IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CRAIG EVERAERT,

OPINION AND ORDER

Plaintiff,

03-C-0358-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 herein by the United States Magistrate Judge on April 26, 2004. The magistrate judge recommended a remand of plaintiff Craig Everaert's application for Disability Insurance Benefits pursuant to sentence four of 42 U.S.C. § 405(g) for a new credibility assessment. It was his opinion that the administrative law judge's assessment was inadequate because he had not given specific reasons for his determination that plaintiff's complaints of pain were not credible. After reviewing the administrative law judge's report, the administrative record and the briefs, I reach a different conclusion about the adequacy of the assessment. Therefore, I will not remand the matter to defendant but

will affirm her denial of plaintiff's application for disability benefits.

Plaintiff filed his application for Disability Insurance Benefits on May 28, 1999, alleging that he had been unable to work since July 11, 1998, because of impairments of his back and neck. In order to qualify for benefits, he had to show that he was disabled on or before September 30,1998, when his eligibility for benefits expired.

As the magistrate judge found, the objective medical evidence supports a finding that plaintiff can do light work. The only question is whether plaintiff's subjective complaints of pain are credible. If they are, the administrative law judge would have had to find plaintiff incapable of working. In finding that they are not, the administrative law judge relied in part on plaintiff's reports to Dr. Jeffrey Marquardt in March 1999 that he was able to perform household chores, such as dishes and laundry, and on a written report that plaintiff submitted to the Social Security Administration in July 1999, in which he stated that he cooked, did laundry, shopped, mowed the lawn and visited with friends. As the magistrate judge pointed out, the administrative law judge failed to mention that plaintiff had stated in his written report that he could engage in these activities for only about two hours each week and that he usually left part of the lawn for his wife to finish. In the same report, plaintiff stated that his chores took longer than they used to because he had to stop and use pain pills and ice packs. Dr. Marquardt does not say in his brief report whether he and plaintiff discussed the extent or duration of plaintiff's work. At the first hearing on his

application, held in June 2000, plaintiff described his typical day as involving short spurts of activity, interspersed with intervals of sitting down or even lying on a couch with two ice packs on his back. This activity does not demonstrate that plaintiff is not being truthful about the pain he experiences.

However, the administrative law judge's careful evaluation of the other evidence in the record led him to the reasonable conclusion that plaintiff's reports of pain are not credible. For example, he noted that plaintiff did not visit a doctor for any of his allegedly disabling injuries or pain from June 12, 1997 to June 15, 1998, when he saw Dr. Marquardt for increased pain in his lower back and right ankle. (Plaintiff had a spinal fusion at L3-4 in 1992.) Plaintiff made no mention of any neck pain at that time and he made no further mention to Marquardt of ankle pain until June 2001. In July 1998, plaintiff fell and suffered a compression fracture in his lowest thoracic vertebra (T12), for which he was treated. On August 27, 1998, he told Marquardt that he was completely free from pain in the area of the fracture and that he had only some aching and stiffness in his lower back, which improved with walking and exercising. On September 22, 1998, he returned to Dr. Marquardt, complaining that the back pain was causing him some sleep problems but stating that he had cut back his pain medication to one Percocet once or twice a day. Marquardt recommended further neurosurgical evaluation. Plaintiff never followed up on the recommendation.

In March 1999, plaintiff reported depression to Marquardt for the first and only time.

Although he never brought it up again or sought any treatment for it, he mentioned it in his 1999 application for benefits.

The administrative law judge took into account plaintiff's lack of effort during his functional capacities evaluation in August 1999 and noted that even with the lack of effort, plaintiff demonstrated the ability to perform at a light exertional level for both dynamic strength and positional tolerances.

Finally, the administrative law judge observed that plaintiff had never participated in any formal exercise or rehabilitation program; he had never shown any interest in pursuing help from a vocational service; and he had not had any significant earnings for the previous 28 years. (Plaintiff's annual earnings since 1976 never exceeded $10,000 and he had only minimal earnings from 1992, when he suffered the back injury that was treated by a spinal fusion in his lumbar spine, through 1996).

In finding the administrative law judge's evaluation incomplete, the magistrate judge relied on several recent opinions of the Court of Appeals for the Seventh Circuit that, in his opinion, show the inadequacy of the evaluation in this case. In Carradine v. Barnhart, 360 F.3d 751 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit found that the administrative law judge had not evaluated plaintiff's subjective complaints of pain adequately because he used the plaintiff's somatization disorder (a psychological disorder that led her to experience pain as physical even though it might have been psychological in

nature) as support for a finding that plaintiff was exaggerating her pain. The court found this erroneous. "If pain is disabling, the fact that its source is purely psychological does not disentitle the applicant to benefits." Id. at 654. Not only did the administrative law judge reject the possibility that the plaintiff's pain might be disabling even though it had a purely psychological source, he disregarded the extensive procedures that the plaintiff had undergone in her effort to relieve it. The court thought it improbable that the plaintiff would have undergone these procedures only to increase the likelihood that she would obtain disability benefits or that she was such a good actress she could fool so many doctors and medical personnel into believing her reports of extreme pain. As in plaintiff's case, the administrative law judge found the plaintiff's reports of her daily activities (household chores and two-mile walks) inconsistent with her complaints of pain. The court of appeals criticized the administrative law judge for not taking into consideration the limited amount of time that these activities consumed and the fact that plaintiff had never maintained that she was in severe pain "every minute of the day." Id. at 755.

In Clifford v. Apfel, 227 F.3d 863 (7th Cir. 2000), the court of appeals found that the administrative law judge had erred in rejecting a doctor's opinion on the sole ground that the opinion was contradicted by the claimant's reports of her daily activities, which included six-block walks, household chores and shopping. The court found that the administrative law judge had failed to give proper weight to the claimant's complaints of

pain but had reached the cursory conclusion that the medical evidence did not support the limitations on her daily activities. In doing so, he ignored the record, which was "replete with instances where [plaintiff] sought medical treatment for pain symptoms related to her physical impairments, including the arthritic condition for which she [was] taking pain medication." Id. at 872.

The magistrate judge characterized these cases and others as giving reviewing courts "more freedom to review credibility determinations by administrative law judges when the determination rests on objective factors or fundamental implausibilities rather than subjective considerations such as the claimant's demeanor and presentation at the hearing." Rep. & Rec., dkt. #21, at 33. Defendant objects to any suggestion that the standard of review has changed. I am not persuaded that it has. Rather, the court is noting the obvious: a reviewing court can better gauge the significance of objective evidence relied upon by the factfinder than it can the significance of matters not shown on the record, such as the applicant's apparent ability to sit through a hearing without squirming in his chair or otherwise exhibiting pain. As far as I can tell, it remains the law that reviewing courts will not overturn credibility determinations unless persuaded that the determinations are patently wrong. E.g., Herron v. Shalala, 19 F.3d 329, 335 (7th Cir. 1994); Wolfe v. Shalala, 997 F.2d 321, 326 (7th Cir. 1995). In both Carradine, 360 F.3d 751, and Clifford, 227 F.3d 863, the court of appeals found good reason to hold the administrative law judge's

determination "patently wrong."

Although these cases make it harder for administrative law judges to ignore or discount disability insurance applicants' subjective complaints of pain, it is still their obligation to examine the entire record to determine whether those complaints are credible. Someone looking only at plaintiff's reports of his daily activities might be persuaded that his complaints of disabling pain are accurate. He does little work during the day and only sporadically. Yet unlike the plaintiff in Carradine, 360 F.3d 751, who reported being able to exercise and engage in other activities during the periods in which her pain receded, plaintiff describes himself as being in constant pain at all times. Such a report does not jibe with being able to carry out some household chores.

Even if plaintiff's household activities chores were limited, the administrative law judge had reason to doubt the extent of pain plaintiff was experiencing when the evidence showed that he went from June 12, 1997 to June 15, 1998, and again from August 1999 until June 2001, without seeing doctors for any help with his allegedly disabling back and neck problems. It does not appear from the records that he even mentioned back or neck pain to his doctors during these intervals even though he saw them for other reasons. Moreover, plaintiff took very little pain medication (only one to two Percocets a day); he was able to sleep six hours with the aid of sleep medication; he was undecided about undergoing any further evaluation of his back problems after September 1998; he did not enroll in any

formal exercise or rehabilitation program; he did not participate in any vocational service program; and his work history suggested strongly that he lacked the motivation to work. When these facts are combined with the lack of any objective findings, they provide ample reason for the administrative law judge to discount plaintiff's complaints.

Within three months of the expiration of plaintiff's eligibility period, his orthopedic surgeon examined him and found a reduced lumbar range of motion, but normal gait, normal sensation, normal reflexes, normal motor functioning, negative straight leg raising test and no spasm. Also, on July 12, 1998, when plaintiff came to the emergency room after suffering a compression fracture of his thoracic spine, Dr. Marquardt noted that plaintiff had no tenderness or pain in the lower lumbar spine where he had had his fusion, good movement of his lower extremities with normal strength and normal sensation and was "actually doing knee to chest bends to help relieve his pain while [lying] on the stretcher." Tr., dkt. #10, at 340.

The magistrate judge criticized the administrative law judge for doubting plaintiff's credibility because of his failure to seek medical treatment on a regular basis, to undergo any additional medical procedures, to participate in any kind of physical therapy and to use vocational rehabilitation services. Noting that the social security regulations direct administrative law judges not to discount subjective complaints on this basis without considering information given by the plaintiff or contained in the record, the magistrate

judge suggested valid reasons why plaintiff might have failed to seek out this help. I am not persuaded that the administrative law judge is obligated to hypothesize explanations for plaintiff's failure to seek vocational help or physical therapy in the absence of evidence that plaintiff had valid reasons for not availing himself of such help. It is true that plaintiff has a legitimate reason for avoiding the additional surgery suggested by Dr. Manz if other doctors have told him that the surgery would not guarantee him any relief. However, there is no similar evidence in the record to justify plaintiff's failure to use vocational and physical therapy resources.

Unlike the plaintiff in Carradine, 360 F.3d 751, plaintiff was not diagnosed as having a somatization disorder and he did not subject himself to extensive procedures in an attempt to ameliorate his pain. Unlike Clifford, 227 F.3d 863, this is not a case in which the opinion of the plaintiff's treating physician is uncontroverted and dispositive. Finally, in contrast to the claimants in both cases, plaintiff had a spotty and inconsistent history of seeking medical treatment. A close review of his reports to his doctors suggests that he was equally inconsistent in reporting his pain. As the administrative law judge noted, plaintiff never mentioned any neck pain for long periods of time. Moreover, on some visits, he complained of lower thoracic pain; on others, he complained of lumbar pain. There is the additional evidence that he failed to exert himself when he underwent a functional capacities evaluation on August 31, 1999, and of course, there is the lack of any medical evidence that would

support the degree of pain that plaintiff reports.

In summary, I conclude that ordering a remand would be exalting form over substance. The justification for the administrative law judge's ruling is evident in his decision. Even if he misconstrued the evidence of plaintiff's daily activities, the other evidence on which he relied was sufficient to support his conclusion that plaintiff's subjective complaints were not credible. After defendant had filed objections to the magistrate judge's report and recommendation, plaintiff filed an untimely motion to extend the time for filing his own objections and his response to defendant's objections. I granted the motion. Plaintiff has now filed the objections and the response.

I am not persuaded that plaintiff's response requires any discussion. I have taken his arguments into account in determining whether to adopt or reject the magistrate judge's recommendation. As for the objections, plaintiff has two: 1) the magistrate judge erred in giving more weight to Dr. Steiner's evaluation of plaintiff's residual functional capacity than to Dr. Zondag's evaluation because Zondag was plaintiff's treating physician; and 2) the magistrate judge erred in recommending approval of the administrative law judge's decision not to consider himself bound by any aspect of his predecessor's determination of plaintiff's eligibility for disability benefits. The magistrate judge dealt comprehensively and convincingly with these two arguments in his report and recommendation. I agree with his resolution of them and see no need to add to the discussion.

ORDER

IT IS ORDERED that the recommendation of the magistrate judge to remand this case to defendant to make a new credibility determination is REJECTED; in all other respects the recommendation is ACCEPTED. FURTHER, IT IS ORDERED that the decision of defendant Jo Anne B. Barnhart denying plaintiff Craig Everaert's application for Disability Insurance Benefits is AFFIRMED.

Entered this 4th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge