

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

ROBERT E. SCHMIDT,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

ORDER

03-C-0281-C

Plaintiff Robert E. Schmidt has filed objections to the report and recommendation entered by the United States Magistrate Judge on December 2, 2003. The magistrate judge recommended affirmance of defendant's finding that plaintiff was not disabled and therefore not eligible for Disability Insurance Benefits or Supplemental Security Income under 42 U.S.C. §§ 416(i), 423(d) and 1382c(a)(3)(A). Plaintiff objects to this recommendation. He argues that the court should remand his case to defendant for consideration of new and material evidence or, in the alternative, remand it under sentence four of § 405(g) on the ground that the administrative law judge's decision is not supported by substantial evidence.

After reviewing the objections, the report and recommendation and the administrative

record, I am persuaded that the magistrate judge made the correct recommendation. Plaintiff's objections do not require remand either for consideration of new evidence or for a new hearing.

Plaintiff objects to what he characterizes as the magistrate judge's failure to address his claim that the Appeals Council violated his right to counsel. Although plaintiff argues this question as if plaintiff never had counsel at any stage of the proceedings, in fact plaintiff was represented at all preliminary stages of his application for benefits, through his hearing before the administrative law judge. On the day that his time expired for submitting new materials to the Appeals Council, plaintiff's current counsel wrote to request a 60-day extension for filing the materials and accompanying legal argument, stating that plaintiff's prior counsel had had to withdraw because of a conflict of interest. The Appeals Council never responded to this request. Six months later, it issued an order denying plaintiff's request for review of the administrative law judge's decision.

The magistrate law judge found that the materials plaintiff would have submitted to the Appeals Council were neither new nor material and concluded from this that plaintiff was not prejudiced by his inability to submit them. Plaintiff objects to this, arguing that if his attorney had been given an opportunity, he could have raised issues that might have persuaded the Appeals Council to remand the matter. This is not a compelling argument. As the magistrate judge has found, the documents that plaintiff would have added to the

record were either irrelevant because they related to medical findings made after the administrative hearing or they were matters that plaintiff could have produced before the administrative law judge. As for the legal argument that plaintiff never had a chance to make, he has had a chance to make his arguments in this court and has not shown that any of those arguments would have influenced the Appeals Council's decision. Although the Appeals Council imposes a lower standard on a claimant than a court can, plaintiff has not shown that his arguments in favor of remand would be convincing, even under a lower standard of persuasion. I find no basis on which to conclude that that the Appeals Council violated plaintiff's right to have representation of counsel or the right to present additional evidence.

Turning to plaintiff's second ground for remand, the insufficiency of the evidence before the administrative law judge, I agree with the magistrate judge that the record supports the administrative law judge's finding that plaintiff's irritable bowel symptoms did not impose any limitations on his residual functional capacity. I do not agree with plaintiff that when the magistrate judge reached this conclusion, he did so after searching the record on his own initiative to find evidence to support the administrative law judge's finding. The magistrate judge outlined the findings that the administrative law judge made that supported the conclusion that the administrative law judge reached; the magistrate judge did not supply his own reasons for that conclusion.

Next, plaintiff argues that when the administrative law judge evaluated plaintiff's complaints of back pain, he erred by making the conclusory finding that plaintiff's activities of daily living are not significantly restricted. As the magistrate judge explained, the administrative law judge did not confine his finding to plaintiff's daily activities. He considered the lack of medical evidence to support plaintiff's complaints, the lack of any prescription pain medication, the lack of any ongoing treatment or therapy for his conditions and his recent work activity. It is inaccurate to characterize this evidence as "conclusory" or to compare it with cases in which administrative law judges did not provide an adequate explanation for finding claimants not credible.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge is ADOPTED. The decision of defendant Commissioner of Social Security denying plaintiff Robert E. Schmidt's application for benefits under the Social Security Act is AFFIRMED. Plaintiff's motion for a remand to defendant for consideration of new and material evidence

pursuant to sentence six of 42 U.S.C. § 405(g) is DENIED.

Entered this 22nd day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge