

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

RUSSELL DEIBERT,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

13-cv-152-bbc

Plaintiff Russell Deibert, who is proceeding pro se, is seeking review of a decision denying his claim for disability and supplemental security income benefits under the Social Security Act. 42 U.S.C. § 405(g). The administrative law judge concluded that even though plaintiff's degenerative disc disease prevented him from performing his past work, he was not disabled because he still could perform a limited range of sedentary work in significant numbers in the national economy. Plaintiff says that he is unable to work because of a variety of physical and mental impairments and that his counselor and treating physician believe that he is not able to work. Although I conclude that the administrative law judge did not err in finding that plaintiff did not have any other severe impairments, I find that her credibility determination is not supported by the evidence and am reversing the decision on that ground and remanding for further proceedings.

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

BACKGROUND

On September 17, 2009, plaintiff Russell Deibert filed applications for disability insurance and supplemental security income benefits, claiming that he had been disabled since September 11, 2008 because of arthritis, degenerative disc disease, anxiety and depression. AR 14, 126. Plaintiff reported to the agency in his application that his back pain limits his bending, twisting, sitting, standing, walking and sleeping. He also stated that his depression and anxiety affect his concentration and memory. AR 126.

On November 17, 2011, plaintiff, who was represented by a lawyer at the time, appeared in a video hearing before Administrative Law Judge Patti Hunter. He was 42 years old at the time of the hearing. Plaintiff, his mother and a vocational expert testified at the hearing. AR 26-30. The administrative law judge denied plaintiff's claim on December 9, 2011, determining that degenerative disc disease of the lumbar spine prevented him from performing his past work but that he was capable of performing sedentary work with the following limitations: lift and carry 10 pounds occasionally and less than 10 pounds frequently, sit six out of eight hours, stand or walk two out of eight hours and no frequent stooping. AR 14-18.

Plaintiff appealed the decision and submitted several medical records to the Appeals council dated between January 10, 2011 through October 1, 2012. AR 5, 9. On December 31, 2012, the Appeals Council declined to review the case. AR 1.

OPINION

A. Severe Impairments

Plaintiff alleges that he suffers from degenerative arthritis in his back, heart disease, depression, anxiety and restless leg and limb syndromes. Cpt., dkt. #1; Plt's Br., dkt. #10. In his complaint, he also indicated that he would be seeing a counselor for post traumatic stress syndrome and possible bipolar disorder and would be tested for sleep apnea. Dkt. #1. However, the administrative law judge found that plaintiff was severely impaired only by degenerative disc disease.

Under the Social Security Act, 42 U.S.C. § 223(d)(3), an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." A claimant's statements alone cannot establish an impairment. 20 C.F.R. § 404.1508, § 404.1528(a). In addition, "[t]he mere presence of some impairment [in the medical records] is not disabling per se." Hames v. Heckler, 707 F.2d 162, 165 (5th Cir. 1983); see also Garmon v. Apfel, 210 F.3d 374, at *4 (Table) (7th Cir. Mar. 22, 2000) (rejecting claimant's argument that he had severe impairment because he sought medical treatment for various symptoms). An impairment is considered "severe" if it significantly limits an individual's physical or mental abilities to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c); SSR 96-3. An impairment that is "not severe" must be a slight abnormality (or a combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities. SSR 96-3. Further, as the claimant, it is plaintiff who "bears the burden of

producing medical evidence that supports [his] claims of disability.” Eichstadt v. Astrue, 534 F.3d 663, 668 (7th Cir. 2008). “That means that the claimant bears the risk of uncertainty.” Id.

Although the medical records reviewed by the administrative law judge discussed plaintiff’s degenerative disc disease, depression and anxiety, they did not mention arthritis, post traumatic stress syndrome, bipolar disorder, sleep apnea, heart disease or restless leg or limb syndrome. Without medical evidence of such conditions, plaintiff cannot show that he was severely impaired by them.

Plaintiff later submitted several pages of additional medical evidence to the Appeals Council, AR 5, 313-451, but because this evidence was not part of the record before the administrative law judge and was not considered by the Appeals Council in a decision on the merits, this court cannot consider it in reviewing the administrative law judge’s decision. 42 U.S.C. § 405(g); Wolfe v. Shalala, 997 F.2d 321, 322 n.3 (7th Cir. 1993); Eads v. Secretary of Dept. of Health and Human Services, 983 F.2d 815, 817 (7th Cir. 1993). Although the introduction of additional evidence may allow a district court to remand a case for further consideration by the commissioner in certain circumstances, none of the 2011 and 2012 progress notes and tests establish that plaintiff had any additional impairment prior to the date of his administrative hearing. 42 U.S.C. § 405(g); Melkonyan v. Sullivan, 501 U.S. 89, 100-01 (1991) (court may remand only if evidence is new and material and there is good cause for the failure to produce evidence before administrative law judge); Schmidt v. Barnhart, 395 F.3d 737, 742 (7th Cir. 2005) (new evidence is “material” if there is

“reasonable probability” that administrative law judge would have reached different conclusion had evidence been considered).

The additional records do show that plaintiff began suffering from chest pain in 2012 and underwent various testing, but it does not appear that he had a diagnosis of heart disease or any other cardiac condition. Further, to the extent that plaintiff did receive such a diagnosis, it would not be relevant to the period of disability considered by the administrative law judge at the time of the hearing. Getch v. Astrue, 539 F.3d 473, 484 (7th Cir. 2008) (“Medical evidence postdating the ALJ's decision, unless it speaks to the patient's condition at or before the time of the administrative hearing, could not have affected the ALJ's decision and therefore does not meet the materiality requirement.”). Therefore, there are no grounds on which to remand this case for consideration of the additional evidence submitted by plaintiff.

With respect to plaintiff's depression and anxiety, the administrative law judge found that plaintiff's “medically determinable mental impairments of depression and anxiety do not cause more than minimal limitations in the claimant's ability to perform basic work.” AR 17. In making this decision, she relied on a state agency physician's finding that plaintiff had only mild limitations in activities of daily living, social functioning and concentration, persistence, and pace and no episodes of decompensation. Id. These are the factors that the regulations require an administrative law judge to consider when evaluating the severity of a mental impairment. 20 C.F.R. § 404.1520a(c)-(d); Nelson v. Apfel, 210 F.3d 799, 802-03 (7th Cir. 2000); Tiemann v. Barnhart, 152 Fed. Appx. 540, 541 (7th Cir. Oct. 25, 2005).

The regulations provide that “[i]f we rate the degree of your limitation in the first three functional areas as ‘none’ or ‘mild’ and ‘none’ in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities.” 20 C.F.R. § 1520a(d)(1).

Nothing in the medical records indicates that plaintiff had any limitations resulting from anxiety and depression that significantly affect his ability to do basic work activities. As noted by the administrative law judge, plaintiff testified that he saw a psychologist for counseling for about four months in 2006, well before his alleged onset date. AR 45-46. Medical records from plaintiff’s primary physician show that plaintiff was doing well on his medications in 2007 and 2008. AR 195-97, 231. He was working, feeling good and described as having “controlled” anxiety and depression. AR 195. Plaintiff testified that he had stopped counseling in 2006 because his psychologist had said that he would be “all right” and could always return to counseling if needed. AR 46. Plaintiff did not seek further counseling or specialty treatment until his physician referred him for an evaluation in 2012, after the relevant disability period. At that time, he was feeling depressed and having relationship difficulties and anger management problems. AR 46, 329-33.

Both plaintiff and his mother testified that he has memory loss because he forgets things. AR 49 and 52. However, as the administrative law judge reasonably concluded, if plaintiff’s mental impairments had been severe, he would have sought help from either his

treating physician or a counselor. AR 17. The administrative law judge did not err in finding that plaintiff's depression and anxiety were not severe.

B. Ability to Work

Although plaintiff generally states that both his counselor and doctor "say that [he] is not able to work," dkt. #10, the docket contains no opinion or assessment in the record from any of plaintiff's providers. AR 10, 16. Apart from the medical records detailing plaintiff's back pain and treatment, the only evidence of plaintiff's functional capacity are two state agency physician reports and plaintiff's testimony that he is unable to work because it hurts him to sit, stand or walk for too long. AR 37, 43-45.

On February 15, 2010, agency physician Dr. Pat Chan found that plaintiff was capable of unlimited sedentary work. AR 252-60. On June 11, 2010, another agency physician, Dr. Mina Khorshidi, wrote that plaintiff was capable of medium level work with only occasional stooping. AR 282-89. The administrative law judge relied on Dr. Chan's more restrictive assessment and also appears to have credited Dr. Khorshidi's stooping limitation. AR 16. Although plaintiff and his mother testified to much greater limitations, the administrative law judge found plaintiff not entirely credible and gave little weight to his mother's testimony because it was inconsistent with the medical records. Id.

Generally, an administrative law judge's determinations regarding credibility are entitled to deference because that judge has the ability to see and hear the testimony, but that deference does not excuse the administrative law judge from explaining the reasons for

her determination. Castile v. Astrue, 617 F.3d 923, 929 (7th Cir. 2010). The administrative law judge still must build an “accurate and logical bridge” between the evidence and his decision. Id. Here, the administrative law judge’s credibility assessment evidences some of the most common problems the Court of Appeals for the Seventh Circuit has identified in Social Security decisions.

The first problem is the administrative law judge’s use of some much-maligned boilerplate: “the claimant’s statements concerning the intensity, persistence and limiting effects of [his] symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.” AR 16. The court of appeals has criticized this language in multiple published opinions as “meaningless” because it “backwardly implies that the ability to work is determined first and is then used to determine the claimant’s credibility,” Shauger v. Astrue, 675 F.3d 690, 696 (7th Cir. 2012) (internal quotations omitted), and because it “fail[s] to indicate which statements are not credible and what exactly ‘not entirely’ is meant to signify,” Spiva v. Astrue, 628 F.3d 346, 348 (7th Cir. 2010). See also Roddy v. Astrue, No. 12-1682, 2013 WL 197924, *4 (7th Cir. Jan. 18, 2013) (court “has consistently criticized” this “boilerplate”); Bjornson v. Astrue, 671 F.3d 640, 645–46 (7th Cir. 2012) (“[T]he boilerplate implies that the determination of credibility is deferred until ability to work is assessed without regard to credibility, even though it often can’t be”); id. at 646 (directing Social Security Administration to “take a close look at the utility and intelligibility of its ‘templates’”); Parker v. Astrue, 597 F.3d 920 (7th Cir. 2010) (language is “meaningless boilerplate” because “statement by a trier of fact that a witness’s

testimony is ‘not entirely credible’ yields no clue to what weight the trier of fact gave the testimony”).

In this case, the administrative law judge did not rely just on the boilerplate, but failed to give any specific reason for concluding that plaintiff was not fully credible. She also failed to discuss how the testimony of plaintiff’s mother was inconsistent with the medical records. Apart from citing the results of a few imaging studies during her discussion of severe impairment, the administrative law judge did not discuss any medical evidence.

The administrative law judge did note that plaintiff tries to remain active with his son and helps his mother with household chores. AR 16. However, neither finding is supported by substantial evidence in the record. Both plaintiff and his mother testified that he *cannot* do activities with his son and *does not* help with chores. He is only able to make his bed and cook and vacuum a little. AR 30, 39-40, 52-53. The administrative law judge did not cite any evidence contradicting this testimony.

It is unclear whether the administrative law judge found that plaintiff’s activities were inconsistent with his alleged symptoms, but administrative law judges must be careful in relying on a claimant’s ability to perform “daily activities.” The Court of Appeals for the Seventh Circuit has “repeatedly cautioned that a person’s ability to perform daily activities, especially if that can be done only with significant limitations, does not necessarily translate into an ability to work full-time.” Roddy, 705 F.3d at 639; see also Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) (“The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former

than the latter, can get help from other persons and is not held to a minimum standard of performance, as she would be by an employer.”).

Finally, at the end of her decision, the administrative law judge generally states that:

Treating physicians have frequently advised the claimant to stop smoking due to its negative effects of disk and bone degeneration and so that doctors could consider more aggressive treatment possibilities, including surgery, but the doctors note that the claimant has not made a strong commitment to recovery, inasmuch as he did not stop smoking.

AR 16. To the extent that the administrative law judge may have construed plaintiff’s failure to quit smoking as non-compliance with a medical recommendation, that is a misuse of the non-compliance regulation. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). The regulations provide that “[i]n order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work.” 20 C.F.R. § 404.1530(a). “The failure to do so without good reason will result in a denial of benefits.” 20 C.F.R. § 404.1530(b). The court of appeals has made clear that an administrative law judge cannot base her credibility determination on a claimant’s failure to quit smoking where there is no evidence that the claimant would be restored to a non-severe condition if he quit smoking. Shramek, 226 F.3d at 813; Rousey v. Heckler, 771 F.2d 1065, 1069 (7th Cir. 1985) (“Essential to a denial of benefits pursuant to Section 404.1530 is a finding that if the claimant followed her prescribed treatment she could return to work.”).

Here, plaintiff’s physician indicated that he would not be recommending surgical intervention because plaintiff was an active smoker and is very young. AR 306. Not only is it uncertain that if plaintiff quit smoking, he would undergo surgery, but there is no

indication that surgery would restore plaintiff's ability to work. Rousey, 771 F.2d at 1070 (finding no evidence that plaintiff's chronic obstructive pulmonary disease would become non-severe if she quit smoking). The court of appeals has noted that even if medical evidence establishes a direct link between smoking and the claimant's symptoms, which it does not in this case, it is extremely tenuous to infer from the failure to give up smoking that the claimant is not credible when he testifies that his condition is serious or painful. Shramek, 226 F.3d at 813.

Given the addictive nature of smoking, the failure to quit is as likely attributable to factors unrelated to the effect of smoking on a person's health. One does not need to look far to see persons with emphysema or lung cancer—directly caused by smoking—who continue to smoke, not because they do not suffer gravely from the disease, but because other factors such as the addictive nature of the product impacts their ability to stop. This is an unreliable basis on which to rest a credibility determination.

Id.

Accordingly, the case must be remanded for a new credibility determination.

ORDER

IT IS ORDERED that the decision of defendant Carolyn Colvin, Acting Commissioner of Social Security, denying plaintiff Russell Deibert's application for Disability Insurance Benefits and Supplemental Security Income is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to

enter judgment for plaintiff and close this case.

Entered this 4th day of October, 2013.

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