IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THOMAS SAGE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

OPINION AND ORDER

06-C-0465-C

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In a report and recommendation entered on April 16, 2007, United States Magistrate Judge Stephen L. Crocker recommended affirmance of defendant Michael J. Astrue's denial of plaintiff Thomas Sage's applications for disability insurance benefits and supplemental security income under the Social Security Act. Plaintiff has filed objections to that recommendation, contending that the magistrate judge erred in finding that the administrative law judge had analyzed plaintiff's benefit properly. Although plaintiff makes a strong challenge to the magistrate judge's recommendation, in the end I am persuaded that the recommendation is correct.

FACTS

The relevant facts are set out comprehensively in the magistrate judge's report and recommendation. For the purposes of this order, I will summarize them briefly. Plaintiff was born in 1972; he dropped out of school in the ninth grade; and he has a sporadic work history, consisting of a number of short-term jobs, such as security guard, restaurant worker and sawmill worker. He has a history of drug and alcohol abuse and criminal convictions. He applied for benefits in 2002, alleging that he was unable to work because he suffered from paranoid schizophrenia, a learning disorder, tuberculosis and "dead feet."

In May 2002, plaintiff sought help from the Wood County Department of Unified Services. He had an intake assessment performed by Mary Readel, a counselor. Plaintiff told Readel that he became nervous if around too many people, that he had been diagnosed with paranoid schizophrenia and antisocial personality disorder in the past and that he had abused alcohol and drugs from his teenage years until May 24, 2001, when he had promised his fiancée that he would stop drinking and using drugs. Readel diagnosed plaintiff as suffering from paranoid schizophrenia and intermittent explosive disorder, with the possibility of an antisocial personality disorder. Her report was reviewed and signed by a psychiatrist. Readel referred plaintiff to Bernadette Bashinski, a psychiatric nurse, to evaluate his need for medication. Bashinski agreed with Readel's diagnosis of paranoid schizophrenia and intermittent explosive disorder.

In September 2002, Rodger Ricketts, Psy.D., performed a consultative examination of plaintiff for the Social Security Administration. He diagnosed plaintiff as having a learning disorder, schizophrenia, paranoid type, and an intermittent explosive disorder and he thought plaintiff would be able to perform only "very simple tasks oriented with minimal stress and minimal extraneous stimuli." A.R. at 142. In the same month, Robert Hodes, Ph.D., reviewed the record evidence for defendant and concluded that plaintiff had schizophrenia, paranoid type, and a personality disorder. In May 2003, Jean Warrior, Ph.D., reached the same conclusion. Hodes and Warrior agreed that plaintiff did not have an impairment that met or equaled one of the impairments listed by the Commissioner of Social Security. (Under social security law, a claimant is disabled if he has an impairment that meets or medically equals the criteria of a listing and meets the durational requirement; if he does not meet those criteria, the disability analysis proceeds to the next step, at which the commissioner decides whether, even with his impairments, the claimant would be able to perform the requirements of his past relevant work.)

During the time that plaintiff saw Readel and Bashinski, he often lied to them about his alcohol use. In April 2004, he admitted to Readel that he had been lying when he had told her he had not been drinking during the preceding several months. In August 2004, plaintiff reported to Bashinski that he was experiencing increased energy, a decrease in his anxiety level and an improved ability to sleep. At the time, he told Bashinski that he had

had only a "sip" of alcohol in the preceding five months.

In November 2004, plaintiff was incarcerated in the Wood County jail for disorderly conduct. He was released in April 2005. On April 8, 2005, he told Readel that he had returned to his home after a six-month stay at the Wood County jail and that he was experiencing decreased productivity and had gotten angry at his wife.

On May 5, 2005, plaintiff admitted to Readel that he had been lying about his alcohol use before November 2004 and that, in fact, he had been mixing whiskey with his medications. He told her that his symptoms of schizophrenia, including auditory hallucinations, had not recurred in many months and he said that he believed his anger would abate if he avoided alcohol and took his medications as directed.

Plaintiff had a hearing before an administrative law judge on September 1, 2005. The administrative law judge undertook a thorough evaluation of plaintiff's condition and determined that plaintiff had a severe combination of impairments, including polysubstance abuse, schizophrenia, intermittent explosive disorder and a learning disability. He then analyzed plaintiff's ability to function in the activities of daily living, to function socially and to maintain concentration, persistence and pace. He concluded that plaintiff qualified as disabled when he was using alcohol and drugs. Next, he analyzed plaintiff's ability to function if he were not using alcohol or other drugs. He concluded that plaintiff would not be limited in the activities of daily life, he would have moderate limitations in social

functioning and would be unable to function in large groups and he would have mild limitations in his ability to concentrate, his persistence and his pace. With these limitations, plaintiff would be able to perform simple to moderately complex work at all levels of exertion so long as he was not required to work with large numbers of the public. From this, the administrative law judge determined that if plaintiff abstained from alcohol, he would be able to perform his past relevant work as a sawmill worker.

OPINION

A person seeking social security benefits has the burden of proving that a severe impairment prevents him from performing past relevant work. If he meets this burden, it becomes the commissioner's burden to show that the claimant is able to perform other substantial gainful work in the national economy despite his impairment. The inquiry becomes more complicated when the claimant is addicted to drugs or alcohol. Under a 1996 amendment to the Social Security Act, 42 U.S.C. § 423(d)(2)(C), the commissioner is required to determine whether the claimant would be found to be disabled if his drug or alcohol use stopped. "In making this determination [the agency] will evaluate which of [the claimant's] current physical and mental limitations . . . would remain if [the claimant] stopped using drugs or alcohol and then determine whether any or all of [the claimant's] remaining limitations would be disabling." 20 C.F.R. §§ 404.1535(c); 416.935(c). If the

answer is that the claimant would not be found disabled, then social security benefits are not available to him.

Although neither the regulations nor the statute specifies whether the claimant or the commissioner bears the burden of proof on the effect of a claimant's alcoholism, the courts of appeals that have considered the question have concluded that the burden is on the claimant. Bell v. Massanari, 254 F. 3d 817, 821 (9th Cir. 2001); Doughty v. Apfel, 245 F.3d 1274 (11th Cir. 2001); Brown v. Apfel, 192 F.3d 492 (5th Cir. 1999). See also Bright-Jacobs v. Barnhart, 386 F. Supp. 2d 1295, 1341 (M.D. Ga. 2004); White v. Commissioner of Social Security, 302 F. Supp. 2d 170 (W.D.N.Y. 2004). This is because the burden of proof is on the claimant to establish disability in the first place. In addition, the placement of burdens is something that has been done by the courts; Congress has not assigned the burden of proof. Brown, 192 F.3d at 498 ("Commissioner's burden arises only from a judicial construction of the Social Security statute"); Walker v. Bowen, 834 F.2d 635, 640 n.3 (7th Cir. 1987) ("shifting of burden of proof is not statutory, but is a long-standing judicial gloss on the Social Security Act"). Therefore, any expansion of the commissioner's burden "ought to have a compelling justification or the clear intent of Congress undergirding it." Brown, 192 F.3d at 498.

In practice, burden shifting plays a much smaller role in a social security ruling than it does in a civil action. It is the claimant's task to produce records and testimony to show

that he is disabled; to that extent, he does carry the burden of proof. If, however, he does not argue a certain issue or point out supporting evidence in the record, the administrative law judge would not be likely to rule that such a failure was a sufficient ground for a ruling against him. In this case, for example, the administrative law judge might have held that plaintiff's failure to show that he was too disabled to work was determinative. Instead, the administrative law judge considered all the evidence in the record before coming to his conclusion.

The administrative law judge found that the reason for plaintiff's "significant maladaptive behaviors, primarily the report of visual and auditory hallucinations, as well as anxiety and violence to others, is secondary to polysubstance dependence and abuse." A.R. at 20. He based this conclusion on the consistent evidence of alcohol abuse and dependence in plaintiff's records. Before reaching this conclusion, he explained his analysis of the severity of plaintiff's impairments carefully and thoroughly. He looked at the objective evidence of plaintiff's violent outbursts and maladaptive behavior when he was drinking, which included fights, arrests, jail terms and the inability to function as a parent. He took into consideration the reports of plaintiff's alcohol abuse and its consequences from Readel, from the supervising psychiatrist and an alcohol and drug counselor. After doing this evaluation, he looked at plaintiff's activities of daily living, his social functioning, his concentration, persistence and pace and his lack of decompensation since he stopped

drinking and concluded that in each area, plaintiff's limitations were no worse than "moderate" when he was not drinking and that in at least one area, plaintiff had no limitations at all. He noted that in the four months directly preceding the hearing, when plaintiff was not drinking or using drugs, he had demonstrated that he could control his anger, take his medications on schedule and concentrate on a task. Plaintiff's own statements indicated that he understood that he could control his angry outbursts or avoid them altogether if he stopped drinking and took his medications.

I have some reservations about the administrative law judge's apparent belief that he could tell when plaintiff was using alcohol and when he was not. It is difficult to say from the record exactly when plaintiff was truly abstinent and when he was not. I assume, however, that the administrative law judge was considering the 120-day period immediately preceding the administrative hearing. No one seems to think that this was not a period in which plaintiff was abstinent. I cannot say that the administrative law judge was wrong to assume that plaintiff was not drinking during this time or that he was wrong to conclude from plaintiff's behavior during this period that he would be able to function reasonably well when he was not drinking. The administrative law judge did not discount the possibility that plaintiff would continue to have angry outbursts even if he were not drinking, but he believed that plaintiff would be "relatively asymptomic," A.R. 24, if he was abstinent and took his medications. Plaintiff's inability to adjust to large groups could be accommodated

with work activity that did not require him to be with large numbers of the public. Id. Therefore, the administrative law judge concluded, plaintiff was not disabled under the social security act.

Although plaintiff assails the administrative law judge for not obtaining additional evidence of the relation between plaintiff's drinking and his mental impairments, it is worth noting that plaintiff's attorney did not develop the record as fully as he might have. For example, he did not ask his client questions to clarify the connection or lack of connection between his abstinence and his hallucinations or uncontrollable anger. If evidence existed to support a conclusion that alcohol abuse did not contribute materially to plaintiff's disability, counsel could have elicited testimony to that effect from his client. If it would have helped plaintiff to have reports from the county's providers that had been working with plaintiff for more than three years, counsel could have obtained them. As the magistrate judge pointed out, when a claimant is represented by counsel, the administrative law judge is entitled to assume that the lawyer will make a request for a consultative expert if he or she deems it important. Glenn v. Secretary of Health & Human Services, 814 F.2d 387, 391 (7th Cir. 1987) (administrative law judge can assume that applicant represented by counsel is "making his strongest case for benefits"). The absence of such a request and of any evidence supporting a finding of disability independent of alcoholism lends additional support to my conclusion that the magistrate judge made the correct recommendation: to

affirm defendant commissioner's denial of plaintiff's applications for benefits.

ORDER

IT IS ORDERED that the report and recommendation of the United States Magistrate Judge is ADOPTED and the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Thomas Sage's applications for disability insurance benefits and supplemental security income under the Social Security Act is AFFIRMED. The clerk of court is directed to close the case and enter judgment for defendant.

Entered this 24th day of May, 2007.

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