IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK SCHLOESSER,

OPINION AND ORDER

Plaintiff,

15-cv-276-bbc

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

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Plaintiff Mark Schloesser is appealing the Appeal Council's denial of his claim for disability benefits under the Social Security Act, 42 U.S.C. § 405(g). In a fully favorable decision dated August 13, 2014, an administrative law judge found that plaintiff has been disabled since January 1, 2011 as a result of degenerative disc disease, major joint dysfunction, obesity and history of cervical radiculopathy and left shoulder surgery. The Appeals Council initiated an independent review and reversed the administrative law judge's decision, finding that plaintiff was not severely impaired by his history of cervical radiculopathy and left shoulder surgery on or before September 30, 2011, the date he last met the insured status requirements of the Social Security Act, and that plaintiff retained the residual functional capacity to perform unskilled, sedentary work as a packer, receptionist and office clerk. AR 4-10. Plaintiff contends that the Appeals Council erred in reaching these conclusions because it failed to consider that (1) plaintiff had made subjective

reports of disabling shoulder and neck pain before his last insured date; (2) plaintiff's condition was degenerative and had worsened over time; and (3) the administrative law judge's decision was consistent with Social Security Ruling 83-20 regarding evidence relevant to determining the onset of disability.

For the reasons discussed below, I conclude that the Appeals Council considered the relevant evidence, adequately explained its findings and provided good reasons for partially overturning the administrative law judge's decision that are supported by substantial evidence in the record. Accordingly, I am affirming the decision of the Appeals Council.

OPINION

In her written decision, the administrative law judge found that plaintiff had not engaged in substantial gainful activity since his amended onset date of January 1, 2011 and last met the insured status requirements of the Social Security Act on September 30, 2011. AR 22. She determined that plaintiff had the residual functional capacity to perform a range of light work with the following limitations: occasional climbing, stooping, kneeling, crouching and crawling; frequent balancing; no overhead reaching with either upper extremity; no more than frequent reaching in all other directions with his nondominant left upper extremity; occasional flexing, extending and rotating his neck; and may need unscheduled breaks and may be off task more than 10 percent of the workday. AR 23. These limitations were more restrictive than those found by two state agency medical consultants. AR 24-25. However, the administrative law judge noted that additional neck

rotation limitations were supported by plaintiff's cervical spine x-ray and magnetic resonance imaging study, which revealed "imposition on the nerve root and disc space narrowing," and by physical examinations that showed that plaintiff had limited and painful neck and shoulder range of motion. AR 25. She stated that the limitations of unscheduled breaks and being off task more than 10 percent of the workday were supported by plaintiff's "generally credible statements regarding his pain." Id. Plaintiff's treating physician, Dr. Claire Natividad, also had stated the opinion that as of May 31, 2013 (a year and a half after plaintiff was last insured), plaintiff required unscheduled breaks. AR 25. Relying on the testimony of a vocational expert, the administrative law judge found that plaintiff was disabled because he would not be able to perform any work that exists in significant numbers in the national economy. AR 26.

The Appeals Council disagreed with the administrative law judge's findings that (1) plaintiff was severely impaired by shoulder and neck pain before September 30, 2011; and (2) plaintiff needed unscheduled breaks, would be off task more than 10 percent of the workday and could only occasionally flex, extend and rotate his neck. Although defendant contends that plaintiff waived any argument regarding his severe impairments by not challenging the Appeals Council's step two finding in his opening brief, I disagree. Plaintiff made clear in his initial brief that he believed that the Appeals Council's overall decision was not supported by substantial evidence.

A. Onset of Neck and Shoulder Problems

In reaching its conclusion about the onset of plaintiff's neck and shoulder issues, the Appeals Council noted that Dr. David Crowther did not diagnose cervical spine derangement and radicular symptomology until December 2, 2011, more than two months after plaintiff's last insured date. AR 5 (citing AR 312). It also pointed out that plaintiff's neck problems seemed to resolve within a few months:

- On January 20, 2012, Dr. Luke Budleski, a physiatrist, reviewed the December 2011 magnetic resonance imaging studies of plaintiff's cervical spine and noted that they showed only mild cervical degeneration. AR 321-22 (adding that degeneration did not cause significant impairment of the central cord or cervical rootlets). Dr. Budleski also noted that plaintiff's neck pain had improved with physical therapy. Id.

- On February 13, 2012, plaintiff's treating physician, Dr. David Crowther, noted that plaintiff's radiculopathy had resolved and his primary concern was having a disability form completed. AR 319.

- Plaintiff did not report neck pain again until February 7, 2014, when he told Dr. Claire Natividad that he had chest pain and palpitations that radiated to his neck. AR 353.

AR 5. See also 20 C.F.R. § 416.920(a)(4)(ii) (severe impairment must meet 12 month durational requirement); SSR 82-52 ("Severe impairments lasting less than 12 months cannot be combined with successive, unrelated impairments to meet the duration requirement.").

With respect to plaintiff's shoulder issues, the Appeals Council noted that except for references to plaintiff's rotator cuff surgery in 2000, the record did not contain evidence showing that plaintiff experienced significant shoulder pain until December 2011 and

January 2012. AR 5-6. A review of the record confirms that the limited progress notes available before December 2011 mention plaintiff's rotator cuff repair but do not state that plaintiff was experiencing any current or recent symptoms. AR 306 (February 21, 2011 progress note); AR 323 (March 18, 2011 progress note); AR 307-08 (August 11, 2011 progress note); AR 309-10 (August 17, 2011 progress note). Plaintiff complained about shoulder pain during office visits on December 2, 19 and 30, 2011, January 23, 2012 and February 10, 2012. AR 311, 314, 316, 318-19 and 321. On February 17, 2012, Dr. Todd Duellman diagnosed plaintiff with left shoulder subacromial impingement syndrome. AR 271-72, 278-79. However, as the Appeals Council pointed out, Dr. Duellman noted at that visit that plaintiff had improved after receiving a steroid injection and physical therapy. Id. The Appeals Council also noted correctly that plaintiff did not seek any further treatment for his shoulder after February 2012. AR 6.

Plaintiff faults the Appeals Council for not considering the credibility of his subjective complaints of neck and shoulder pain or the administrative law judge's finding that his complaints were credible. Although plaintiff says that he complained about having neck and shoulder pain before September 30, 2011, his argument includes no specific discussion of his subjective complaints. In the fact section of his brief, plaintiff quotes the administrative law judge's written decision, which refers to general statements that plaintiff made in his initial application; a disability report; and a function report about having shoulder pain and not being able to raise his arms above his chest. AR 23 (citing AR 185, 192 and 205). Plaintiff also notes that he testified at the hearing that he has trouble lifting and cannot raise

his left arm very far without having pain. AR 42-43. (Although plaintiff suggests in his briefs that these symptoms started right after he stopped working in 2009, his testimony is not clear on this point and seems to refer to his current condition.) Finally, progress notes dated December 2, 2011 and January 20, 2012 (after his last insured date) reveal that plaintiff told his doctors that he had experienced neck and shoulder pain for "years" and that his neck bothered him more in the "fall of 2011." AR 311 and 320.

Contrary to plaintiff's assertion, the Appeals Council specified that it "considered [plaintiff's] statements concerning his subjective complaints (Social Security Ruling 96-7p), including his statements regarding the effect of his pain" and found them unsupported by the record. It pointed out correctly that plaintiff had infrequent treatment before the expiration of his last insured date and that the limited records dated before September 30, 2011 did not document recent neck or shoulder pain. In addition, the Appeals Council gave consideration to plaintiff's argument on appeal that he had reported having shoulder pain for "years" and that his condition was degenerative. It dismissed this argument because a state agency medical consultant had reviewed the entire medical record and concluded on August 27, 2013 that as of September 30, 2011, plaintiff could lift up to twenty pounds occasionally and had no manipulative limitations. AR 6.

Plaintiff does not challenge any of the reasons provided by the Appeals Council for discrediting plaintiff's subjective complaints and finding that plaintiff did not have disabling symptoms of neck and shoulder pain before the expiration of his last insured date. I note that in an unrelated section of his brief discussing the administrative law judge's decision,

plaintiff mentions a function report in which he reports that he did not seek treatment for several years after his shoulder surgery in 2000 and discectomy in 2002 because he did not have insurance. Dkt. #9 at 22-23 (citing AR 191). In the same report, plaintiff explained that even though he had brought up his shoulder problems with Dr. Crowthers on numerous occasions, Dr. Crowthers ignored the complaints until one of plaintiff's last visits with him. (Although plaintiff does not specify what visit this was, presumably it was one that occurred in December 2011.) However, because plaintiff does not develop an argument that the Appeals Council failed to consider these as reasons for why he may not have sought treatment for his neck and shoulder pain, I have not addressed the argument and consider it waived. Wehrs v. Wells, 688 F.3d 886, 891 n.2 (7th Cir. 2012) (undeveloped and unsupported arguments are considered waived). In any event, even if plaintiff had developed such an argument, I would not find it persuasive. Plaintiff had access to medical care before September 30, 2011, including treatment from providers other than Dr. Crowthers, but never reported having neck and shoulder pain at that time.

I find that plaintiff has not met his burden of showing that the credibility determination was patently wrong. Schmidt v. Astrue, 496 F.3d 833, 843 (7th Cir. 2007) (credibility determination will be reversed only if claimant can show it was patently wrong). In addition, even if the Appeals Council should have found plaintiff credible, none of the statements to which plaintiff refers in the fact section of his brief establish with any certainty that he suffered from disabling neck or shoulder pain before September 30, 2011.

In another argument, plaintiff contends that the Appeals Council had a myopic view

of the record and incorrectly assumed that his neck and shoulder problems began when he sought treatment in December 2011. Relying on Lester v. Chater, 81 F.3d 821, 828 (9th Cir. 1996) and Estok v. Apfel, 152 F.3d 636, 638 (7th Cir. 1998), he argues that medical evaluations performed after the expiration of a claimant's insured status are relevant to an evaluation of a "preexpiration condition." Dkt. #9 at 12 and 21. Plaintiff reasons that because his condition was degenerative and not the result of a traumatic event, his problems must have begun before December 2011. Although I agree that a retrospective diagnosis may be relevant in determining whether a claimant was disabled during his insured period, plaintiff "must provide sufficient evidence of actual disability" before the expiration of his last insured date. Estok, 152 F.3d at 638. See also Castile v. Astrue, 617 F.3d 923, 926 (7th Cir. 2010) (burden is on claimant to prove his impairment is severe). Plaintiff has not met this burden. As discussed, he does not cite any clinical findings or subjective complaints establishing that his neck and shoulder condition were disabling before he began seeking treatment in December 2011.

Finally, plaintiff seeks to defend the administrative law judge's decision awarding him benefits on the ground that it "appears to follow" Social Security Ruling 83-20 related to determining the onset date of a disability. Dkt. #9 at 13 and 21. As defendant points out, neither the administrative law judge nor the Appeals Council discussed SSR 83-20. More important, the decision under review on this appeal is that of the Appeals Council and not the administrative law judge. Plaintiff does not contend that the Appeals Council violated SSR 83-20 in any way. As a result, it is unclear why it is relevant other than to bolster what

plaintiff believes to be the correct decision by the administrative law judge. Generally, the ruling requires that with respect to disabilities of non-traumatic origin, three factors are relevant in determining the onset date: the applicant's allegations, work history and medical and other evidence. The parties agree that plaintiff's work history shows that his last insured date was September 30, 2011. Plaintiff also does not cite any medical evidence showing that he was severely impaired by neck and shoulder issues on or before that date. This leaves plaintiff's allegations, which the Appeals Council reasonably found lacking and not supported by the medical evidence for the reasons discussed above.

In sum, I find that the Appeals Council reasonably concluded that plaintiff failed to meet his burden of showing that he was severely impaired by neck and shoulder pain before the expiration of the date that he was last insured under the Social Security Act.

B. Residual Functional Capacity

The administrative law judge stated that she added the limitations of unscheduled breaks and being off task more than 10 percent of the workday because they are supported by plaintiff's "generally credible statements regarding his pain." AR 25. It is unclear from the decision what specific statements that the administrative law judge was referring to, but plaintiff did testify at the hearing that he has been in constant back pain since 2009 and has to lie down every 20 to 30 minutes. AR 37-42. The Appeals Council failed to adopt the limitations related to unscheduled breaks and being off task, finding they were not supported by the record. Apart from arguing that the Appeals Council did not consider the credibility

of his subjective complaints of pain, plaintiff does not raise any specific challenges to the Appeals Council's residual functional capacity assessment and fails to develop an argument that more restrictive limitations were necessary.

As discussed at length above, the Appeals Council did consider plaintiff's credibility. In addition, it made the following findings with respect to the reported severity of plaintiff's back pain before the expiration of his date last insured:

- On March 18, 2011, plaintiff reported to Dr. Budleski that his pain was only a two out of ten and that he had stopped taking Tramadol in favor of Tylenol and Ibuprofen for pain relief. AR 323.

- Although the physical examination on March 18, 2011 showed that plaintiff had a reduced range of motion and some weakness in his left leg, the strength in all of his other muscles was a five out of five and there was no tenderness in his low back. AR 324-25.

- On August 17, 2011, the last documented treatment visit prior to the expiration of plaintiff's insured status, plaintiff reported discontinuing Ibuprofen and feeling well. The visit focused on plaintiff's abdominal issues and made no mention of any other pain. AR 309.

- Plaintiff's next report of increased back pain was on May 31, 2013, more than one year and eight months after the expiration of his date last insured. At that time, plaintiff reported worsening low back pain "over the last year" to his treating physician, Dr. Natividad. AR 338.

AR 7. A review of the medical record confirms that although plaintiff reported on February 21, 2011 that he had been having sciatic pain for two months, AR 306, he stated in the March 18, 2011 office visit that his symptoms had improved and he no longer needed prescription pain medication. AR 323. By August 2011, plaintiff was no longer complaining about back pain or sciatic pain in his appointments with Dr. Crowthers. AR 307-10. Without more, the Appeals Council could reasonably conclude that plaintiff's back pain was

not as disabling as plaintiff claimed before the expiration of his last insured date. Because the Appeals Council gave specific reasons for discrediting plaintiff's subjective complaints and plaintiff has failed to show that those reasons were not supported by the record, remand is not warranted.

ORDER

IT IS ORDERED that plaintiff Mark Schloesser's motion for summary judgment, dkt. #8, is DENIED. The Appeals Council decision denying plaintiff benefits is AFFIRMED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 19th day of February, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge