IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEANNE M. STEBBINS,

OPINION AND ORDER

Plaintiff,

03-C-0117-C

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

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Defendant Jo Anne B. Barnhart, Commissioner of Social Security, has filed objections to the report and recommendation entered by the United States Magistrate Judge on August 20, 2003. The commissioner denied plaintiff Jeanne M. Stebbins's application for Disability Insurance Benefits; on appeal to this court, the magistrate judge recommended reversal and remand of this decision pursuant to sentence four of 42 U.S.C. § 405(g), with directions to the commissioner to award benefits to plaintiff. The commissioner objects to the recommendation, arguing that a district court may reverse and order the award of benefits only when the record yields "but one supportable conclusion" that plaintiff is disabled, Campbell v. Shalala, 988 F.2d 741, 744 (7th Cir. 1993), and that the record in this case

does not fit within that category.

I agree with the magistrate judge that the administrative law judge's decision in this case falls well below the standard that the commissioner should expect of persons in his position. I agree also that the decision is not one that the commissioner should be defending. However, I am not willing to direct the commissioner to award benefits to plaintiff without further investigation of one piece of undeveloped evidence. Therefore, I will remand the case with directions that it be heard by a different administrative law judge who will consider all of plaintiff's evidence, develop the facts bearing on plaintiff's reports of pain and investigate the extent to which plaintiff provides child care for her grandson.

Plaintiff's application for benefits rests on her claim that her migraine headaches are so debilitating as to prevent her from working on a regular and consistent basis. The administrative law judge found "no medical evidence of any diagnosed complaint which might be expected to cause pain." A.R. at 14. He cited the negative MRI test, the lack of any EEG evidence of abnormality, the absence of neurologic, motor or sensory abnormalities seen in physical examinations and the facts that plaintiff had been on prescription opiates for several years, that her treating physician had cut off her medications and that a consultant had recommended the same course of action. He noted that one doctor had described plaintiff's headaches as "mixed vascular/tensions headaches with social stressors," id., that another had found a "very clear psychological overlay[s]" to her headaches, id., and

that one doctor had noted that plaintiff had described her life as "one big disappointment." Id. He made no reference to the reports of plaintiff's treating physician or the number of medical providers who had treated plaintiff for migraine headaches.

The administrative law judge never said that he finds plaintiff's complaints of headaches and the resulting limitations not credible, yet it is evident from his opinion that he did not believe plaintiff or her treating physician. Social Security Ruling 96-7p requires an administrative law judge to give "specific reasons for the finding on credibility, supported by evidence in the case record, [that are] sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." See Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001) ("ALJ should have explained the 'inconsistencies' between [claimant's] activities of daily living . . . his complaints of pain, and the medical evidence"); Luna v. Shalala, 22 F.3d 687, 691 (7th Cir. 1994)(when claimant indicates that pain is significant factor for inability to work, administrative law judge must "obtain detailed descriptions of claimant's daily activities . . . [and] investigate all avenues presented that relate to pain"). In this case, the administrative law judge never took the first step of saying that he found plaintiff and her treating physician incredible, as he should have done, if that is what he believed. Skipping this crucial step, he made no effort to investigate plaintiff's reports of pain or to explain why he found her incredible, as he is required to do. Instead, he cited only

the evidence that cast doubt on plaintiff's complaints of debilitating headaches.

The administrative law judge erred again in basing his decision on the lack of measurable physical findings because the record contained no evidence that migraine headaches can be detected or measured by imaging techniques, laboratory tests or physical examination. He never addressed the fact that none of the doctors who treated plaintiff questioned the existence or severity of her headaches, despite the lack of observable physical evidence. One consulting physician wrote that the headaches might have "social stressors," without explaining the significance of her comment, such as how such headaches would be different from migraines or whether they would be less painful or easier to cure. Despite these deficiencies, the administrative law judge relied on her diagnosis in his decision.

The administrative law judge seemed to think that plaintiff's complaints of pain were nothing more than an effort to secure prescription drugs. He observed in his decision that Dr. Zerofsky, her treating physician had "cut her off," but this statement is misleading. The record shows that Zerofsky became concerned about plaintiff's dependency because of an incident concerning her prescription and took her off her medication *until she could see an addiction specialist.* The specialist concluded that plaintiff was not addicted. Although at least three of the doctors who saw plaintiff believed that she might be helped by decreasing her dependence on pain medication, their recommendations do not show that they doubted that plaintiff suffered from debilitating headaches but rather that they thought she might be

suffering a rebound reaction from the medication.

It is difficult to imagine what additional evidence plaintiff could have marshaled to support her application. Plaintiff has a bulging medical record showing emergency room visits over the years, all of which indicate complaints consistent with classic migraine symptoms: throbbing head, sharp pain, headaches lasting for days at a time, nausea and sensitivity to light, sound and smell. Her doctors never questioned the reality of her underlying medical impairment. She saw a neurologist for four years; he believed that she had an impairment serious enough to warrant prescriptions for heavy narcotics. After he and plaintiff had a dispute over a medication mixup, plaintiff saw another neurologist for evaluation. The consulting neurologist diagnosed plaintiff with "migrainous" headaches with elements of analgesic rebound headaches.

In the face of this evidence, defendant sets out five reasons why she believes that plaintiff has not established a disability. First, she contends that Dr. Zerofsky, plaintiff's treating neurologist, failed to explain what work-related activities plaintiff could and could not perform. This is a red herring. Zerofsky did not find plaintiff disabled for exertional reasons; he found her disabled because of the number of days each month that she was in too much pain to go to work at any kind of job. He explained that plaintiff had daily headaches that were present 95 percent of the time, that they could be at a pain level of "10" out of a possible 10 and that plaintiff might have "difficulty with [her]

memory/concentration" when she had a severe headache.

Second, defendant argues that because Zerofsky did not explain the medical findings that supported plaintiff's limitations, the administrative law judge had no reason to give his opinion any weight. It is true that an administrative law judge need not give controlling weight to the opinion of a treating physician if the opinion "is not well-supported by medically accepted clinical and laboratory diagnostic techniques or if it is inconsistent with the other substantial evidence in the case record." SSR 96-2p. However, the administrative law judge is required to address the opinion of a treating physician; he cannot simply ignore it. Green v. Shalala, 51 F.3d 96, 101 (7th Cir. 1995) (administrative law judge must "minimally discuss" claimant's evidence that contradicts Commissioner's position). Moreover, defendant cannot point to anything in this record that is inconsistent with the treating physician's report. The absence of "medically accepted clinical and laboratory diagnostic techniques" is not "evidence" if there are no such techniques that can detect migraine headaches.

Third, defendant notes that Zerofsky's opinion was based largely on plaintiff's own descriptions of her pain. However, she does not explain how else a doctor is to diagnose and treat migraine headaches. The cases she cites in support of her position are inapposite. Dixon v. Massanari, 270 F.3d 1171 (7th Cir. 2001), stands for the unobjectionable proposition that "[a]n ALJ may properly reject a doctor's opinion if it appears to be based

on a claimant's exaggerated subjective allegations." Id. at 1178. In Dixon, however, the claimant had alleged a kidney infection, diabetes, high blood pressure and knee and back pain. Although her treating physician characterized the claimant's arthritis as "very severe," the administrative law judge was entitled to ignore the report because the record showed that the orthopedic specialists who had examined the claimant had found that she had a fairly good range of motion and muscle strength and the record did not show any medically demonstrable degenerative changes. In Butera v. Apfel, 173 F.3d 1049 (7th Cir. 1999), the claimant's treating physician reported that the claimant was in chronic pain and could not lift more than five pounds, despite the fact that the claimant had normal x-rays, with the exception of mild degenerative changes in his spine, normal reflexes, a normal ability to raise his right leg and the ability to stand, walk and balance on his heels and toes. Two orthopedic surgeons who examined the claimant at his treating physician's request noted that he had a herniated disc and a limited range of motion in his hip, but found no evidence of motor, sensory or reflex loss. In addition, the administrative law judge found the claimant's testimony not credible because he was vague and evasive in answering questions, was indefinite in describing the character, severity and location of his pain, declined to answer questions about his work history and finally admitted that he had been imprisoned for burglary and assessed interest and penalties for tax evasion.

In contrast to the cases defendant cites, none of the doctors who saw plaintiff thought

that her allegations were exaggerated. In disregarding the treating physician's opinion of plaintiff's ability to work, the administrative law judge focused on what he believed were plaintiff's efforts to obtain narcotics for their own sake, the lack of objective medical evidence in the record to support the physicians' opinions and the likelihood that plaintiff's migraine headaches were a symptom of depression. This last finding is puzzling. Why would headaches caused by depression or stress be any less disabling than headaches caused by other factors? The administrative law judge did not say. It is difficult to escape the conclusion that he simply refused to believe that migraine headaches could be painful. See Decision, A.R. at 14:

> Technically, the undersigned must note that it is questionable whether the claimant's pain complaints require evaluation under the criteria of Social Security Ruling 96-7p, as there is simply no medical evidence of any diagnosed complaint which might be expected to cause pain.

Fourth, the commissioner objects to the magistrate judge's recommendation, arguing that "the record shows that a problem developed regarding Plaintiff's use of medication that raises additional questions regarding Dr. Zerofsky's opinion." Defendant does not explain what she means by this statement; one would think that if there were a "problem" regarding plaintiff's use of medication, Zerofsky would have been more likely to have written a negative evaluation of plaintiff, rather than to have supported plaintiff's application for benefits. The record shows that Zerofsky did have a question and sent plaintiff to a

specialist to check out a possible addiction problem, that the specialist found no evidence of addiction, although he recommended adjustment of the *psychotropic* medications plaintiff was taking because they did not appear to be working fully, and that Zerofsky resumed prescribing for plaintiff once she had seen the addiction specialist. It was only after all this that Zerofsky prepared his report for the Social Security Administration. The administrative law judge ignored this chronology and Dr. Zerofsky's opinion. The commissioner argues that the administrative law judge had no need to address that opinion because treating physicians often bring biases to the disability evaluation. The commissioner can only assume that this is why the administrative law judge ignored the opinion because he never said anything about it in his own decision.

Finally, the commissioner notes that the report of plaintiff's counselor's about plaintiff's headaches is of no value because the counselor is not an expert in headaches or medicine of any kind. The commissioner is correct; the counselor's report does not constitute medical evidence and it would not support a finding in plaintiff's favor in and of itself. However, it does provide additional support for plaintiff's complaints of pain.

In his decision, the administrative law judge noted that plaintiff "spent much of her time in child-care for her grandchild, while other records reflect that the grandchild was accompanying her to therapy sessions." A.R. at 15. He cites exhibit 7F for these findings. The only reference to childcare in exhibit 7F is a report from a treating physician, who wrote

that plaintiff "does child care for [her] son's 4 month old son." A.R. at 201. There is no reference in exhibit 7F to plaintiff's bringing her grandchild to therapy sessions, although there is a notation in exhibit 9F to this happening on one occasion. A.R. at 398. The administrative law judge relied on plaintiff's ability to provide childcare without knowing anything about the circumstances in which she provided the care, the frequency with which she provided it or the demands of the task. He never questioned her about it at the hearing or asked plaintiff why she did not refer to it when she described her typical day.

Although I share the magistrate judge's concern about the errors in the administrative record and the administrative law judge's refusal to give proper consideration to the medical records of plaintiff's persistent, debilitating pain, I am not prepared to hold that there is only one supportable conclusion that plaintiff is disabled. If a properly developed record would support the administrative law judge's assumption that plaintiff is providing extensive childcare for her grandson on a daily basis, it would be difficult to say that she is unable to engage in substantial gainful employment. Therefore, I will remand her case to the commissioner pursuant to sentence four of 42 U.S.C. § 405(g), for a hearing before a different administrative law judge, for the limited purpose of taking additional evidence about plaintiff's daily activities and her provision of childcare for her grandchild in particular.

ORDER

IT IS ORDERED that the United States Magistrate Judge's recommendation for a remand of the defendant commissioner's decision is ADOPTED, with modifications. FURTHER, IT IS ORDERED that this matter is REMANDED to the defendant commissioner for rehearing before a different administrative law judge for the limited purpose of taking additional evidence about plaintiff's provision of childcare for her grandson, as it bears upon her ability to engage in substantial gainful employment.

Entered this 21st day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge