IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL HALL,

Plaintiff,

v. MEMORANDUM AND ORDER

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, 05-C-710-S

Defendant.

Plaintiff Michael Hall 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 in June 2000 alleging disability since December 15, 1999. His application was denied initially and upon reconsideration. A hearing was held on December 5, 2001 before Administrative Law Judge (ALJ) Arthur Schneider. In a written decision dated April 25, 2002 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 May 25, 2005.

FACTS

Plaintiff was born on May 22, 1950 and his insured status expired on March 31, 2000. He graduated from high school and

worked in the past as a construction worker, carpenter, roofing/siding installer and paper mill laborer.

Plaintiff has an anxiety disorder with panic attacks and has a history of symptoms of a post traumatic stress disorder. Plaintiff also has a history of alcohol abuse which is in a period of sustained remission. He has not been hospitalized or required crisis intervention for psychiatric treatment during his alleged period of disability and has had no documented relapses of alcohol abuse since he completed treatment in 1999.

Plaintiff saw counselor Milo Gordon, M.S., since at least July 1999 for his alcohol abuse. In August 2000 Milo Gordon completed a Psychiatric Questionnaire for plaintiff which was signed by Anthony Gillette, Ph.D. They reported that his affect was blunted but that his thought processes were concrete. They also reported that he had continuous anxiety which was reduced to a tolerable level with BuSpar. They noted that plaintiff's personal hygiene continued to improve and that his primary interest was work. He was self employed and worked 8 to 10 hours a day. They noted that he fished and participated in AA activities.

By February 2000 plaintiff was doing well and had reduced anxiety levels. He was working as a self-employed contractor and continued to abstain form alcohol.

Dr. Glen Heinzl saw plaintiff three times between August 1999 and May 15, 2000. In August 2000 Dr. Glen Heinzl, plaintiff's

physician, completed a Psychiatric Questionnaire. He noted that plaintiff's condition was stable and that he did not require any medication changes.

In September 2000, Timothy Henke, Ph. D., a state agency psychologist, reviewed the record and completed a mental residual functional capacity assessment for plaintiff. He concluded that plaintiff could understand, remember and carry out instructions, was capable of getting along with others and had normal concentration and attention. He noted that plaintiff had problems dealing with supervisors when pressured. Dr. Henke concluded that plaintiff's anxiety-related disorder did not meet or equal any listed mental impairment.

In May 2001 two clinical psychologists, Kurt Euller, Ph.D. and Gary Loethen, Ph.D., evaluated plaintiff for the Veterans Administration to determine disability. They concluded that plaintiff's anxiety disorder only minimally affected his ability to work. Plaintiff had a 50% disability rating. He appealed this determination.

In August 2001, Roger Rattan, Ph. D., a state agency psychologist, reviewed the record evidence. He concluded that plaintiff was very capable of interacting well with others and had not more than moderate limitations sustaining attention and concentration needed to perform work activities.

At the December 5, 2001 hearing before the ALJ plaintiff appeared with counsel and testified that he was self-employed doing

carpentry and siding work for about six hours a day. He testified that he is unable to work more than two to three days a week because of his anxiety and panic attacks.

Milo Gordon, plaintiff's counselor, testified that plaintiff complained about experiencing high level of anxiety working with contractors. Gordon testified that plaintiff was more calm as long as he did not have someone pressuring him.

Dr. Allen Hauer, a medical expert, testified that plaintiff had an anxiety disorder which did not interfere with his daily activities. He further testified that plaintiff's anxiety sometimes interfered briefly with his concentration.

Michael Gukenberg, 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 simple, routine, repetitive, low stress work but should avoid hazardous machinery and dangerous heights.

The expert testified that such an individual could perform jobs that existed in the Wisconsin economy. These jobs included hand packer (28,000), hand assembler (100,000) and cleaner (49,000).

In his April 25, 2002 decision the ALJ concluded that plaintiff had severe impairments of anxiety disorder with panic attacks and a history of alcohol abuse which did not meet or equal the requirements for a listed impairment. The ALJ found that plaintiff's testimony that he could work only two to three days a week was not credible based on his work activities, the medical evidence and the record as a whole. He concluded that plaintiff retained the residual functional capacity to perform simple, routine, repetitive, low stress work but should avoid hazardous machinery and dangerous heights. The ALJ found that plaintiff could not perform his past work but that he was not disabled because there are a significant number of jobs in the Wisconsin economy that plaintiff could perform.

The ALJ made the following findings:

> 1. The claimant met the disability insured status requirements of the Act on December 15, 1999, the date the claimant stated he became unable to work, and continued to meet them through at least March 31, 2000.
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> 2. The Administrative Law Judge reserves a finding on the matter whether the claimant is engaging in substantial activity.
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> 3. The medical evidence establishes that the claimant has severe anxiety disorder and a history of alcohol abuse (currently in a sustained period of remission), but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. When the claimant's complaints and allegations concerning the impairments and limitations are considered in light of all objective medical evidence, as well as the record as a whole, they do not show that he is so severely impaired by his impairments and symptoms that he is incapable of engaging in all substantial gainful activity.

5. The claimant has no exertional limitations, but he should avoid hazardous machinery and dangerous heights. He is only available for simple, routine, repetitive, low stress work (20 CFR 404.1545 and 416.945).

6. The claimant is unable to perform his past relevant work as a construction worker, carpenter, roofing/siding installer, and paper mill laborer.

7. The claimant is 53 years old, which is defined as closely approaching advanced age (20 CFR 404.1563 and 416.963).

8. The claimant has a high school education (20 CFR 404.1564 and 416.964).

9. The claimant does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work.

10. If the claimant's nonexertional limitations did not significantly compromise his ability to perform work at all exertional levels, section 204.00, Appendix 2, Subpart P, Regulations No. 4 indicates that a finding of not disabled would be appropriate. If his capacity to work at all levels were significantly compromised, the remaining work which he would functionally be capable of performing would be considered in combination with his age, education and work experience to determine whether a work adjustment could be made.

11. Considering the types of work which the claimant is still functionally capable of

> performing in combination with his age, education and work experience, he can be expected to make a vocational adjustment to work which exists in significant numbers in the national economy. Examples of such jobs are the following: hand packer (28,000 in the Wisconsin economy); hand assembler (100,000 in the Wisconsin economy); and cleaner (49, 000) in the Wisconsin economy).
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> 12. The claimant was not under a "disability", as defined in the Social Security Act, on or before his uninsured status expired or at any time through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

On November 21, 2005 the Department of Veterans Affairs ruled on plaintiff's appeal of his disability rating and increased his rating to 70% effective October 31, 1996 based on his anxiety disorder with dysthymia and alcohol dependence in remission. This decision was based on the report of Dr. Murray Kapell, a psychiatrist. Upon his examination of plaintiff, Dr. Kappel noted that plaintiff was notably anxious but had no thought disorder and good insight and judgment.

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 severe impairments of anxiety disorder with panic attacks and a history of alcohol abuse which did not meet or equal the requirements for a listed impairment. The ALJ found that plaintiff's testimony that he could work only two to three days a week was not credible based on his work activities, the medical evidence and the record as a whole. He concluded that plaintiff retained the residual functional capacity to perform simple, routine, repetitive, low stress work but should avoid hazardous machinery and dangerous heights. The ALJ found that plaintiff could not perform his past work but that he was not disabled because there are a significant number of jobs in the Wisconsin economy that plaintiff could perform.

Plaintiff argues that his anxiety disorder meets a listed impairment. The medical evidence in the record does not support this argument. Plaintiff's daily activities and the notes of his treating doctor and counselor indicate that plaintiff's daily functioning is at most only moderately limited by his disorder. His impairment does not meet or equal a listed impairment.

Plaintiff also contends that he is unable to preform simple routine, repetitive low stress work as the ALJ found. The reports of the state agency psychologists, plaintiff's doctor and his counselor indicate plaintiff has the ability to perform this low stress work. In addition, plaintiff's own work as a self-employed contractor and his daily activities support the conclusion that he retain the residual functional capacity to work.

It may be that plaintiff is claiming that the ALJ did not properly assess his credibility concerning his statement that he could work only two or three days a week. The ALJ's credibility decision must be upheld unless it is "patently wrong." Powers v. Apfel, 207 F.3d 421, 435 (7th Cir. 2000). In his decision the ALJ specifically addressed plaintiff's subjective complaints and concluded that they were not fully credible based on the objective medical evidence and the record as a whole. This finding is consistent with the law. Donohue v. Barnhardt, 279 F.3d 441 (7th Cir. 2002). An examination of the record supports the ALJ's conclusion that plaintiff's testimony was not wholly credible.

There is substantial evidence to support the Commissioner's finding that plaintiff was not disabled because he could perform jobs existing in the national economy. Accordingly, the Commissioner's decision will be affirmed.

Plaintiff asks the Court to consider the evidence that he has submitted with his complaint, the November 21, 2005 decision of the Veterans's Administration determining that he is 70% disabled effective October 21, 1996. This Court may not consider the evidence but may remand under sentence six 42 U.S.C. § 405(g) for consideration of new and material evidence. Perkins v. Chater, 107 F.3d 1290, 1296 (7th Cir. 1997). In order for this Court to remand under sentence six it must find that there is a reasonable probability that the Commissioner would have reached a different conclusion had the evidence been considered. Id.

The ALJ would not be required to find plaintiff disabled based on the new VA determination. 20 C.F.R. § 404.1504. Clifford v. Apfel, 227 F.3d 863, 874 (7th Cir. 2000). The question is whether there is a reasonable probability that the new medical evidence, Dr. Kapell's report, on which the decision was based would have caused the Commissioner to reach a different decision. Dr. Kapell found that plaintiff was notably anxious but had no thought disorder. It is not likely that this evidence which was consistent with the medical records considered by the Commissioner would have

caused him to reach a different conclusion. Accordingly, plaintiff's motion for a sentence six remand will be denied.

ORDER

IT IS ORDERED that plaintiff's motion for a sentence six remand is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion to reverse the decision of the Commissioner is DENIED.

IT IS FURTHER ORDERED that the decision of the defendant Commissioner denying plaintiff Disability Insurance Benefits (DIB) is AFFIRMED.

Entered this 27th day of April, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge