

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

GREGORY MEYERS,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART,
Commissioner of Social Security,

04-C-593-C

Defendant.

REPORT

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Gregory Meyers challenges the commissioner's determination that he is not disabled and therefore not eligible for disability insurance benefits or supplemental security income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c (3)(A). Because I conclude that the administrative law judge failed to articulate his reasoning clearly enough to show that he considered the full range of evidence supporting plaintiff's claim, I am recommending that the case be remanded to the commissioner.

Legal and Statutory Framework

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that he is under a disability. The Act defines “disability” as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(C).

The commissioner has promulgated regulations setting forth the following five-step sequential inquiry to determine whether a claimant is disabled:

- (1) Is the claimant currently employed?
- (2) Does the claimant have a severe impairment?
- (3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?
- (4) Can the claimant perform his or her past work? and
- (5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. § 404.1520. The inquiry at steps four and five requires an assessment of the claimant’s “residual functional capacity,” which the commissioner has defined as “an

assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id.*

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, then the burden shifts to the commissioner to show that the claimant was able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

The following facts are drawn from the administrative record:

Facts

I. Background and Hearing Testimony

At the time of the ALJ's decision, plaintiff was 44 years old, making him a "younger individual" for the purposes of social security disability benefits. He has a limited education, having completed the ninth grade. He has work experience in the manufacturing sector, having worked primarily as a press operator and assembler.

At the time of the hearing, plaintiff was obese, standing 5' 3" tall and weighing 250 pounds. He has a history of coronary artery disease, including a heart attack in 1997, numerous visits to the emergency room for chest pain, and angioplasty with stent placement

in August 2000. However, by early 2001, plaintiff's heart condition was deemed "clinically stable." In addition, plaintiff has only one kidney (having donated the other to his brother), high cholesterol, hypertension, insulin-dependent diabetes and degenerative changes in his knees that cause pain. Plaintiff also suffers from anxiety and depression, but he does not focus on his mental impairments in this appeal.

Plaintiff stopped working in August 2000 when he was hospitalized for angioplasty and stent placement. On September 11, 2000, he applied for disability insurance benefits and supplemental security income. In questionnaires that plaintiff completed with his application, he reported that he could not work because he was tired all the time and experienced shortness of breath and chest pain whenever he tried to exert himself. Plaintiff indicated that he did very little except sleep and watch television.

The local disability agency denied plaintiff's applications. Apparently, plaintiff did not appeal that determination. Instead, he filed new applications on July 9, 2001. Once again, plaintiff alleged that he was disabled from heart problems, stating that he had chest pain, shortness of breath and fatigue. In addition, he alleged that he had severe depression that made him afraid to leave his home. With respect to his daily activities, plaintiff reported that he took the garbage out once a week, washed dishes on occasion, shopped monthly, watched children daily and visited with friends and relatives at his house. Plaintiff reported that he was tired all the time and did not leave the house because he was afraid that people were talking about him. He lived with his mother who cooked his meals.

On July 5, 2001, Dr. Leo Egbujiobi, one of the doctors who treated plaintiff's heart condition, completed a cardiac residual functional capacity questionnaire. Dr. Egbujiobi reported that plaintiff had chest pain with moderate exertion as a result of coronary artery disease. He opined that plaintiff was capable of performing low stress work but would need to be able to shift positions at will, take unscheduled breaks for 10-15 minutes in length every two hours and elevate his feet 20 percent of the workday. In addition, he indicated that plaintiff could not lift more than 10 pounds and should avoid all exposure to extreme cold, extreme heat, wetness, humidity, fumes, odors, dusts, gases and hazards.

State agency physicians who reviewed the record concluded that plaintiff was capable of performing light work (lifting up to 20 pounds and standing or walking six hours a day) with limited overhead reaching on the right. One of these physicians, Dr. Joan Crennan, noted that testing showed that plaintiff had preserved left ventricular function and was able to reach 9 METS on a recent stress test.

After the local disability agency denied his July 2001 applications, plaintiff requested and received a hearing before an administrative law judge. Plaintiff appeared at the January 14, 2003 hearing with an attorney and he testified. He stated he had pain in his arm and chest if he overexerted himself, such as when he walked too far or lifted something too heavy. Plaintiff indicated that he could walk about a block and lift about 20 pounds. He also stated that he was depressed and tired all the time, had crying spells two to three times a month and usually napped two or three times a day. He testified that he became very

nervous around strangers, did not go anywhere alone and did not have any friends. In addition, plaintiff stated that his knees became swollen and sore if he stood or walked too far. To alleviate the swelling, plaintiff took ibuprofen and elevated his feet by sitting in a recliner. He indicated that he spent most of his day with his feet up in the recliner. Plaintiff also testified that because of his depression, he often did not take his insulin, which resulted in his vision becoming blurred approximately three times a week.

Plaintiff testified that he tried to help his mother with chores around the house, like dishes, vacuuming, laundry, mowing the lawn and taking the garbage out. He stated that he had to take breaks while doing dishes, mowing lawn or vacuuming.

Les Goldsmith testified as a vocational expert. Goldsmith testified that plaintiff's past work was performed at the medium exertional level. The ALJ posed a hypothetical to Goldsmith asking whether there were any jobs in the state of Wisconsin that could be performed by an individual of plaintiff's age, education and past work experience who was limited to light exertion and had a limited but satisfactory ability to: relate to coworkers, deal with the public, interact with supervisors, deal with work stresses, maintain attention and concentration, and understand, remember and carry out detailed job instructions. Goldsmith responded that such an individual could perform small parts assembly (25,000 jobs), hand packaging (30,000 jobs), food preparation (60,000 jobs), mail clerk (2,000 jobs) and cleaning jobs (30,000 jobs). Goldsmith testified that if the hypothetical was changed so that the individual was capable of only sedentary work, there still would be 15,000 hand packaging jobs and 25,000 bench assembly jobs that the individual could perform.

Goldsmith testified that no jobs would be available for an individual who required two, 30-minute naps during the day, unscheduled breaks every two hours for 10-15 minutes or the ability to elevate his feet 20 percent of the workday. He testified that the environmental restrictions identified by Dr. Egbujiobi would eliminate some but not all of the jobs he had identified, indicating that about a third of the production jobs would be performed in a “clean” environment.

II. The ALJ’s Decision

In his decision, the ALJ followed the commissioner’s five-step evaluation procedure. At step one, he found that plaintiff had not engaged in substantial gainful activity since his alleged onset date of August 2, 2000. At step two, he found that plaintiff suffered from several severe impairments, namely, depression, anxiety disorder with agoraphobia, coronary artery disease, obesity, diabetes mellitus and degenerative joint disease. At step three, he found that none of plaintiff’s impairments, either singly or in combination, met or were equal in severity to any impairment that the commissioner presumes to be disabled.

At step four, the ALJ evaluated plaintiff’s residual functional capacity. He concluded that plaintiff retained the residual functional capacity to perform the requirements of light work except that he had a limited but satisfactory ability to deal with the public, interact with supervisors, deal with work stresses, maintain attention and concentration and understand, remember and carry out detailed instructions. In reaching this conclusion, the

ALJ stated that he had considered Dr. Egbujiobi's residual functional capacity assessment but had not found it persuasive. The ALJ explained:

Dr. Egbujiobi stated that the claimant needed to avoid all exposure to extreme cold, extreme heat, wetness, humidity, fumes, odors, dusts, gases, poor ventilation, and workplace hazards. The medical evidence does not support these limitations. Furthermore, whereas Dr. Egbujiobi noted that the claimant could only lift up to 10 lbs., repeated stress testing has not revealed any ischemia with moderate and heavy workloads. Finally, at the hearing, the claimant testified that he could lift and carry 20 lbs.

AR 28. The ALJ indicated that he was adopting the opinion of the three state medical consultants who concluded that plaintiff was capable of performing light work, finding that "their assessment accurately depicts the claimant's exertional functioning." *Id.*

The ALJ found that plaintiff's subjective complaints and allegations of more serious limitations "were not fully credible, and, when considered in light of all the objective medical evidence and clinical findings as well as the record as a whole, do not reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful work activity." *Id.* Relying on the testimony of the vocational expert, the ALJ found that as a result of his limitations, plaintiff could not perform any of his past relevant work. However, he found that plaintiff could perform a significant number of other light and sedentary jobs in the regional economy, including small parts assembler, hand packager, food preparation worker, mail clerk, cleaner and bench assembler. Accordingly, he found that plaintiff was not disabled and not entitled to either disability insurance benefits or supplemental security income under the Social Security Act.

Plaintiff appealed to the agency's appeals council which denied his request for review, making the ALJ's decision the final decision of the commissioner. 20 C.F.R. § 404.981.

Analysis

I. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not conduct a new evaluation of the case but instead reviews the final decision of the commissioner. This review is deferential: under § 405(g), the commissioner's findings are conclusive if they are supported by "substantial evidence." *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the commissioner's findings under § 405(g), this court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *Clifford*, 227 F.3d at 869. Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, *id.*, and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). When the ALJ denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

II. Dr. Egbujiobi's Opinion

Plaintiff contends that the ALJ erred in rejecting the opinion of Dr. Egbujiobi. Plaintiff makes two arguments. First, he argues that the evidence does not support the reasons cited by the ALJ for rejecting Dr. Egbujiobi's opinion regarding plaintiff's need for a 10-pound lifting restriction and to avoid various environmental contaminants. Second, he argues that the ALJ erred in failing to cite any reason at all for rejecting the other limitations endorsed by Dr. Egbujiobi, including his conclusion that plaintiff would need a job that allowed him to take unscheduled breaks during the day and to elevate his legs for periods totaling 20 percent of the workday.

Plaintiff's first contention merits little discussion. The ALJ stated that he was rejecting Dr. Egbujiobi's conclusion concerning environmental limitations because the medical evidence did not support such limitations. Although it would have been better for the ALJ to have elaborated on this general statement, I agree that there is no medical evidence to support a conclusion that plaintiff had environmental limitations. Plaintiff did not allege any breathing impairment and there is no evidence to suggest that any of his conditions was aggravated by dust, fumes, extreme heat or cold. Accordingly, it was not improper for the ALJ to reject this aspect of Dr. Egbujiobi's opinion on the ground that it was not supported by the medical evidence. *See* 20 C.F.R. § 404.1527(d) (treating physician's opinion entitled to controlling weight only where well-supported by medically acceptable diagnostic techniques and not inconsistent with other substantial evidence in

record). In any case, even if the ALJ had accepted the environmental restrictions, the vocational expert testified that plaintiff could still perform a substantial number of the jobs he had identified even if plaintiff was restricted to a “clean” environment. As for the 10-pound lifting restriction, the ALJ properly noted that it was inconsistent with plaintiff’s testimony that he could lift 20 pounds. This was an adequate reason to dismiss the 10-pound lifting restriction.

As plaintiff points out, however, the ALJ neglected to mention any of the other limitations endorsed by Dr. Egbujiobi. This omission was significant insofar as the vocational expert testified that some of the limitations, namely, the need for leg elevation and periodic breaks, would preclude plaintiff from all employment. The commissioner argues that it was proper for the ALJ to reject these other limitations because they too were devoid of any medical support and there are no contemporaneous treatment notes showing that plaintiff complained of such limitations to Dr. Egbujiobi or to any of the other various doctors who treated him.

I agree that there is scant support in the medical records for the limitations identified by Dr. Egbujiobi. Medical notes from 2001 show that plaintiff consistently denied chest pain, shortness of breath or leg swelling and his coronary artery disease was described as well-controlled and asymptomatic. Although plaintiff testified that he took rest breaks and elevated his legs at home, there is nothing to indicate that he did so pursuant to any doctor’s recommendation. These would have been legitimate grounds on which the ALJ *could* have

rejected the other limitations endorsed by Dr. Egbujiobi, but the ALJ did not offer them, nor can these be inferred reasonably from his decision. The ALJ simply failed to offer any reason at all for rejecting Dr. Egbujiobi's conclusions regarding plaintiff's need to elevate his legs or take periodic breaks.

An ALJ is not required to discuss every piece of evidence in the record, but

neither may the ALJ select and discuss only that evidence that favors his ultimate conclusion. We have repeatedly stated that the ALJ's decision must be based upon consideration of all the relevant evidence, and that the ALJ must articulate at some minimal level his analysis of the evidence.

Herron v. Shalala, 19 F.3d 329, 333 (7th Cir. 1994). *See also Stephens v. Heckler*, 766 F.2d 284, 287 (7th Cir.1985) ("The ALJ's opinion is important not in its own right but because it tells us whether the ALJ has considered all the evidence, as the statute requires him to do."). Here, the ALJ's incomplete discussion of Dr. Egbujiobi's report forces this court to guess why he rejected those parts of the report that favored plaintiff. Perhaps the ALJ thought that the lack of medical support for some of Dr. Egbujiobi's opinions rendered all of his opinions suspect—a conclusion that would not necessarily have been unreasonable—but this reasoning is not discernable from the ALJ's decision. It is equally logical and likely to conclude that the ALJ simply ignored some portions of Dr. Egbujiobi's report.

The Commissioner attempts to fill in the gaps by offering her own reasons why the ALJ might have rejected certain of Dr. Egbujiobi's findings, but "general principles of administrative law preclude the Commissioner's lawyers from advancing grounds in support

of the agency's decision that were not given by the ALJ.” *Golembiewski*, 322 F.3d at 916 (citations omitted). Those same principles preclude this court from weighing the evidence or finding facts in the first instance. If this court were to conclude on its own initiative that the additional limitations found by Dr. Egbujiobi are not credible, it would be tantamount to deciding that plaintiff is not disabled. This clearly would exceed the scope of judicial review allowed by § 405(g). Accordingly, I am recommending that this court remand this case to the commissioner for a new evaluation of Dr. Egbujiobi’s opinion.

III. Plaintiff’s Credibility

On remand, the commissioner also should conduct a new assessment of plaintiff’s credibility. In evaluating the credibility of statements supporting a Social Security application, “an ALJ must comply with the requirements of Social Security Ruling 96-7p.” *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003). SSR 96-7p requires ALJs to articulate the reasons behind credibility evaluations:

The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision. It is not sufficient to make a conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." ... The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be 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.

1996 WL 374186, at *4 (S.S.A. July 2, 1996).

The ALJ's credibility assessment lacks the specificity required by SSR 96-7p. It consists mostly of a list of various pieces of evidence with no explanation how the ALJ was weighing that evidence. For example, the ALJ noted without explanation that "the claimant has filed repeat applications for disability benefits since 1998. All of these applications have been denied." AR 27. He noted without explanation that one of plaintiff's doctors described plaintiff as a "noncompliant patient." AR 28. The ALJ noted twice that progress notes indicated plaintiff still smoked cigarettes. The ALJ listed plaintiff's daily activities, but he did not explain whether he thought they were consistent or inconsistent with plaintiff's complaints of disabling limitations.

Such rote, unexplained citations to evidence in the record are insufficient to support a determination because they prevent the applicant or subsequent reviewers from acquiring a fair sense of how the applicant's testimony was weighed. *Golembiewski v. Barnhart*, 322 F.3d 912, 916 (7th Cir. 2003); *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002); *Zurawski v. Halter*, 245 F.3d 881, 888 (7th Cir. 2001). Moreover, the ALJ's decision fails to show that he considered several of the relevant credibility factors, including the nature and intensity of claimant's pain, precipitating and aggravating factors, dosage and effectiveness of any pain medications, other treatment for the relief of pain and functional restrictions. *Luna v. Shalala*, 22 F.3d 687, 691 (7th Cir. 1994); SSR 96-7p.

The ALJ's incomplete credibility assessment of plaintiff prevents meaningful judicial review. Therefore, I recommend that this case be remanded with directions that the ALJ

conduct a reevaluation of plaintiff's subjective complaints that sufficiently articulates the ALJ's reasoning. I am not concluding or implying that the ALJ's credibility determination was incorrect; my sole point is that this court cannot meaningfully review its correctness on this record.

Finally, I note that insofar as the ALJ's decision might be read to imply that the ALJ discounted plaintiff's credibility because plaintiff failed to stop smoking, the Seventh Circuit has held that is an unreliable basis on which to rest a credibility determination. *Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir. 2000).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner of Social Security denying plaintiff Gregory Meyers's applications for disability insurance benefits and social security income be reversed and remanded for further proceedings consistent with this opinion, pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 27th day of April, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

April 27, 2005

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Re: ___ Meyers v. Barnhart
Case No. 04-C-593-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before May 11, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 11, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge