

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

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ALYSSA KREKLOW, a minor  
by VICKIE KREKLOW, her  
mother and natural guardian,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner  
of Social Security Administration,

Defendant.

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ORDER

03-C-0574-C

In a report and recommendation entered on September 27, 2004, United States Magistrate Judge Stephen L. Crocker recommended affirmance of defendant Jo Anne B. Barnhart's decision to terminate plaintiff Alyssa Kreklow's entitlement to Supplemental Security Income benefits. Plaintiff has filed objections to the recommendation. She contends that the magistrate judge failed to comply with the standard of review when he reviewed defendant's decision and failed to follow circuit law when he did not hold the administrative law judge to the rulings and regulations promulgated by the Social Security Administration.

The magistrate judge noted in several places in his report that the administrative law judge had not complied perfectly with his obligations. He concluded, however, that the missteps were not significant in this particular case, because even if they had not occurred, the result would not have changed. I agree with his conclusion.

To qualify for Supplemental Security Income benefits, plaintiff had to show that she was disabled within the definitions of the law. She had been found disabled in 1996, when she was seven, under the childhood disability listings for asthma. Those benefits stopped in July 1998, when defendant re-evaluated the case and concluded that plaintiff was no longer disabled. Plaintiffs' parents appealed that determination and asked for a hearing, contending that plaintiff was disabled not only from asthma but also from attention deficit disorder and an oppositional defiant disorder.

As the magistrate judge found, the administrative law judge failed to obtain a valid waiver of counsel from plaintiff's mother and he failed to make a finding of the credibility of her testimony. The first failure is problematic but was cured by the administrative law judge's full and fair development of the record. His questioning of plaintiff's mother was not as extensive as it should have been but he obtained records from all of plaintiff's medical providers and counselors and allowed plaintiff's parents time to submit records from a 1999 evaluation of plaintiff conducted by the multidisciplinary team at plaintiff's school. That report was a comprehensive one that included a daily activities questionnaire and other

reports from plaintiff's mother about plaintiff's activities and how they were affected by her impairments. These reports and records gave the administrative law judge a good picture of plaintiff's physical and behavioral problems.

Citing Thompson v. Sullivan, 933 F.2d 581 (7th Cir. 1991), plaintiff argues that defendant has not met her burden of showing that the administrative law judge developed a full and fair record. The circumstances in Thompson were different in important respects. As the court of appeals found, the administrative law judge had not only failed to explore with the claimant the nature and extent of his alcoholism and possible mental problems, but had ignored evidence that he suffered from osteoarthritis and a degenerative condition of his spine. Although the most recent x-ray of the claimant had been taken nine years earlier, the administrative law judge failed to order updated x-rays or a psychological examination of the claimant's mental state. In addition, the administrative record was missing two documents that the Social Security Administration had had before it when it denied the claim for benefits originally. By contrast, in this case, the record contains a number of recent medical records, psychological and educational reports and information supplied by plaintiff's mother. Plaintiff has not identified any missing records or suggested any tests or examinations that would have given the administrative law judge a clearer understanding of her claimed disability.

It is true, as plaintiff argues, that the burden is on defendant to show that the

administrative law judge developed the record sufficiently. Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994) (shifting of burden to Secretary to show that administrative law judge developed record adequately is necessary sanction for administrative law judge's failure to obtain valid waiver of counsel from claimant). Nevertheless, when the record is well developed, as it is in this case, the plaintiff must be able to point to some overlooked or omitted evidence to show that defendant has not met its burden. Id. (once Secretary establishes that record was developed fully and fairly, plaintiff has opportunity to rebut showing by demonstrating prejudice or evidentiary gap). In this instance, plaintiff has not identified any additional evidence that the administrative law judge should have considered, other than additional testimony that her mother might have given had the administrative law judge questioned her more thoroughly. However, the lengthy written materials from plaintiff's mother that are in the record more than offset any omissions in her oral testimony at the hearing.

Plaintiff has not suggested that she could have produced any additional evidence that would have been material to the administrative law judge's decision or that her mother would have had more relevant information had she only been asked the right questions. Without condoning the administrative law judge's inadequate advice to plaintiff's mother about the right to counsel, I agree with the magistrate judge that defendant has shown that the record was developed fully and fairly despite the administrative law judge's failure to

question plaintiff's mother as well as he should have, particularly after having failed to obtain a fully informed waiver of counsel from her. I see no reason to remand this case to allow plaintiff to develop her case more fully.

The administrative law judge's second alleged failure is not making a finding of the credibility of plaintiff's mother. As the magistrate judge pointed out, the administrative law judge had no reason to make such a finding because plaintiff's mother's testimony was not inconsistent with the other evidence he had before him. He found against plaintiff because she had not shown that she was disabled, even when he took into consideration all of the evidence in the record, including her mother's testimony. This is evident from the record; plaintiff's mother did not testify to anything that would have changed the outcome of the hearing.

Plaintiff's final objection is that the administrative law judge's findings are not supported by substantial evidence. This objection is not borne out by the record, which includes reports from plaintiff's multidisciplinary team, which had concluded in both 1996 and 1999 that plaintiff did not have a disability and was not in need of special educational services. In 1999, the team found that plaintiff was a B or C student in regular classes and that she was "satisfactory" in her ability to follow directions and pay attention. Her teachers observed no evidence of behavioral problems or depression. A psychological evaluation found no evidence that she was clinically depressed. A social worker who met with her on

four occasions found she knew right from wrong, could act appropriately in social situations, could reasonably tolerate frustration and was not experiencing any significant social or emotional difficulties at school.

With respect to plaintiff's medical disability, she had been diagnosed at age four with cough variant asthma. Although she made frequent clinic visits for the condition and sometimes went to the emergency room for respiratory problems, the medical records showed that her lungs were clear with only mild wheezing noted on some visits. She had had a few breathing treatments.

None of this evidence suggests that plaintiff was disabled because of a "medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(C)(I). Plaintiff argues that if the administrative law judge had questioned her mother more thoroughly, he would have found that plaintiff had impairments in her health and physical well-being and in her ability to attend and complete tasks. This may be so, although plaintiff does not describe this withheld testimony in any detail, but all of the experts who examined plaintiff and worked with her concluded that she was not impaired in the area of attending and completing tasks. Moreover, her medical reports showed that her asthma was not a marked limitation (that is, more than moderate and less than extreme),

that interfered seriously with her functioning. Her lungs were clear and she could participate in sports to some extent, although she became out of breath while running.

In summary, I am persuaded that the magistrate judge's recommendation is correct. Although the administrative law judge's performance fell short of ideal in this case, the record is fully and fairly developed, the credibility of plaintiff's mother is not in issue and the record contains substantial evidence to support defendant's decision to terminate plaintiff's Supplemental Security Income benefits.

#### ORDER

IT IS ORDERED that the United States Magistrate Judge's recommendation is ADOPTED and the decision of the Commission of Social Security to terminate plaintiff Alyssa Kreklow's entitlement to Supplemental Security Income benefits is AFFIRMED.

Entered this 22nd day of October, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge