

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

HEIDI MCFARLAND,

Plaintiff,

MEMORANDUM AND ORDER

04-C-496-S

v.

JO ANNE BARNHARDT,
Commissioner of Social Security,

Defendant.

Plaintiff Heidi B. McFarland 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 of the Commissioner or to remand the case for further proceedings.

Plaintiff applied for benefits on April 23, 2002 and July 12, 2002 alleging disability since September 13, 2001 due to pain, reflex sympathetic dystrophy, swelling of the hands, knees and feet, headaches and depression. Her applications were denied initially and upon reconsideration.

A hearing was held on November 4, 2003 before administrative Law Judge (ALJ) Jerome J. Berkowitz. In a written decision dated February 27, 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 May 20, 2004.

FACTS

Plaintiff was born on December 1, 1961. She graduated from high school and has an Associate of Arts degree. Her past relevant work was as a cashier.

On November 15, 2000 plaintiff was injured at work when a box of water fell on her left hand. She was treated by Dr. John Stephenson who referred her for physical therapy on December 18, 2000. On December 20, 2000 physical therapy was terminated by referral back to Dr. Stephenson for evaluation of possible Reflex Sympathetic Dystrophy Syndrome/Complex Regional Pain Syndrome (RSDS/CRPS) .

Dr. Matthew S. Harrison saw plaintiff on January 11, 2001 and diagnosed her with Myofascial Pain Syndrome secondary to splinting from contusion to the first metatarsal. He also noted depression or adjustment disorder suspect.

On April 1, 2002 plaintiff was seen by Dr. Peter S. Hindle who concluded that she had chronic myofascial pain syndrome but did not have RSDS. He recommended a therapeutic dose of non-steroid antiinflammatories and physical therapy.

On May 9, 2002 plaintiff was seen by Dr. Wolcott S. Holt, a neurologist, who indicated that she likely had RSDS. On June 6 and July 5, 2002 plaintiff had cervical blocks to relieve her symptoms. On July 16, 2002 Dr. Holt prescribed MS Contin and Amitriptyline for plaintiff.

On October 29, 2002 Dr. Carmen L. Johnson examined plaintiff and diagnosed her with Complex Regional Pain Syndrome(CRPS) of the left upper extremity which spread to affect the left side of the body and rib dysfunction. He continued to treat her through 2003 and prescribed MS Contin, Amitriptyline and Topomax for her.

In February 2003 psychologist Marcus P. Desmonde examined plaintiff for the Wisconsin Disability Determination Bureau. He diagnosed Narcotic Dependence, Narcotic Induced Mood Disorder with Depressive Features and Adjustment Disorder with Depressed Mood. It was his opinion that plaintiff "would have difficulty tolerating the stress and pressure of full time,

competitive employment." He further stated that 'tolerance of part time employment would not be ruled out on the basis of stress tolerance."

At the November 4, 2004 hearing before the ALJ plaintiff appeared and testified that she had a high level of constant pain and that her depression interfered with her ability to do things. She testified that she could sit for about twenty minutes at a time, stand for about ten minutes and lift about five pounds. Plaintiff further testified that she had swelling in her feet, hands and knees, that her skin color changed and that her body shook. Her daily activities include doing household chores and traveling with her boyfriend, an over-the road truck driver.

Dr. Andrew Steiner, a medical expert, testified that plaintiff had Reflex Sympathetic Dystrophy Syndrome. He testified that plaintiff would be limited to a light range of work: lifting twenty pounds occasionally and ten pounds frequently with standing and walking six hours in an eight-hour day.

Mary Harris, a vocational expert, was present at the hearing and had reviewed the record. The ALJ asked the expert whether an individual of plaintiff's age, education and work experience who was limited to a range of unskilled to semi-skilled, low stress work not requiring lifting and/or carrying weight of more than twenty pounds occasionally and ten pounds frequently, work at unprotected heights, working around dangerous machinery or high production goals could perform plaintiff's past work or any other work existing in significant numbers in the national economy. The expert testified that such individual could perform plaintiff's past relevant work as a cashier.

In his written decision the ALJ concluded that plaintiff had complex regional pain syndrome but retained the residual functional capacity to perform a range of unskilled to

semiskilled low stress work not requiring lifting and/or carrying weight of more than twenty pounds occasionally or ten pounds frequently, working at unprotected heights, working around dangerous machinery or high production goals. He found that plaintiff's testimony insofar as it was inconsistent with said residual functional capacity was not credible. The ALJ held that plaintiff was not disabled because she could perform her past relevant work.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on September 13, 2001, the date she asserts she became unable to work, and continues to meet those requirements through the date of this decision.
2. The claimant has not engaged in disqualifying substantial gainful activity since September 13, 2001, the date she asserts she became disabled.
3. The medical evidence establishes that the claimant has a history of contusion of the first metacarpal and contusion of the ribs, headaches, complex regional pain syndrome with chronic pain, and an adjustment disorder with anxious features, but that she 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. The claimant's testimony insofar as it is inconsistent with the residual functional capacity, is found not credible.
5. The claimant has retained the residual functional capacity for a range of unskilled to semiskilled, low stress work not requiring lifting and/or carrying weight of more than twenty pounds occasionally, ten pounds frequently, no working at unprotected heights or around dangerous machinery, and no requirements for high production goals.
6. The claimant's impairments do not prevent her from performing her past relevant work as a cashier as that position is performed in the national economy. 20 C.F.R. § 404.1565 and § 416.965.
7. The claimant was not under a "disability" as defined in the Social Security Act, at any time since September 13, 2001. 20 C.F.R. § 404.1520 (f) and § 416.920 (f) .

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 Arbosast 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 5 404.1520 (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 complex regional pain syndrome and retained the residual functional capacity to perform a range of unskilled to semiskilled low stress work not requiring lifting and/or carrying weight of more than twenty pounds occasionally or ten pounds frequently, working at unprotected heights, working around dangerous machinery or high production goals. He concluded that plaintiff could perform her past relevant work as a cashier. The ALJ found plaintiff's testimony not credible where it was inconsistent with the said residual functional capacity.

Plaintiff demonstrated that she had a medically determinable impairment, complex regional pain syndrome (CRPS) . The Commissioner has specifically addressed the issue of RSDS/CRPS by creating SSR 03-2p directing ALJ's on how to evaluate this condition for determination of "disability". The introduction states :

RSDS/CRPS are terms used to describe a constellation of symptoms and signs that may occur following an injury to bone or soft tissue. The precipitating injury may be so minor that the individual does not even recall sustaining an injury.

The ALJ found that plaintiff's RSDS/CRPS was a severe impairment.

The regulation further states that once an impairment has been established, "an individual's symptoms and the effects of those symptoms on the individual's ability to function must be considered . . . in assessing the individual's residual functional capacity." The regulation also states, "when additional information is needed to assess the credibility of the individual's statements about symptoms and their effects, the adjudicator must make every reasonable effort to obtain additional information that could shed light on the credibility of the individual's statements.

The ALJ did not refer to this regulation in his decision. Although the ALJ found that plaintiff had CRPS he did not specifically address her symptoms or the effects of her symptoms on her residual functional capacity. Plaintiff's testimony at the hearing about her ability to lift, stand or walk was significantly different than the residual functional capacity found by the ALJ. The ALJ did not make a specific finding as to which of these limitations was not credible. Further, he did not make any effort to obtain additional information to shed light on the credibility of plaintiff's statements. The Court cannot find that the ALJ properly applied SSR

03-2p and will remand for the Commissioner's consideration of this regulation in assessing plaintiff's credibility.

The ALJ found that plaintiff's mental impairment resulted in moderate deficiencies of concentration, persistence and pace but he ignored the opinion of Dr. Desmonde that plaintiff could not tolerate the pressure of full time competitive employment. On remand the Commissioner should address Dr. Desmonde's opinion.

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 3rd day of January, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge