

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

ROBERT JOSEPH CHARETTE, JR.,

Plaintiff,

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

11-cv-819-bbc

Plaintiff Robert Joseph Charette, Jr., is seeking judicial review of a final decision of the defendant Commissioner of Social Security denying his application for disability insurance benefits and supplemental social security. Plaintiff contends that the denial was erroneous because the administrative law judge did not undertake a proper analysis to determine whether plaintiff has “deficits in adaptive functioning initially manifested” before he was 22. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05. I conclude that the administrative law judge’s analysis was sufficient to support her decision that plaintiff does not meet that criteria.

The following facts are drawn from the administrative record (AR).

FACTS

A. Background

Plaintiff Robert Charette was born on May 29, 1969. His past work includes jobs as a roofer helper, iron worker helper, car washer, dishwasher, mason helper and groundskeeper. He last worked as a general worker for a marina for a year until he was laid off in June 2007. AR 228. Plaintiff applied for disability insurance benefits and supplemental security insurance on December 29, 2008, alleging disability beginning on June 1, 2007. AR 195-98. His alleged disabilities are a learning disability, illiteracy and lazy eye; he says that he has had these disabilities all his life, AR 233, but he believes he became unable to work in June 2007. Id.

Plaintiff's application was denied initially and again after he moved for reconsideration. He appealed and had a videoconference hearing on February 9, 2011 before Administrative Law Judge Lisa Groeneveld-Meijer, at which he was represented by counsel. Also present at the hearing were his witness, Michelle Basina, and Edward Utities, a vocational expert called by defendant. The administrative law judge issued a decision on March 14, 2011, in which she found that plaintiff was not disabled. AR 24-33. On October 18, 2011, the Appeals Council notified plaintiff that it had denied his petition to review the administrative law judge's decision, AR 1-2, making the administrative law judge's decision the final decision of the commissioner.

B. Evidence of Impairment

Plaintiff is not alleging that his inability to work is based on any physical impairments or illnesses, with the possible exception of his lazy eye. The record shows that he had a knee problem for which he was treated, but he is not alleging that it prevents him from holding a job. His focus is exclusively on his mental impairments and whether they cause deficits in his adaptive functioning.

Plaintiff was seen by a licensed psychologist, Marcus P. Desmonde, on May 13, 2009 for a social security disability evaluation. Desmond found that plaintiff had a verbal comprehension index of 70, a perceptual reasoning index of 77, working memory index of 71, processing speed index 71 and a full scale IQ of 67. AR 388. Plaintiff's scores ranged from the first to the sixth percentile or from extremely low to borderline. Id. Desmonde found the results consistent with plaintiff's educational history "and slightly lower than [Desmonde] would have expected from [plaintiff's] educational history." Id. He added that he was unable to detect "any lack of effort on the subtests." Id. His diagnoses were borderline intellectual functioning and a learning disability. Id. Desmonde reported that plaintiff had "[m]oderate psychosocial stressors due to problems obtaining and maintaining any full time employment for the last few years," but that he could interact with coworkers, supervisors and the general public. Id. at 339. Desmonde found plaintiff to be open, friendly, cooperative, spontaneous and uninhibited. Id. at 338. He had good hygiene and was "cleanly dressed." Id.

Plaintiff told Desmonde that he had a girlfriend and that the two of them visited her

family and sometimes went to tribal powwows. AR 337-38. He also said that he had been able to manage his finances over the preceding several years. AR 337. He was able to recall six digits forward, three back and two digits in sequence. AR 338. He was able to sequence events over the past 20 years without confusion and to discuss some of the television shows he watched and sports events and he seemed to be well informed. Id. Desmonde thought plaintiff would be able to manage his own financial affairs if he were to receive benefits. Id.

Plaintiff had a social security evaluation of his amblyopia (lazy eye) by an ophthalmologist, who reported that plaintiff had 20/15 distance vision, 20/20 near vision in his right eye when corrected but only 20/100 distance vision and 20/800 near vision in his left eye even when corrected. AR 348. He had approximately 20 diopter left esotropia (crossed eye) but otherwise normal findings. Id.

A social security consultant, Dr. Robert Callear, found that plaintiff had a history of esotropia, amblyopia, myopia and astigmatism in his left eye but no difficulty with his right eye. AR 354. He noted that plaintiff had no alleged limitations related to his vision. He was able to drive, watch television, do chores, cook, clean, etc. Id. Callear's medical evaluation was affirmed by Pat Chan, M.D., a social security physician. AR 377.

An agency psychologist, Eric Edelman, completed a psychiatric review technique form, AR 359-72, in which he agreed with Desmonde that plaintiff had borderline intellectual functioning and a learning disability, AR 363, with mild restriction of activities of daily living and difficulties in maintaining social functioning and moderate restrictions in maintaining concentration, persistence or pace and no episodes of decompensation. AR 369.

Edelman filled out a mental residual functional capacity assessment, finding that plaintiff had no significant limitations in his ability

- to remember locations and work-like procedures;
- to understand and remember very short and simple instructions;
- to carry out very short and simple instructions;
- to maintain attention and concentration for extended periods;
- to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances;
- to sustain an ordinary routine without special supervision;
- to work in coordination with or proximity to others without being distracted by them;
- to make simple work-related decisions;
- to complete a normal work-day and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods;
- to interact appropriately with the general public;
- to ask simple questions or request assistance;
- to accept instructions and respond appropriately to criticism from supervisors;
- to get along with coworkers or peers without distracting them for exhibiting behavioral extremes;
- to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness;
- to respond appropriately to changes in the work setting;
- to be aware of normal hazards and take appropriate precautions;
- to travel in unfamiliar places or use public transportation; and
- to set realistic goals or make plans independently of others.

AR 373-74. Edelman found that plaintiff was moderately limited in the ability to understand and remember detailed instructions and the ability to carry out detailed instructions. Id.

Edelman adopted Desmonde's assessment of plaintiff's mental abilities. AR 375. He noted that plaintiff had borderline working memory but good long term memory, that he had no significant difficulties with concentration, that he had a good fund of knowledge, was well informed, fully alert and oriented. Id. Edelman observed that although plaintiff's

mother had indicated that plaintiff had difficulty with memory, following instructions and concentration, that he needed constant repetition of directions and that he was easily angered, none of these problems were apparent at his mental status evaluation. In addition, plaintiff had reported being able to perform daily activities independently, taking care of his own personal needs, cooking, cleaning, laundry, driving and shopping. Edelman found that plaintiff's statements about his condition and his functional ability were fully credible and supported by objective findings. Id.

C. Hearing Testimony

1. Plaintiff's testimony

At the hearing before the administrative law judge, plaintiff testified that he had a driver's license, that he had lived with his mother until she went to a nursing home three to four years earlier and that since then he had lived by himself. AR 88. He said he could not read but that his neighbor, Michelle Basina, paid his bills for him. He could read a "little kid book," but was unable to read signs at the grocery store or on the street. Instead, he memorized them. AR 89. He could add, subtract, multiple and divide and make change at the grocery store. Id. & AR 104. He finished high school but he took special courses. AR 89-90. He was living on General Assistance, was never in the military and had no specialized training for any kind of job. AR 90. He said that his last job was probably at Marshall Concrete, where he took broken and damaged blocks off a conveyor belt. Id. He was let go after he was required to take a safety test and his employer found out he had a

learning disability. Id. He thought he had been doing an “all right job,” because he had shown up every day and done what he was supposed to do. AR 91. He had worked there full time for about six months. Id. Before that he had worked at the iron company for three to four years as a laborer, helping the other workers “put bolts into metal things when they went up in the air,” fetched water and gassed up the trucks. AR 92. He was let go because he could not pass the test to get into the apprenticeship program, although he tried three times and “they were working with me. They wanted me to pass. They really worked with me patiently.” AR 93.

Plaintiff worked as a roofer for about five to six months, but, again, he could not pass the test to get into the apprenticeship program. AR 97-98. He has also worked as a dishwasher, a job he was able to perform, but was let go because his employer wanted him to move up to cooking and he could not read the orders or keep them straight. AR 94-95. The dishwasher-cook job was one of his last, along with his seasonal job as general laborer at the marina. AR 96.

Plaintiff testified that he had trouble with his knee and that he did not think he could perform at a job that required standing, such as cooking. AR 98-100. He described his day-to-day activities as including taking care of his dogs, shoveling snow, cutting wood for heat and watching television. AR 101-02. When he needed to read something, such as a notice of an appointment, he would ask his neighbor, Ms. Basina, for do it for him. AR 101.

Plaintiff testified that at some of his jobs, he had trouble working fast enough and following directions. AR 104. He said that when he tried to work as a cook, he messed up

the orders frequently and was really able to do only one order at a time. AR 105-06. When supervisors or co-workers worked with him, they had to walk him through the job requirements many times before he was able to perform them. AR 106.

2. Vocational expert

Vocational expert Edward Utities testified that he had reviewed plaintiff's records and noted that the jobs that plaintiff had held in the preceding 15 years included heavy and very heavy, low-end, semi-skilled positions and medium unskilled positions. AR 108-09.

The administrative law judge asked Utities whether a person of plaintiff's age, education and work experience would be able to perform any of his past work, assuming he is limited to work involving simple, routine tasks with instructions of no more than three to four steps demonstrated and given verbally to the worker, in an environment free of fast paced production requirements, involving only simple work-related decisions and few if any day-to-day changes in the job and assuming that the work was limited to occupations that do not require peripheral acuity in both eyes. AR 109-10. Utities said that such a person would be able to work as a dishwasher or a car washer. AR 110. In addition, the person could work as a hand packager or a machine packager and that state-wide, there were 5,000 hand packaging jobs and 4,000 machine packaging jobs. Nationally, there were more than about 50,000 of each job. AR 110-11. Utities added that there would be numerous other jobs that a person with the listed restrictions could perform. AR 110. He added that he would expect normal supervision, with a supervisor touching base with the worker about

three to four times a day and normal tolerance for questions from employees (about three to four times a day). AR 111.

3. Michele Basinas

Michele Basinas testified that she has known plaintiff since he was a child and that she reads his mail for him, lets him know when he has appointments and helps him with his finances. AR 116. They go out to eat and she reads the menu to him. Id. She finds that she often has to tell him something more than once and that he calls her often during the day with questions. AR 117. She said that he will do errands for her but that often he will forget everything she asked him to do unless he has a written list and someone to read it to him. AR 119.

D. Administrative Law Judge's Decision

In reaching her conclusion that plaintiff had not been under a disability from June 1, 2007, the administrative law judge began by noting that plaintiff met the insured status requirement of the Social Security Act through December 31, 2011. She then performed the required five-step sequential analysis. 20 C.F.R. § 404.1520. At step one, she found that plaintiff had not been engaged in substantial gainful activity since June 1, 2007. At step two, she found that plaintiff had the severe impairments of borderline intellectual functioning, a learning disability and lack of peripheral vision in his left eye.

At step three, the ALJ found that plaintiff's physical impairments did not meet or

equal a listing in 20 C.F.R. Pt. 404, Subpt. P, App. 1, either singly or in combination. AR 26. Although plaintiff's left eye problems were rated as severe under the regulations, his right eye had visual acuity and peripheral visual fields better than required under the applicable listings (2.02 and 2.03). AR 27. She then found that plaintiff did not meet the requirements of sections A, B, C or D of Listing 12.05. AF 27-28. He did not meet the A criteria because he was not dependent on others for personal needs and he did not lack the ability to follow directions. AR 27. He did not meet the B criteria because he did not have a valid verbal, performance or full scale IQ of 59 or lower. Id. He fell short of the C criteria because he did not have a valid verbal, performance or full scale IQ of 60 to 70 or a physical or other mental impairment imposing an additional and significant work-related limitation of function, both of which are required to meet the listing. Id. His verbal comprehension index score was 70 and his full scale IQ score was 67, but the ALJ did not find these scores valid. In the consultative evaluator's opinion they were lower than he would have expected in light of plaintiff's occupational history.

The ALJ did not explain why plaintiff did not have a physical or other mental impairment, but she found that plaintiff did not have deficits in adaptive functioning, another criterion for the C listing. AR 28. She found plaintiff's adaptive functioning "good," AR 29. He had no problems with his activities of daily living and social functioning. Id. He lived on his own, had no trouble with his personal care, bathed independently, did laundry and other chores around his house, including snow shoveling and firewood cutting for heat, did some cooking and cared for his dogs. AR 29-30. He had had a driver's license since he

was 18, he went out daily, shopped weekly, ran errands and did chores for his friend, Ms. Basina, and visited with his family. AR 30. The ALJ acknowledged that plaintiff needed assistance in reading and sometimes had trouble understanding things, as Ms. Basina had testified; in addition, Basina paid his bills for him. On the other hand, plaintiff told the consultative examiner that he had been able to manage his financial affairs for the preceding several years. Id. The ALJ found that plaintiff had been able to work at a number of different jobs that he lost only because of testing requirements or changes in job duties, not because he was unable to perform them. AR 30. She noted Desmond's findings that plaintiff was well informed, capable of understanding simple to moderately complex instructions in his area of expertise, able to interact with co-workers, supervisors and the general public. AR 31. She also noted that plaintiff has friends, maintains meaningful relationships with other people and has been described by his doctors as cooperative and pleasant. Id. She took into consideration plaintiff's visits with his family and his girlfriend's family and his attendance at sporting events and at tribal powwows. Id.

Although plaintiff often has to be reminded of things several times, he watched movies and sports on television; he was able to recall six digits forward and three in reverse, sequence events over 30 years without confusion and discuss current information. AR 31-32.

The ALJ found that plaintiff did not meet the D criteria because he did not have a valid, verbal, performance or full scale IQ of 60 to 70 resulting in at least two of the following: marked restriction of activities of daily living; marked difficulties in maintaining social functioning; marked difficulties in maintaining concentration, persistence or pace; or repeated

episodes of decompensation. Id.

At step five, the ALJ found that plaintiff had the residual functional capacity to perform the full range of work at all exertional levels with the following limitations: work limited to simple, routine tasks with instructions of no more than three to four steps, demonstrated or spoken, and in a work environment free of fast-paced production requirements. Id. The work would have to involve only simple work-related decisions, with few if any day-to-day changes in the workplace and it could not require peripheral visual acuity. Id.

The ALJ concluded that plaintiff was unable to perform any past relevant work, that he was a younger individual on his alleged disability onset date, that he had at least a high school education and could communicate in English and that jobs existed in significant numbers in the national economy that plaintiff could perform. AR 32. She concluded that plaintiff had not been under a disability as defined in the Social Security Act, from June 1, 2007 through the date of her decision. AR 33.

OPINION

A. Standard of Review

Plaintiff's only challenge is to the administrative law judge's conclusion that plaintiff did not meet the criteria for mental retardation under the C listing in 20 C.F.R. Pt. 404, Subpt. P, App. I, § 12.05, which requires the ALJ to determine whether the claimant has an IQ score between 60-70 and an additional physical or mental impairment imposing an

additional and significant work-related limitation of function, as well as a “significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested” before he was 22. Blakes ex rel. Wolfe v. Barnhart, 331 F.3d 565, 570 (7th Cir. 2003) (noting that social security regulations included new requirement that impairment must satisfy both diagnostic criteria of introductory paragraph and any one of various criteria set out thereafter) (citing 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A).

Plaintiff argues that the ALJ’s conclusion is inadequate because she failed to provide any indication of the evidentiary standard she relied upon to assess plaintiff’s adaptive functioning. He says she did not explain how she arrived at her conclusion that plaintiff did not have deficiencies of adaptive functioning and he contends that she should have consulted either the American Psychiatric Association’s Diagnostic and Statistical Manual-IV, the standard set out by the American Association on Intellectual and Developmental Disabilities, or the criteria of the other major professional organizations that deal with mental retardation.

The Court of Appeals for the Seventh Circuit has not held that an ALJ is required to articulate a particular standard for assessing adaptive functioning. In Novy v. Astrue, 497 F.3d 708, 709 (7th Cir. 2007), it defined “deficits in adaptive functioning” as denoting the “inability to cope with the challenges of ordinary everyday life,” quoting the Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR) 42 (4th ed. 2000). (The court did not quote the second part of the definition: how well the individuals “meet the standards of personal independence expected of someone in their particular age group, sociocultural background and community setting.” Id.) Having set out the definition, the

court simply looked at the kinds of activities Ms. Novy managed, which included caring for at least three children well enough that they have not been adjudicated neglected and removed from her home, paying her bills and avoiding eviction. Novy, 497 F.3d at 710.

Plaintiff faults the court of appeals for not setting out specific criteria, but does not suggest what those might be and whether they would make the ALJ's task any easier or more precise. It is not apparent that anything more specific is required. Perhaps it might be if the question were a closer one or if the ALJ had been less comprehensive in her analysis of plaintiff's situation. However, I am convinced that she took into consideration the challenges of plaintiff's life and the level of personal independence he had attained, evaluated all of the evidence and arrived at the correct conclusion. Plaintiff is hindered by his borderline intellectual functioning and his inability to read, but he has adapted well to his limitations.

As the ALJ noted, plaintiff gets out and around, drives, shops, chops wood, does errands, cooks, shops and presents himself as a person with good hygiene and appropriate dress. He has worked at various jobs and lost them only because he could not meet additional requirements, such as passing written tests, or because the employer increased his responsibilities. He has a girlfriend and other friends; he visits his family and his girlfriend's family; he goes out to sporting events and to powwows. He is cooperative and friendly. The ALJ acknowledged plaintiff's inability to read and the help his neighbor provided with bill paying, but she noted that he had told the consultative examiner that he had been able to manage his financial affairs since his mother had moved to a nursing home.

The ALJ's evaluation was sufficient: she considered the challenges of everyday life and

of plaintiff's life in particular and the way plaintiff coped with those challenges and concluded that he was doing well. Even if there were a specific standard for assessing "adaptive functioning" that she failed to use, she was thoroughly justified in finding that plaintiff would not meet the introductory paragraph's requirement that he exhibit "deficits in adaptive functioning."

In any event, the issue of plaintiff's deficits in adaptive functioning is not critical to the finding that plaintiff does not meet the criteria of Listing 12.05C. The ALJ found that plaintiff did not meet either of the two criteria in ¶ C: he did not have a valid IQ score between 60-70 and he did not have a physical or mental impairment imposing an additional and significant work-related limitation of function. His individual IQ scores were all above 70, although his full scale score was 67, and Desmonde had questioned the scores, noting that they were lower than he would have expected in light of plaintiff's occupational history. If any aspect of the ALJ's decision in this case can be faulted, it is her failure to explain why she did not find that plaintiff had any other physical or mental impairment. However, that failure is immaterial because plaintiff had to meet both of the two criteria and the ALJ explained persuasively why he did not meet the first criteria. Therefore, the ALJ would have been justified in concluding that plaintiff did not meet the § 12.05C listing even if she had found that he did have deficits in his adaptive functioning.

I conclude that plaintiff has failed to show that defendant erred in finding that he was not disabled and therefore, not entitled to disability insurance benefits and supplemental social security.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Robert Joseph Charette, Jr.'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 31st day of May, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge