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

WILLIAM T. POHL,

Plaintiff, OPINION AND ORDER

v. 06-C-603-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Plaintiff William Pohl brings this action for judicial review of a final decision of defendant Commissioner of Social Security denying plaintiff's March 8, 2004 application for a period of disability and disability insurance benefits under the Social Security Act. Plaintiff contends that the administrative law judge who denied his claim at the hearing level made a number of errors, including failing to consider whether plaintiff's condition was medically equal to the listing for prostate cancer, failing to give controlling weight to the opinion of plaintiff's treating urologist, ignoring important evidence in plaintiff's favor, improperly rejecting the opinion of a consulting psychologist and reaching a faulty determination about plaintiff's ability to make a vocational adjust to other work.

Defendant concedes that the administrative law judge erred in her consideration of the listings and failed to articulate an adequate rationale for rejecting the opinion of plaintiff's treating physician, Dr. Ojeda; he asks this court to remand this case to the

administrative law judge to correct these errors and, if necessary, to determine the onset date of plaintiff's disability. Plaintiff opposes remand, arguing that further administrative proceedings are unnecessary because the record compels an immediate award of benefits. Having reviewed the administrative record and the supplemental briefing by the parties, I am persuaded that factual issues remain concerning whether plaintiff's cancer equals a listing and the severity of his incontinence that preclude this court from making an award of benefits. Accordingly, the case will be remanded to the agency for further proceedings.

From the administrative record and the parties' submissions, I find the following facts.

FACTS

In early 2003, plaintiff was diagnosed with cancer of the prostate gland. Under the commissioner's regulatory framework, prostate cancer is presumed to be disabling under one of two scenarios:

> A. Progressive or recurrent despite initial hormonal intervention.
>
> OR
>
> B. With visceral metastases.

20 C.F.R., Pt. 404, Subpt. P, App. 1, 13.24.

On April 7, 2003, plaintiff underwent corrective surgery. Although the surgery was deemed a success, it left in its wake the secondary problems of incontinence and sexual

dysfunction. On March 8, 2004, plaintiff applied for disability insurance benefits, alleging that he was unable to work because of incontinence following prostate cancer. On April 16, 2004, plaintiff's treating urologist, Dr. Larry Ojeda, completed a report on which he indicated that although plaintiff's cancer had not recurred, plaintiff was unable to do exertional work of any kind "due to a continual loss of urine with any, and all, body movement." AR 206.

On May 17, 2004, Dr. T. Arjmand, a consulting physician for the state disability determination service, reviewed plaintiff's medical records and determined that plaintiff was not disabled because he did not have a severe impairment. Dr. Arjmand explained that plaintiff's surgery was uneventful with no complications and the cancer had not recurred or required further treatment. In Dr. Arjmand's opinion, plaintiff's incontinence was not a disabling condition. Dr. Arjmand's conclusions were affirmed by a second state agency physician on September 2, 2004. AR 209.

In early 2005, plaintiff's prostate cancer returned. From February 8, 2005 to March 24, 2005, plaintiff was treated with a total of 33 radiation treatments.

An administrative hearing on plaintiff's application for disability insurance benefits was convened on June 10, 2005. Plaintiff's lawyer and the administrative law judge questioned plaintiff in detail about his incontinence problems. Plaintiff denied that urine leaked constantly, but said his primary problem was difficulty controlling his bladder while exerting himself or moving suddenly, such as when chasing after a grandchild or coughing. Plaintiff testified that he could control his bladder if he concentrated on what he was doing,

but that doing so at all times was almost impossible. Plaintiff testified that he changed his pants about three times a day because of dribbling. Although he had tried adult diapers and pads, he stopped using them because he developed rashes and sores. Plaintiff's wife testified that plaintiff tired easily, was depressed and somewhat withdrawn.

At the end of the hearing, the administrative law judge said that she was going to refer plaintiff for a mental consultative evaluation on the basis of plaintiff's wife's testimony, which suggested depression. On July 25, 2005, plaintiff was evaluated by Dr. Peter Koehn, a licensed psychologist. Dr. Koehn found that plaintiff had significant adaptation problems related to his medical condition, notably anxiety in social or public situations related to his fear of soiling himself. Dr. Koehn stated that as a result, plaintiff had marked or extreme limitations in his ability to respond appropriately to supervision, co-workers and work pressures in a work setting. AR 233-240.

On May 24, 2006, the administrative law judge issued a decision denying plaintiff's application. Applying the familiar five-step sequential evaluation, 20 C.F.R. § 404.1520, the administrative law judge found at step two that plaintiff had the severe impairments of prostate cancer status post radical prostatectomy and radiation and residual urinary stress incontinence. At step three, she observed that although plaintiff's cancer had recurred, the condition did not satisfy the criteria of Listing 13.24 because plaintiff had not undergone hormonal therapy and his cancer had not resulted in visceral metastases. The administrative law judge did not articulate any rationale with respect to whether plaintiff's condition was "medically equivalent" to the listing.

At steps four and five, the administrative law judge recognized that plaintiff had problems with incontinence, but not such severe problems as to prevent plaintiff from performing work requiring lifting no more than 20 pounds and standing or walking 6 of 8 hours each workday. The administrative law judge rejected Dr. Ojeda's opinion that plaintiff's incontinence was disabling, finding his opinion inconsistent with his treatment notes and plaintiff's testimony and that Dr. Ojeda appeared to have offered his opinion out of sympathy for plaintiff. She also rejected Dr. Koehn's assessment of plaintiff's limitations, finding that it was based upon assumptions about plaintiff's incontinence that were not supported by the record. Accordingly, the administrative law judge found that plaintiff was not disabled at any time up to the date of her decision.

On August 18, 2006, the Appeals Council denied plaintiff's request for review, making the decision of the administrative law judge the final decision of the commissioner. On August 31, 2006, plaintiff filed a new application for disability insurance benefits. The social security administration decided that application in plaintiff's favor, finding that he was disabled as of May 25, 2006.

OPINION

The parties agree that this case must be reversed and remanded to the agency, although they disagree about the reasons for remand. Also, they disagree whether this court should direct the commissioner to hold new proceedings or whether it should instead direct the commissioner to award benefits to plaintiff.

This court may reverse a decision of the commissioner and order him to award benefits only when the record yields "but one supportable conclusion" that plaintiff is disabled. Campell v. Shalala, 988 F.2d 741, 744 (7th Cir. 1993). Having carefully considered the parties' arguments and the record, I find that this standard has not been met.

Plaintiff contends first that the administrative law judge should have found that his condition meets or equals the listing for cancer of the prostate gland, Listing 13.24, because of the recurrence of plaintiff's cancer in 2005. Plaintiff points to no evidence in the record showing that he had hormone therapy or that his cancer spread to other organs, as required by the listing. Accordingly, the issue appears to be solely whether plaintiff's condition under the period under consideration was "at least equal in severity and duration" to the listed criteria. 20 C.F.R. § 404.1526(a) (explaining standard for medical equivalence).

Plaintiff argues that the recurrence of cancer after surgery is at least as severe as the recurrence of cancer after hormonal intervention, but that is not necessarily true. Typically, hormone therapy is prescribed for prostate cancer that has progressed beyond the prostate. Peter R. Carroll, M.D. *et al.*, Prostate Cancer Foundation, Report to the Nation on Prostate Cancer, A Guide for Men and Their Families 61-62 (2005) (but noting that recent research suggests that hormone therapy might be beneficial before, during or after local treatment), *available at* http://www.prostatecancerfoundation.org/ (follow "Guide for Men With Prostate Cancer" hyperlink) (last visited August 2, 2007). The requirement of Listing 13.24 A that the prostate cancer be resistant to hormonal intervention appears to reflect a judgment by the commissioner that only the more advanced forms of prostate cancer are presumed to be

disabling. Whether plaintiff's cancer during the time period under consideration was equal in severity and duration to hormone-resistant cancer is a question this court cannot answer on the basis of the record, which lacks any medical expert opinion on that subject. Whether a claimant meets or equals a listing is a determination based solely on medical evidence. Hickman v. Apfel, 187 F.3d 683, 688 (7th Cir. 1999); 20 C.F.R. § 404.1526(b). I am persuaded that a medical expert is needed to evaluate the clinical signs and laboratory findings in the record to determine whether they medically equal the criteria of the listing, and if so, to offer an opinion of the date on which plaintiff's disability began.

In support of his argument that this court can find on its own that plaintiff meets the listing, plaintiff cites cases that are from other circuits or not on point. For example, in Guzman v. Bowen, 801 F.2d 273 (7th Cir. 1986), the commissioner conceded that the plaintiff met the listing criteria for mild mental retardation, but maintained that an award of benefits was not appropriate because there was no evidence establishing that the plaintiff met the necessary IQ criterion during her insured period, which had expired before the date of the testing that had established plaintiff's low IQ. In ordering that the case be remanded for an award of benefits, the court agreed with the Fourth Circuit that, in the absence of evidence leading to a contrary result, the court would assume that an IQ test taken after the insured period correctly reflected the person's IQ during the insured period. Id. at 275 (citing Branham v. Heckler, 775 F.2d 1271, 1274 (4th Cir. 1985)). In this case, however, the commissioner has not conceded that the evidence establishes that the criteria of the listing is satisfied, but only that an expert is needed to make that determination.

In Hickman, 187 F.3d at 690, the court did state that the record "leads us to conclude that Hickman does indeed suffer from a severe medical condition which is equivalent to the impairment set forth in Listing 101.03" and it ordered the district court to enter judgment in Hickman's favor. Although it is reasonable to infer, as plaintiff does, that the appellate court was awarding benefits to Hickman, it did not so specify in its opinion; it may simply have been directing the district court to remand the case to the agency for new findings. In any event, even if the court did find that Hickman was entitled to an award of benefits, in this case the record fails to establish that plaintiff's condition during the relevant time period was at least equal in severity to the impairment set forth in Listing 13.24.

Next, plaintiff contends that the administrative law judge erred in failing to weigh Dr. Ojeda's opinion in accordance with the commissioner's rulings and regulations regarding treating source opinions, 20 C.F.R. § 404.1527 and SSR 96-2p. The commissioner agrees that the administrative law judge "did not provide adequate rationale" for rejecting Dr. Ojeda's opinion. Plaintiff argues that in light of this concession, an award of benefits is appropriate. However, the commissioner does not concede that the administrative law judge had no proper reasons to reject Dr. Ojeda's opinion; he concedes only that the administrative law judge failed to *articulate* those reasons. Admitting that the administrative law judge ought to have provided better reasons for rejecting Dr. Ojeda's opinion is not the same as conceding that she should have accepted it.

In fact, were it not for the commissioner's concession, I would probably uphold the administrative law judge's decision to give little weight to the opinion of Dr. Ojeda. Plaintiff denied that his incontinence problem involved a continuous leaking of urine, as Dr. Ojeda reported, but said the leakage occurred with exertion. Accord Reynolds v. Bowen, 844 F.2d 451, 455 (7th Cir. 1988) (administrative law judge could reject evidence from treating physician where it conflicted with plaintiff's testimony regarding his activities). Support for accepting plaintiff's description over Dr. Ojeda's can be found in notes of office visits, in which plaintiff's incontinence was described as "stress" incontinence and not as a continuous drip of urine. AR 197, 198. Plaintiff relies heavily on a note from one examination during which Dr. Ojeda observed a small amount of urine dripping from plaintiff's penis, AR 218, but the existence of that report shows merely a conflict in the evidence. In light of this conflict, it would be inappropriate to order an award of benefits, notwithstanding the commissioner's concession that the administrative law judge failed to provide good reasons for rejecting Dr. Ojeda's opinion. Briscoe ex rel. Taylor v. Barnhart, 425 F.3d 345, 356 (7th Cir. 2005) ("[A]n award of benefits by the court is appropriate only if all factual issues have been resolved and the record supports a finding of disability").

I have considered plaintiff's remaining (and contested) challenges to the administrative law judge's decision and find that none of them provides a basis for remand, much less an immediate award of benefits. The administrative law judge was entitled to reject Dr. Koehn's report insofar as it was based upon physical limitations that the administrative law judge did not find credibly supported by the record. She also reasonably

rejected the vocational expert's testimony supporting a finding of disability to the extent it also assumed the existence of such limitations. Finally, it was not improper for the administrative law judge to rely on the Medical-Vocational Guidelines (commonly known as "the grids") insofar as she found that plaintiff's only limitation resulting from his incontinence was exertional in nature. 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(a) (grids may be employed and conclusion directed regarding disability when claimant's "vocational factors and residual functional capacity coincide with all of the criteria of a particular rule"). I note, however, that all of these findings are subject to modification on remand, even if the listings are not satisfied, insofar as the commissioner has acknowledged that the administrative law judge must reconsider Dr. Ojeda's opinion.

Accordingly, this case will be remanded to the commissioner so that he may consult with a medical expert regarding whether plaintiff's impairment met or medically equaled the listings at any time relevant to the application under consideration and, if so, to determine the onset of disability. If the commissioner determines that plaintiff's impairment did not meet or medically equaled a listing, then he must direct the administrative law judge to reevaluate Dr. Ojeda's opinion. The administrative law judge is free to hold a supplemental hearing at which she may call a vocational expert.

Plaintiff's request that the commissioner be ordered to assign his case to a new administrative law judge on remand is denied. The fact that the administrative law judge indicated at the end of the hearing that she believed plaintiff's testimony regarding his post-radiation bowel problems does not mean that she credited his allegation that he satisfied the

criteria for disability, much less show that she was biased against plaintiff. The only other evidence of bias to which plaintiff points is the administrative law judge's delay in issuing the decision and the adverse decision itself. None of this evidence meets plaintiff's burden of overcoming the presumption that administrative adjudicators are unbiased. Schweiker v. McClure, 456 U.S. 188, 195-96 (1982) (plaintiff bears burden of establishing that hearing officer was biased by showing conflict of interest or some other specific reason for disqualification).

ORDER

IT IS ORDERED that the decision of defendant Michael Astrue, Commissioner of Social Security, denying plaintiff William Pohl's March 8, 2004 application for a period of disability and disability insurance benefits under the Social Security Act, is REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g). On remand, the commissioner shall consult with a medical expert regarding whether plaintiff's impairment met or medically equaled the listings at any time relevant to the application under consideration and, if so, to determine the onset of disability. If the commissioner determines that plaintiff's impairment does not meet or medically equal a listing, then he must direct

the administrative law judge to reevaluate Dr. Ojeda's opinion. The administrative law judge is free to hold a supplemental hearing at which she may call a vocational expert.

The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 3rd day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge