do not establish that her condition was severe before her eligibility for disability insurance benefits expired on December 31, 1998, they do not afford a basis for remanding this case to the commissioner.

ORDER

IT IS ORDERED that the decision of the commissioner denying plaintiff Mary Mara's application for disability insurance benefits is AFFIRMED.

Entered this 12th day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge