IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

DANIEL WALL,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

ORDER

06-C-0103-C

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Defendant Jo Anne B. Barnhart, Commissioner of Social Security, has filed an objection to the report entered on September 13, 2006, in which the magistrate judge recommended remand of this case to the defendant commissioner to obtain more information about the extent of plaintiff Daniel Wall's recovery from back surgery. Saying that it was a close call, the magistrate judge concluded that the administrative law judge should not have found plaintiff capable of returning to work in September 2005 without finding out from plaintiff's neurosurgeon whether plaintiff had recovered sufficiently to perform full-time work.

Defendant objects to the remand, arguing that it was plaintiff's burden to produce

evidence that he had not recovered fully from his surgery after nine months, as is typical for persons having similar surgery. 20 C.F.R. § 404.1512(c); Flener ex rel. Flener v. Barnhart, 361 F.3d 442, 448 (7th Cir. 2004) (although administrative law judge has duty to develop claimant's medical record and may be required to consult medical advisors where record appears to be incomplete, "the primary responsibility for producing medical evidence demonstrating the severity of impairments remains with the claimant"); Luna v. Shalala, 22 F.3d 687, 693 (7th Cir. 1994) (same). I agree with defendant that the case should not be remanded, for two reasons. First, I am not persuaded that the magistrate judge was correct in characterizing the administrative law judge's decision as "speculative" and therefore, not supported by substantial evidence in the record. Second, regardless whether plaintiff had the burden at the hearing to produce evidence of his continued inability to work more than half-time, I am convinced by his failure to produce such evidence in the time since his hearing that remanding the case would not change the result.

Plaintiff had back surgery in January 2005. In June 2005, his neurosurgeon, Dr. McDonnell, found that plaintiff's fusion construct was aligned properly and in excellent position, that plaintiff exhibited good strength throughout his physical examination and had a normal gait. AR 191. McDonnell noted that plaintiff was still complaining of persistent pain in his back and leg. At the same time, plaintiff reported to a physical therapist that he was walking half a mile to a mile when he was feeling well and mowing lawns "some." AR

203. On June 28, 2005, McDonnell reported to the Wisconsin Division of Vocational Rehabilitation that plaintiff was able to perform light work with restrictions on repetitive twisting and bending four hours a day, AR 237, and that the restrictions were temporary until "further recovery." AR 240.

Other than plaintiff's own testimony, nothing in the record before the administrative law judge indicated that plaintiff would not be able to perform at least sedentary work on a full-time basis nine months after his surgery. McDonnell believed that plaintiff could perform light work for half a day, even before his recovery was complete. Dr. Steiner, the medical expert testifying at plaintiff's hearing before the administrative law judge, testified that it is typical for patients undergoing fusion surgery to recover fully in nine months. He noted that plaintiff's surgery had been technically successful: the hardware was in good position and plaintiff had a normal gait and good strength.

The only evidence to the contrary came from plaintiff, who testified at his hearing about the constant pain in his back and leg that kept him from walking, sitting or lying down in any one position for any length of time. He testified that he had trouble lifting a bottle of milk, trouble driving and that he was very groggy from the medications he was taking, which included oxycodone. He said that he had gone to only three physical therapy sessions, which had increased his pain, so his doctor had told him to stop going. (Nothing in the record suggests that his doctor knew he was not going to physical therapy or told plaintiff

not to go. In McDonnell's June 30, 2005 report to the Division of Vocational Rehabilitation, he reported his treatment plan for plaintiff as "Continue physical therapy." AR 237.) It is evident from the administrative law judge's opinion that she questioned plaintiff's credibility. She noted, for instance, that plaintiff's description of being groggy when he took oxycodone made no sense. The medical record indicated that plaintiff was allergic to oxycodone and that McDonnell had reported in June 2005 that plaintiff was off all analgesics and sleep medications. AR 23. Plaintiff's failure to return to work when his employers had offered him work within his limitations suggested to the administrative law judge that he was not motivated to return to work. She found his statements about "the intensity, duration and limiting effects" of his symptoms not entirely credible because they were unsupported by the objective medical evidence and treatment record. AR 19.

The administrative record contains substantial evidence supporting the administrative law judge's determination that plaintiff was capable of performing substantial, gainful work. This evidence included Dr. Steiner's testimony that most people recover fully from fusion surgery after nine months, the medical records showing the good result of plaintiff's surgery and his progress following the surgery, Dr. McDonnell's opinion that plaintiff was capable of light work on a half-time basis only six months after surgery and considerable evidence undermining the credibility of plaintiff's testimony.

Even if I had questions about the sufficiency of the evidentiary support for the

administrative law judge's decision, I would not remand this case to the commissioner. A remand is not an insignificant decision: inserting another case into the long queue of applications from new claimants increases the wait for every other applicant. It cannot be justified in this instance, in which the only information that could help plaintiff is a favorable report from Dr. McDonnell. If such a report existed, surely plaintiff or his lawyer would have brought it to the attention of the Social Security Administration or this court in the two years that have passed since the administrative hearing. It is not as if plaintiff has not had the opportunity to obtain a report. Indeed, he told the administrative law judge that he had an appointment scheduled with McDonnell one week after his hearing.

Plaintiff has been represented by experienced counsel throughout the proceedings in this case. He has had no reason to withhold any favorable evidence, if it existed. The only logical conclusion to draw from his failure to submit such evidence is that McDonnell's findings would not support plaintiff's application for disability benefits. Therefore, I conclude that a remand would serve no useful purpose.

ORDER

IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge is ADOPTED as the court's own, with the exception of the magistrate judge's recommendation that the court reverse the administrative law judge's decision that

plaintiff Daniel Wall could return to work nine months after his surgery and remand the case to defendant commissioner for proceedings limited to obtaining updated medical evidence from Dr. McDonnell concerning plaintiff's condition and work-related limitations.

FURTHER, IT IS ORDERED that the decision of Jo Anne B. Barnhart, Commissioner of Social Security, denying plaintiff Daniel Wall's applications for disability insurance benefits and supplemental security income is AFFIRMED.

Entered this 6th day of October, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge