IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL J. DeLONG,

ORDER

Plaintiff,

00-C-0222-C

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

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Plaintiff Michael J. DeLong has filed objections to the report and recommendation issued by the United States Magistrate Judge on November 5, 2001, in which the magistrate judge recommended that this court affirm the decision of defendant Commissioner of Social Security denying plaintiff's application for Supplemental Security Income benefits. Plaintiff contends that the magistrate judge erred in three respects: 1) he did not use the proper standard of review; 2) he erred in finding that the administrative law judge had obtained a valid waiver of counsel from plaintiff; and 3) he erred in finding that the administrative law judge had analyzed the evidence reasonably and that she articulated her conclusions

adequately.

Plaintiff's first ground for objection overlaps his other two. He argues that in finding that plaintiff had waived his right to counsel, the magistrate judge adopted post hoc rationalizations propounded by defendant Commissioner and in finding that the administrative law judge had reached a valid decision, the magistrate judge disregarded circuit case law. Rather than discuss these arguments separately, I will analyze them in connection with plaintiff's objections to the magistrate judge's specific conclusions.

As to the validity of the waiver of counsel, plaintiff objects to the magistrate judge's reading of the record as a whole to find that plaintiff made a valid waiver of his right to representation at his hearing. Plaintiff has a legitimate point. It has been ten years since the Court of Appeals for the Seventh Circuit first stated the requirement that administrative law judges advise pro se claimants of their right to representation. The judges were to explain to a claimant how a lawyer could assist the claimant in the proceedings, that the claimant might be able to find a lawyer who would provide assistance for free or on a contingency basis and that if the arrangement is a contingency fee, the fee would be limited to 25% of the past-due benefits awarded. See Thompson v. Sullivan, 933 F.2d 581, 585 (7th Cir. 1991); see also Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994). There is no apparent justification for continued failures to abide by this requirement. It would not be difficult for defendant Commissioner to provide each administrative law judge with a script so as to

insure that each of the rights is discussed with each pro se claimant. In this case, for example, the Appeals Council, the magistrate judge and this court would have been spared considerable effort if the administrative law judge had had such a script or, at the very least, a check list of topics to cover. The record shows that she made a concerted effort to discuss the need for a representative with plaintiff's mother, who made the decision for plaintiff because plaintiff was a minor at the time. She explored the topic in depth and gave plaintiff's mother time to consider the decision. Unfortunately, despite the length of time the administrative law judge spent going over the matter with plaintiff's mother, she omitted information about the 25% cap on the contingency fee and she did not explain just how a representative might be able to help plaintiff.

It appears, however, that plaintiff's mother had all the information she should have had when she made her decision to waive her right to representation at the hearing. As the magistrate judge pointed out, plaintiff's mother was advised in writing well before the hearing of her son's right to be represented at the hearing and of her option of obtaining a list of legal referral and service organizations. She was sent a leaflet entitled "Social Security and Your Right to Representation" that defendant represents contains detailed information about what a representative can do to help a claimant prepare for a hearing. (Plaintiff does not deny that it does.) The same leaflet contains information about the 25% limitation on fees. Moreover, at the hearing, the administrative law judge discussed the matter of

representation with plaintiff's mother at great length and offered to postpone the hearing to allow her to find a lawyer. The administrative law judge reviewed with plaintiff's mother her telephone conversation with a representative from the Social Security Administration early in plaintiff's application process. In the course of that review, the administrative law judge reminded plaintiff's mother that the representative had talked to her about her right to have an attorney or non-attorney representative and had told her that some representatives do not charge a fee or that if they do, that the fee is based on a percentage of the award if the claim is successful. Plaintiff's mother agreed that she had been sent a list of representatives that would be available to assist her and that she had talked with a lawyer about the claim and that the lawyer had suggested to plaintiff's mother that she could see it through herself.

Plaintiff takes strong objection to what she characterizes as the magistrate judge's adoption of certain "post hoc rationalizations propounded by the Commissioner which were not stated by the ALJ" and substitution of "his own judgment for that of the Commissioner." Pltf.'s Objs., dkt. #14, at 3. Of necessity, the Commissioner's statements were "post hoc." Plaintiff never raised the issue of the inadequacy of the waiver of representation information before the administrative law judge; as a result, the administrative law judge had no reason to address it. The statements are not mere rationalizations but rather an attempt to determine from the record whether plaintiff's mother had enough information to have made a valid waiver.

Most important, neither the Commissioner's nor the magistrate judge's "post hoc" review of the record on this point relieves the Commissioner of her burden of showing that despite the omissions in the oral advice of rights, the administrative law judge developed the record fully and fairly. See Binion, 13 F.3d at 245 ("if the ALJ does not obtain a valid waiver, the burden is on the Secretary [now Commissioner] to show that the ALJ adequately developed the record"). I agree with the magistrate judge that the Commissioner has met that burden in this case. The administrative law judge questioned both plaintiff and his mother at length about his treatment history, his medications, his behavior, his social life, his academic achievements and his daily routine. The hearing lasted over an hour and the administrative law judge allowed plaintiff's mother to supplement the record with additional documents from his school and from the Juneau County Department of Health and Social Services.

Once the Commissioner has shown that the record was developed fairly and fully, the claimant has an opportunity to rebut the showing by establishing that he was prejudiced in some way by the lack of representation, such as by the omission of critical evidence. Plaintiff has failed to show how he has been prejudiced by the lack of counsel at the hearing. His failure to make this showing is not the result of lack of representation because plaintiff is represented by counsel in this court. Plaintiff does not deny that the administrative law judge questioned him and his mother thoroughly about a wide range of topics. He asserts

only that a representative would have made sure that the administrative law judge was advised of the deleterious effects of the medications plaintiff was taking and would have obtained a psychological report from the psychologist he was seeing. Plaintiff does not explain what information a psychological report would have provided or why the administrative law judge needed to ask plaintiff more questions about any subject, including the side effects of his medication. Plaintiff says now that the medication he took for depression made him sleepy and that the medication he took for his hyperactivity made him hyperactive (although this assertion makes little sense in light of the record evidence from plaintiff's school that plaintiff's performance was noticeably better when he was on the medication), but he does not explain how the sleepiness would change defendant Commissioner's determination that he did not qualify for benefits and the administrative law judge considered his hyperactivity in assessing his entitlement to benefits.

I conclude that plaintiff has failed to show that the magistrate judge erred in finding that plaintiff effected a valid waiver of his right to representation at his hearing before the administrative law judge.

As to the magistrate judge's review of the administrative law judge's conclusions, the record shows that her conclusions were based upon the evidence contained in the record. It is true that she erred in labeling the agency's physicians' opinions as "controlling" on the question whether plaintiff's impairments met or medically equaled any listed impairment or

whether functional equivalence was established under the "specific functions," "episodic impairments" or "treatment or effects of medication" methods. However, as the magistrate judge noted, the mistake did not affect the result. The fact is that the record contains no medical evidence that contradicts the opinions of the agency physicians, one of whom found that plaintiff did not have an impairment that met a listed impairment or was medically or functionally equal to a listed impairment and one of whom concluded that plaintiff's attention-deficit-hyperactivity disorder and depression resulted in functional impairments that were less than the "marked" or "severe" impairments that would entitle plaintiff to benefits.

Plaintiff challenges the magistrate judge's willingness to overlook the administrative law judge's mistake in characterizing the effect of the agency's physicians' evaluations. He asserts that in doing so, "the Magistrate disregarded Seventh Circuit case law which ruled that 'once published, a ruling is binding on all components of the Administration, "including ALJs," and is to be relied upon in determining cases where the facts are basically the same.' Warmoth v. Bowen, 798 F.2d 1109, 1111 n.5 (7th Cir. 1986)." In fact, the magistrate judge did not disregard Seventh Circuit case law. He acknowledged that the administrative law judge had erred in saying that the agency's physicians' opinions were "controlling," but he went on to say that the error was irrelevant in light of the entire record. The reality is that the opinions were the only medical evidence in the record that had any bearing on the

administrative law judge's determination that plaintiff did not have a listed impairment and that he did not have any limitation of a specific function, any limitation resulting from a chronic illness or any limitation resulting from treatment or the effect of medications. The decision requires medical evidence. Had the administrative law judge chosen to disregard the opinions of the agency's physicians altogether, she would have been left with a record that contained no medical evidence to support plaintiff's assertion of disability. In either case, whether she looked at the opinions of the agency's physicians or ignored them entirely, she could not have found in plaintiff's favor on the initial disability determinations.

After deciding that plaintiff did not have a listed impairment, the administrative law judge looked at the entire record to assess plaintiff's functional limitations in the requisite areas: motor, social, personal, cognition/communication and concentration/persistence/pace. Plaintiff argues that the administrative law judge erred in her review because she did not make a determination of plaintiff's and his mother's credibility but, as the magistrate judge found, the administrative law judge considered that testimony and essentially accepted it. However, she found that neither that testimony nor anything else in the record established marked or severe limitations in the areas she had to assess.

Plaintiff argues that the administrative law judge could not have considered the entire record because she failed to mention the evidence that did not support her findings, such as two 1997 M-Team reports, Dr. Bergs's records and Mr. Boyd's reports. Plaintiff fails to take

into account the lack of support that this allegedly omitted evidence gives his own position. The M-Team said that it did not consider plaintiff learning disabled, although he needed special education help. Dr. Bergs saw little in the way of depression in plaintiff and no evidence of a reading disability. He assessed plaintiff as having a willingness to accept authority and discipline, showing signs of optimism about the future and having a sense of humor. Mr. Boyd found moderate to serious impairments in plaintiff's social or school functioning but reported that plaintiff had been getting along better with his father. None of this amounts to a sufficient showing to lead to a finding of disability, whether the evidence is considered separately or as a whole.

I conclude that the magistrate judge's recommendation to affirm defendant Commissioner's denial of plaintiff's application is well founded and that it should be adopted.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge is ADOPTED and the decision of defendant Jo Anne B. Barnhart, Commissioner of Social Security, to deny the application for Supplemental Security Income benefits of plaintiff

Michael J. DeLong is AFFIRMED.

Entered this 12th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge