IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DANIEL BUCHHOLTZ,

ORDER

Plaintiff,

02-C-0487-C

v.

JO ANNE B. BARNHART,
COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

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Plaintiff Daniel Buchholtz has filed objections to the report and recommendation entered by the United States Magistrate Judge on June 6, 2003. The magistrate judge recommended affirmance of defendant Jo Anne B. Barnhart's denial of plaintiff's applications for disability insurance benefits and supplement security income. Plaintiff objects to the recommendation, arguing that the magistrate judge erred in his determination that the administrative law judge had made an adequate assessment of plaintiff's residual functional capacity. Plaintiff contends that the administrative law judge did not propound an accurate hypothetical to the vocational expert, making the vocational expert's opinion

worthless.

According to plaintiff, the administrative law judge erred when he asked the vocational expert what jobs plaintiff could perform if he had to stand for *brief* periods of time. This was erroneous, plaintiff says, because the administrative law judge did not specify whether the standing included an opportunity to walk around and because he did not quantify what he meant by "brief." Although the administrative law judge could have made his question more detailed, I am not persuaded his failure to do so was an error. The vocational expert had sat through the medical expert's testimony and had heard the doctor say that plaintiff needed to be on his feet for 5-10 minutes every half hour. Having heard this testimony, he would have understood what the administrative law judge meant by the term brief.

Plaintiff objects to the administrative law judge's failure to include in his hypothetical any reference to plaintiff's difficulty with bending. He argues that his inability to bend undermines the vocational expert's conclusion that he could perform his sedentary jobs either standing or sitting. (If he had to work at a bench job standing up, he would necessarily be required to bend over the bench to do the work and he asserts that this would cause him pain.) The record shows that the vocational expert gave this option in response to a question by plaintiff's attorney about what jobs would be available to plaintiff if he could sit only four hours a day, which was not the hypothetical that the administrative law

judge had posed or on which he relied. Even if the administrative law judge considered that plaintiff could perform some of his work standing during the five or ten minutes he needed for a change of position every half-hour, this would not be an error. He had found that plaintiff retained the ability to bend occasionally. Nothing in the record supports the conclusion that plaintiff could not bend slightly at the waist for short periods of time every half-hour, with the exception of plaintiff's testimony, which the administrative law judge found not credible because it was not supported by the medical evidence.

It is not necessary to re-construe the administrative law judge's hypothetical as referring to *frequent* changes in position rather than *brief* changes in order to find that the record contains substantial evidence to support his finding that plaintiff retained the residual functional capacity to perform a sedentary job that permitted him the opportunity to change his position for five to ten minutes every half-hour. As to plaintiff's argument that the magistrate judge erred in "perform[ing] an erroneous evaluation of the ALJ's credibility determination, namely by using *post hoc* rationale and moral judgments," Plt.'s Objs., dkt. #19, at 8, there is more smoke than fire. Plaintiff contends that the magistrate judge made up his own reasons for upholding the administrative law judge's evaluation of plaintiff's credibility but the magistrate judge was merely summarizing the evidence in the record that supported the administrative law judge's conclusion. He was not making a *post hoc* rationale, as plaintiff argues. The administrative law judge found that plaintiff was not credible; that

conclusion can be supported on a number of grounds, including those that the administrative law judge spelled out in his decision.

Neither the magistrate judge nor the administrative law judge relied on plaintiff's alleged "disincentive to work" as a reason to deny him benefits. It was simply a factor that helped to explain why a person with no incapacitating physical problems would not be looking for work.

Finally, plaintiff argues that the administrative law judge should have considered plaintiff's "heart condition" and the magistrate judge should not have criticized plaintiff for referring to it. This argument is without merit. It is true that certain tests disclosed some anomalies in plaintiff's heart; it is also true that the record contains no interpretation of the test results by any doctor. There was nothing for the administrative law judge to take into effect. It would have been improper for him to try to interpret the test results and determine their effect on plaintiff when no doctor has done so. I do not agree with plaintiff that the magistrate judge should not have criticized him for raising this argument.

ORDER

IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge is ADOPTED, with the one exception of the magistrate judge's discussion of the administrative law judge's summary of plaintiff Daniel Buchholtz's residual functional

capacity. FURTHER, IT IS ORDERED that the decision of defendant Jo Anne B. Barnhart denying plaintiff's application for disability insurance benefits and supplemental security income is AFFIRMED.

Entered this 23rd day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge