

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

OLLIE CARVER-THOMAS,

Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

11-cv-797-bbc

Plaintiff Ollie Carver-Thomas has brought this suit for judicial review of defendant Michael J. Astrue's September 21, 2011 denial of her application for disability insurance benefits. She contends that the administrative law judge erred in rejecting her claims that she is physically and mentally handicapped as a result of a damaged ankle joint, impaired cognition and compromised heart resulting from cellulitis, staphylococcus aureus and meningitis. She argues that the administrative law judge did not give sufficient weight to her full medical history and misinterpreted the medical reports on which he relied to determine her work activity following the onset of her disability.

Plaintiff cannot succeed on her challenge to defendant's decision. The particular medical problems she lists in her complaint are not problems from which she suffered before her insured status expired on December 31, 2004 and the medical problems she did have

before that date were not so severe as to render her unable to engage in substantial gainful activity. Plaintiff has not shown that the administrative law judge failed to take into consideration any relevant medical evidence in the record or that he erred in any other respect. Therefore, I will enter judgment for defendant.

RECORD EVIDENCE

Plaintiff's onset of disability date was January 1, 2000; the date on which she was last insured was December 31, 2004. Five years or so before the onset of her disability, she was physically assaulted by an offender while working for Genesis Behavioral Services as a counselor for high risk offenders in the prison system. She sustained a serious physical injury in that assault and became quite depressed.

In late 1999, she began seeing a therapist at the Dean Medical Center in Madison, primarily because she was experiencing stress that she attributed to her supervisor at Genesis. AR 2074-77. On December 22, 1999, her medical doctor, Thomas Wax, wrote to Genesis, asking for a continuation of a medical leave of absence for plaintiff. AR 2078. On April 21, 2000, he wrote "To Whom It May Concern," saying that, in his best medical judgment, plaintiff should not return to her job at Genesis. He added that he could also "say within a degree of medical certainty that [plaintiff] can hold and perform a job adequately (for which she has training and experience] with some other company." AR 2079.

During the five years from January 1, 2000 through December 31, 2004, plaintiff sought medical attention for various problems: esophageal reflux on November 5, 2001, AR

2080; for benign right adrenal adenoma, AR 2081, 2092-93; weight gain and heartburn, AR 2083-84; left submandibular gland swelling, 2086; and eye pressure and pain. AR 2088, 2090. On July 9, 2009, Dr. Kevin Fehr noted that plaintiff had a history of chronic myofascial pain syndrome dating from the 1995 assault, that she tried to avoid taking any medications for the pain because of fear of addiction and that she dealt with it by using biofeedback techniques and a TENS unit. AR 2083. On a December 9, 2004 visit to Dr. Dirk M. Nuennighoff, plaintiff denied that she had musculoskeletal pain that kept her from sleeping at night. AR 227.

A state agency doctor, Syd Foster, found that plaintiff had had no severe physical impairment during the relevant time period. AR 1639. Another state agency doctor, Susan Donohoo, found that plaintiff had had no severe psychiatric impairment during the same period. AR 1640-1653. Dr. Mina Korshidi performed a physical residual functional capacity assessment for the state agency and concluded that plaintiff had the severe physical impairment of myofascial pain syndrome, which supported a finding of a medium residual physical functional capacity. AR 1654-61. Dr. Beth Jennings found that plaintiff had depression and that this manifested itself in mild difficulty in maintaining social function and moderate difficulty in concentration, persistence and pace. AR 1672. She found also that plaintiff was moderately limited in her ability to work in coordination with or proximity to others without being distracted by them, AR 1676, in her ability to complete a normal workday without interruptions from psychologically based symptoms, AR 1677, in her ability to interact appropriately with the general public, id., in her ability to get along with coworkers

without distracting them or exhibiting behavioral extremes, id., and in her ability to travel in unfamiliar places and use public transportation. Id. Jennings concluded that plaintiff would be capable of working at a “more low stress job” than that of working with released convicts. AR 1678.

At a December 16, 2010 hearing before the administrative law judge, at which plaintiff was present in person and represented by counsel, she testified about the 1995 assault and a later incident in 1999, when fire broke out in the back of her car that the police described as arson. She described her reaction to her supervisor’s treatment of her at Genesis that led to her decision to stop working there and she testified that she was afraid to go back to working with clients and aggressive people. AR 45. She said that her ability to get out and interact with other people had worsened over the years, although she had been working with a psychologist who had started treating her with biofeedback. AR 48. She said that during the five year period at issue, she went to her husband’s office with him and did whatever she could do to keep herself preoccupied or just slept. AR 49. Her husband’s testimony confirmed some of plaintiff’s testimony about her pain and her willingness to spend time at her husband’s office when she was not in pain, but he testified that she was counseling persons when she was at the office. AR 60.

Michelle Elbers testified at the hearing as a vocational expert that plaintiff’s skills as an ADOA counselor would be transferable to other work at light or sedentary levels, such as interviewing skills, customer service and case management. AR 67. However, in response to the administrative law judge’s question, she testified that plaintiff could not continue to

perform her past work if she was limited to medium work, had restrictions on stooping bending, and standing, etc., had limited but satisfactory restrictions on her ability to deal with coworkers, the public and work stress and could not complete a normal work day and workweek without interruption from psychologically-based symptoms. AR 68.

Elbers testified that her findings did not close plaintiff out of the job market. If she was limited to light or medium work, she could perform jobs in handpackaging, of which approximately 6,000 exist in Wisconsin; she could do small product assembly (12,000 jobs in Wisconsin at the light level); she could work as a machine tender (4,000 jobs in Wisconsin at the light level); and she could do routine office clerk work (3,000 jobs in Wisconsin at the light level). Id. Elbers also testified that if plaintiff had no useful ability to complete a normal workday and work week without interruption from psychologically-based symptoms or unreasonable rest periods, she would not be able to perform any other jobs in the state. AR 69.

In his decision, the administrative law judge found that plaintiff had not engaged in any substantial gainful activity during the five years from January 1, 2000 through December 31, 2004 and that during this period, she was suffering from myofascial pain and either anxiety or post traumatic stress syndrome, AR 15, but that in December 2004, she had told a doctor that her musculoskeletal symptoms were not significant enough to interfere with her sleep. However, he agreed with Dr. Khorshidi that plaintiff's myofascial pain was a severe impairment. AR 16. He adopted Dr. Jennings's finding that claimant had some moderate mental limitations, id., but he found her other medically determinable conditions not

medically significant. AR 16-17. From this he concluded that plaintiff had no impairment or combination of impairments that equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 17. He concluded that plaintiff had the residual functional capacity to perform a range of light work, AR 19, although she was not capable of performing any past relevant work as a social services aide or as a psychotherapist. AR 20-21. Finally, he found that plaintiff was 52 when she was last insured; she had at least a high school education; she was able to communicate in English; and as of 2000-04, there were jobs that existed in significant numbers in the national economy and in Wisconsin that she could have performed. AR 21. Accordingly, he concluded, plaintiff was not under a disability at any time from January 1, 2004 through December 31, 2004. AR 22.

OPINION

Plaintiff sets out only two reasons for her disagreement with the administrative law judge: he erred in giving weight to “Dr. [Mark] Moore’s assertion that [plaintiff] was ‘continuing to work as a psychotherapist throughout 2004’” and he failed to take into account certain medical records. Neither reason supports her claim. First, it is irrelevant whether plaintiff told Dr. Moore in 2008 that she was working as a psychotherapist or a psychologist because the administrative law judge did not place any weight on this statement. In fact, he found that plaintiff had not worked at any substantial gainful activity during this period.

If plaintiff is arguing that the administrative law judge used the statement to Dr. Moore as a basis for finding that plaintiff was functioning at a higher level than she admitted,

that argument is rebutted by the administrative law judge's acceptance of Dr. Jennings's evaluation of plaintiff's mental and emotional capacity. Dr. Donahoo had found no psychological limitations on plaintiff's ability to work during her insured period, whereas Dr. Jennings had found that there were some, albeit not so grave as to prevent plaintiff from working at a lower stress job than that of counselor or psychotherapist.

Second, plaintiff argues that the administrative law judge erred because he did not take into account the medical records to which plaintiff refers in her brief. However, plaintiff has not shown that any of those records were submitted to defendant for inclusion in the record. Had there been additional medical evidence that would have been helpful to plaintiff, she and her attorney should have produced it for the administrative law judge's consideration.

In summary, I conclude that the administrative law judge gave full consideration to the record, followed the required sequential evaluation process for determining whether plaintiff was disabled and reached a reasonable conclusion. His decision is supported by substantial evidence.

In her reply brief, plaintiff argues that the concept of residual functional capacity "is a concept that is yet to be substantiated scientifically for its reliability as an occupational/psychological measure or to have predictive validity." Plt.'s Reply Br., dkt. #30, at 2. This may well be true, but until the present concept of residual functional capacity is revised and updated, it is the one that the administrative law judges and courts must work with. It is up to trained mental health professionals to evaluate and improve the concept and how it can best be measured, not judges.

It appears from the record that plaintiff experienced serious medical problems in 2008 that may have rendered her totally disabled under the laws governing Social Security. Unfortunately, her eligibility for benefits ended on December 31, 2004, with the expiration of the period in which she was insured. As a result, none of the serious problems that are now plaguing her can be considered in deciding whether she should prevail on her claim for benefits.

ORDER

IT IS ORDERED that plaintiff Ollie Carver-Thomas's motion for summary judgment is DENIED and the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff's application for disability insurance benefits is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 20th day of November, 2012.

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