

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

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KENNETH L. SCHILLING,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,  
Commissioner of Social Security,

05-C-105-S

Defendant.

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Plaintiff Kenneth L. Schilling brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying him Disability Insurance Benefits (DIB). He asks the Court to reverse the decision.

Plaintiff applied for DIB with a protective filing date in December 2001 alleging disability beginning December 13, 2001 due to cardiac disease, respiratory disease, human immunodeficiency virus (HIV) positive status and depression. His application was denied initially and upon reconsideration. A hearing was held on November 6, 2003 before Administrative Law Judge (ALJ) Roger W. Thomas. In a written decision dated February 23, 2004 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 April 9, 2004. The case was transferred to this Court on February 28, 2005.

## FACTS

Plaintiff was born on May 12, 1961 and his insured status expires on December 31, 2006. He graduated from high school and worked in the past as a bus driver, pharmacy tech and clerk.

Plaintiff was treated for cardiac problems by Dr. Glenn Nickele. Plaintiff had a stent placement in 1999. Plaintiff was treated for chest pain on September 11 and October 4, 2000. On May 13, 2002 plaintiff was hospitalized with chest pain and numbness in his left arm. On March 24, 2003 he was treated for chest pain.

In April 2003 Dr. Nickele noted that plaintiff was incapable of even low stress jobs, could occasionally lift and carry less than ten pounds and would miss work more than four times a month. In May 2003 Dr. Nickele concluded based on a stress test that plaintiff's chest pain was not cardiac in nature. Dr. Nickele stated that plaintiff's prognosis was "excellent given his work capacity and his nuclear images."

Dr. Elliot Francke treated plaintiff for HIV since 1994. In April 2000 Dr. Francke requested that plaintiff's work hours be changed to allow him to work four hours in the morning and at night, allowing for at least a five-hour break between shifts. In August 2000 Dr. Francke explained that plaintiff was able to work only in the afternoons but could then work for five to eight hours.

Dr. Francke noted that plaintiff's lab tests were "in ok range" in January, March and May 2001. In August 2001 Dr. Francke

stated that he treated only plaintiff's HIV and was unable to answer any questions of employment.

In January 2002 Dr. Francke noted that plaintiff had marked restrictions of activities of daily living and marked difficulties in maintaining social functioning. In October and December 2002 Francke noted that plaintiff's lab results were high. In January and March 2003 Dr. Francke noted that plaintiff's lab tests were normal.

In March 2003 Dr. Francke concluded that plaintiff could walk/stand for zero hours a day, could sit for seven hours in an eight hour work day, could occasionally bend and reach , and could lift ten pounds occasionally. Franke explained that plaintiff needed to nap in the middle of an eight hour workday and to rest for two to three hours at a time, concluding he would miss more than four work days a month due to his HIV impairment.

Dr. Michael Kelly treated plaintiff's neuropathy. In April 2002 Dr Kelly stated that plaintiff's conditions were permanent, ongoing and progressive. His opinion was that plaintiff's disability was total and permanent and that plaintiff could not work.

Plaintiff saw Steven P. Tibbetts, MS, LICSW, for his depression and anxiety with medication prescriptions provided by Zvi Frankfort, M.D. Tibbetts believed plaintiff had an anxiety disorder and was unable to work. His notes consistently assessed

the plaintiff's loss of concentration in the mild to moderate range.

In October 2000 plaintiff saw Dr. Frankfort and complained that the medications were making him drowsy. Dr. Frankfurt suggested reducing the medications and noted that although plaintiff complained of being depressed and despondent he was cheerful and spontaneous during the interview.

In March 2002 plaintiff reported to Dr. Frankfort that he felt his medications had been working fairly well except that at times he felt lethargic. Dr. Frankfort increased his medications. In November 2002 he continued plaintiff's diagnosis of major depression and adjusted his medications. Plaintiff saw Frankfort again in March 2003 who continued his medications. In August 2003 Dr. Frankfort concluded that plaintiff's major depression was in remission.

In August 2002, Jeffrey Gorman, M.D., reviewed plaintiff's records for the state agency and concluded that plaintiff retained the ability to work at the medium exertional level. In December 2002, Charles T. Grant, M.D., reviewed plaintiff's records and confirmed Dr. Gorman's assessment.

In September 2002 plaintiff saw Alford Karayusuf, M.D., at the request of the state agency. Dr. Karayusuf concluded that plaintiff retained the ability to understand, retain and follow simple instructions but was generally not able to maintain pace and persistence.

Paul Berry, Ph.D., reviewed plaintiff's records and concluded that plaintiff could concentrate on, understand and remember routine three and four step instructions. He concluded plaintiff retained the ability to perform such tasks with adequate persistence and pace. In January 2003 James Alsdurf, Ph.D., reviewed plaintiff's record and concurred with Dr. Berry's assessment.

At the November 6, 2003 hearing before the ALJ plaintiff appeared with counsel and testified he could not feel the bottom of his feet but was able to walk normally for one half-block at a time as long as he watched where he was going. He testified that he had side effects from his HIV medication which includes diarrhea and fatigue. Plaintiff's daily activities included caring for himself, household chores and light yard work.

Dr. Elmer Martinson, a medical expert, testified that plaintiff did not have impairments considered singly or in combination that met or equal any listed impairment. Dr. Martinson testified that plaintiff could lift ten pounds occasionally and probably less than ten pounds frequently, could stand /walk two hours and sit for six hours in an eight hour work day and could occasionally perform postural activities such as stooping. He testified that plaintiff needed a low stress job, three-four step tasks and no environmental hazards.

Barbara Wilson Jones, a vocational expert, was present at the hearing and had reviewed the record. The ALJ asked the expert

whether an individual with the claimant's age, education, work experience and residual functional capacity could perform any jobs in the regional economy. The ALJ indicated plaintiff retained the residual functional capacity to perform sedentary work with only occasional stooping, crouching or bending; no climbing ladders or work around unprotected heights or dangerous moving machinery; no exposure to environments with extreme levels of smoke, fumes, odors, dust, heat, cold or humidity; ready access to a bathroom and work which is unskilled routine and repetitive involving completion of concrete tangible task. The expert testified that such an individual could perform surveillance monitor jobs (1,750 jobs) and mail clerk sorter jobs (2,240 jobs).

In his February 23, 2004 decision the ALJ concluded that plaintiff had severe impairments including coronary heart disease, chronic obstructive pulmonary disease, HIV(+) status (not AIDS), peripheral neuropathy, a history of rhinitis, an affective disorder and a history of alcohol and tobacco abuse. The ALJ concluded that plaintiff had mild limitations in activities of daily living and social functioning and moderate limitations in concentration, persistence or pace and no documented episodes of deterioration of extended duration.

The ALJ considered plaintiff's subjective complaints pursuant to Social Security Ruling 96-7p and 20 C.F.R. § 404.1529 and found him to not be fully credible. The ALJ rejected the opinions of the treating physicians, Dr. Francke and Dr. Kelly, stating as follows:

These opinions are largely based on the claimant's allegations regarding the severity of his impairments, which the undersigned has found to be not fully credible, and these opinions are not well-supported by medically acceptable clinical and laboratory diagnostic techniques and are not consistent with other substantial evidence in the case record.

He also rejected the March 2003 opinion of Dr. Nickele that plaintiff would be expected to miss more than four days of work a month. The ALJ also rejected the opinions of Mr. Tibbetts that plaintiff was unable to work and of Dr. Karayusuf that plaintiff was generally not able to maintain pace and persistence because they were not consistent with plaintiff's daily activities and his improvement with medication.

The ALJ concluded that plaintiff retained the residual functional capacity to perform a sedentary level of work involving occasionally lifting ten pounds; frequently lifting up to ten pounds; standing and/or walking for two hours in an eight hour work day; sitting for six hours in an eight hour work day; only occasional stooping, crouching or bending; no climbing ladders or work around unprotected heights or dangerous moving machinery; no exposure to environments with extreme levels of smoke, fumes, odors, dust, heat, cold or humidity; ready access to a bathroom and work which is unskilled routine and repetitive involving completion of concrete tangible tasks. The ALJ found that plaintiff was not disabled because although he could not perform his past work he

could perform a significant number of jobs available in the national economy.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on December 13, 2001, the date he alleged he became unable to work, and continues to meet them through December 31, 2006.

2. The claimant has not engaged in substantial gainful activity since December 13, 2001.

3. The claimant is severely impaired by coronary artery disease, chronic obstructive pulmonary disease, HIV(+) status (not AIDS), peripheral neuropathy, a history of rhinitis, an affective disorder, and a history of alcohol and tobacco abuse.

4. The medical evidence does not establish that the claimant has an impairment, or combination of impairments, that meets or equals the requirements of any impairment listed in the Listing of Impairments of Appendix 1 of the regulations.

5. The claimant's testimony with regard to his subjective symptoms and functional limitations was not fully credible due to significant inconsistencies in the record as a whole.

6. The claimant retains the residual functional capacity to perform a sedentary level of work involving occasionally lifting ten pounds, frequently lifting up to ten pounds; standing and /or walking for two hours in an eight hour workday; sitting for six hours in an eight hour workday; only occasional stooping, crouching or bending; no climbing ladders or work around unprotected heights or dangerous moving machinery; no exposure to environments with extreme levels of smoke, fumes, odors, dust, heat, cold, or humidity; ready access to a bathroom; and work which is unskilled, routine, and repetitive

involving completion of concrete tangible tasks.

7. The claimant is 42 years of age, considered to be a younger individual.

8. The claimant has a twelfth grade education and past relevant work experience as a bus driver and pharmacy technician.

9. The claimant is unable to perform his past relevant work because the demands of the jobs exceed his residual functional capacity.

10. Considering the claimant's residual functional capacity, age, education and relevant work history, he is able to perform a significant number of jobs in the national economy such as surveillance monitor and a mail clerk sorter.

11. The claimant was not under a disability, as defined in the Social Security Act, at any time on or before the date of this decision.

#### 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 Arboqast 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 plaintiff had severe impairments including coronary heart disease, chronic obstructive pulmonary disease, HIV(+) status (not AIDS), peripheral neuropathy, a history of rhinitis, an affective disorder and a history of alcohol and tobacco abuse. He concluded plaintiff retained the residual functional capacity to perform a sedentary level of work involving occasionally lifting ten pounds; frequently lifting up to ten pounds; standing and/or walking for two hours in an eight hour work day; sitting for six hours in an eight hour work day; only occasional stooping, crouching or bending; no climbing ladders or work around unprotected heights or dangerous moving machinery; no exposure to environments with extreme levels of smoke, fumes, odors, dust, heat, cold or humidity; ready access to a bathroom and work which is unskilled routine and repetitive involving completion of concrete tangible task. The ALJ found that plaintiff was not disabled because although he could not perform his past work he

could perform a significant number of jobs available in the national economy.

The ALJ did not give great weight to the opinions of plaintiff's treating physicians Dr. Francke, Dr. Kelly or Dr. Nickele concerning his exertional limitations. Specifically he rejected the opinions of Dr. Francke and Dr. Nickele that plaintiff would miss four days of work a month and Dr. Kelly's opinion that plaintiff was unable to work at all.

In order to be entitled to controlling weight, a medical opinion must be rendered by a treating source, be well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the record. See 20 C.F.R. §404.1527(d)(2), Social Security Ruling 96-2p. Failure to provide good reasons for discrediting a doctor's opinion is alone grounds for remand. Clifford v. Apfel, 227 F.864, 870 (7<sup>th</sup> Cir. 2000). The ALJ must "minimally articulate his reasons for crediting or rejecting evidence of disability." Scivally v. Sullivan, 966 F.2d 1070,1076 (7<sup>th</sup> Cir. 1992).

In this case the ALJ rejected the opinions of plaintiff's three treating physicians who were treating him for severe impairments for a lengthy period of time. He has failed to set forth adequate reasons for doing so. Specifically he has not shown that the three doctors opinions are not well supported by medically accepted clinical and laboratory techniques nor that they were inconsistent with other substantial evidence in the record. The

three doctors' opinions were consistent with each other even though they were treating plaintiff for different impairments.

The Court will remand this action for more adequate reasons for not giving controlling weight to the opinions of plaintiff's three treating physicians that he was unable to work. After making this determination, the Commissioner should readdress plaintiff's credibility particularly as to the side effects of his medication and the hypothetical question posed to the expert to determine if plaintiff is disabled.

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 14<sup>th</sup> day of April, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge