IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NANCY PROCHASKA,

ORDER

Plaintiff,

04-C-0644-C

v.

JO ANNE B. BARNHART,
Commissioner Social Security
Administration,

Defendant.

- -

An order was entered in this case on May 4, 2005, affirming the United States Magistrate's report and recommendation on the mistaken belief that no objections had been filed to the report, when in fact plaintiff had filed timely objections on May 3, 2005. I will vacate the May 4 order and take up plaintiff's objections.

Plaintiff contends, first, that the magistrate judge erred in finding that the administrative law judge had considered the combination of plaintiff's impairments. She argues that the administrative law judge made his initial mistake by concluding that plaintiff did not have a "medically determinable" mental impairment and that he compounded the error by not considering plaintiff's actual mental impairment as bearing upon her ability to

work.

Although plaintiff mounts a vigorous argument in support of her position, she fails to show that either the administrative law judge or the magistrate judge erred in concluding that plaintiff's depression did not amount to a mental impairment. Plaintiff challenges their reasoning, arguing that her failure to list her depression as a reason for seeking social security benefits does not amount to a waiver of her right to raise it later in the proceedings, but this is a straw man argument. Neither judge treated this failure as a waiver; both treated it as merely one factor leading to the conclusion that the depression was not a significant problem for plaintiff. Other factors included plaintiff's failure to seek treatment for her condition beyond obtaining medication from her treating physician; the agency psychologist's finding that plaintiff had not shown the existence of a medically determinable mental impairment; the lack of any objective clinical findings or even an explanation to support her treating physician's diagnosis of depression; the treating physician's failure to identify any work-related limitations that might result from her depression; plaintiff's failure to submit the reports that she asserted would support the diagnosis after the administrative law judge asked for them (plaintiff and her counsel promised to submit them and the record remained open for them to do so); and finally, the evidence showing that although plaintiff's doctor had diagnosed her with depression in 1992, she had worked for many years thereafter and did well as long as she took her medication. The magistrate judge noted that despite

plaintiff's testimony that she has difficulty maintaining concentration, she testified that she was able to read newspapers and magazines, work crossword puzzles and embroider and she never identified any specific mental limitations that would keep her from working.

In circumstances in which the treating physician does not explain or support his diagnosis, there is no reason to give his opinion substantially greater weight than that of an agency psychologist who merely reviews the file. The case cited by plaintiff makes this plain. Allen v. Weinberger, 552 F.2d 781, 785 (7th Cir. 1977) ("'[t]he weight to be given [a treating] physician's statement depends on the extent to which it is supported by specific and complete clinical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment or impairments.'") (quoting 20 C.F.R. § 404.1526). In Weinberger, the treating physician's opinion was given weight despite the lack of clinical findings in his records because he had operated on the plaintiff, allowing him to observe the extent of the plaintiff's spinal disorder directly and had examined him several times after the surgery to evaluate his recovery. The records of plaintiff's treating physician disclose no similar indicia of first-hand knowledge to support his statement that plaintiff suffered from chronic depression with panic disorder.

The administrative law judge was not obligated to obtain a consultative psychiatric examination of plaintiff before rejecting her claim, as plaintiff argues. It was reasonable for him to find that doing so was unnecessary, in light of the dearth of evidence that plaintiff

had a disabling mental impairment, particularly when plaintiff never produced the records she had asserted would support her claim of a serious mental impairment.

Plaintiff argues that the administrative law judge erred in another respect by not considering her obesity. In making this argument, plaintiff ignores the absence of evidence in the record suggesting that her obesity impaired her ability to work and specifically, that it contributed to the back or knee conditions that did impair her ability to work at anything but sedentary to light jobs. Even plaintiff's treating physician believed that plaintiff could sit, stand and walk for four hours at a time in an eight-hour day, despite his diagnosis of chronic obesity. Her ability to perform at this level qualified her for work.

Plaintiff maintains that the administrative law judge should have considered her weight because her "problems with her knees and back are exacerbated by the fact that Plaintiff has been carrying this extra weight for over ten years," Plt.'s Objs., dkt. #12, at 7, and because plaintiff suffers from severe arthritis of the knees and high blood pressure, "which are significantly related to obesity under Listing 9.09, 20 C.F.R. Part 404, Subpart P, Appendix 1," id. at 7-8, but she cites nothing in the record to support her assertions about the effect of her obesity upon her other medical conditions. It is routine for losing litigants to criticize administrative law judges for "playing doctor"; this is the mirror image of that complaint. Plaintiff is saying that the administrative law judge erred because he did not supply the medical conclusions that the doctors did not draw.

Plaintiff objects to the magistrate judge's "creation of post hoc rationales to support the administrative law judge's credibility determination." Id. at 9. This is an overstatement of the magistrate judge's discussion of the administrative law judge's decision. As the magistrate judge noted, the decisions of an administrative law judge are to be given a commonsensical reading, Shramek v. Apfel, 226 F.3d 809, 811 (7th Cir. 2000). Giving the decision in this case such a reading, it is clear that the record supports the administrative law judge's conclusion that plaintiff's reports of totally disabling conditions and pain were not entirely credible. Her treating physicians were unpersuaded that she was totally disabled, her reports of her daily routines demonstrated a level of activity that did not jibe with her complaints, the administrative law judge noted that he had reviewed plaintiff's use of medication and course of treatment and found them inconsistent with her impairments and plaintiff had been untruthful in omitting a previous back injury in a Post Offer Medical Questionnaire she had completed for an employer. Sending the case back to the commissioner so that the administrative law judge could write a better decision coming to the same conclusion would be a waste of scarce resources and no benefit for plaintiff.

Finally, plaintiff challenges the administrative law judge's decision that she can perform a significant number of jobs despite her impairments. Her objection to the finding that she can lift and carry 10 pounds occasionally is unpersuasive; her treating physician supplied the evidence for this finding. Sedentary work does not require that she lift and

carry 10 pounds frequently; therefore, her lifting and carrying restrictions do not bar her from performing this kind of work. The vocational expert took into account plaintiff's inability to stoop when he determined the jobs she could perform and the administrative law judge accounted for plaintiff's obesity by using her treating physician's residual functional capacity assessment, in which the doctor considered her obesity. He did not have to account for her alleged mental limitations because the record did not support any.

Plaintiff believes that the administrative law judge erred in not identifying and resolving the conflicts between the vocational expert's report and the Dictionary of Occupational Titles and that the magistrate judge erred in finding that plaintiff had forfeited her opportunity to challenge the failure by not raising the issue herself. "When no one questions the vocational expert's foundation or reasoning, an ALJ is entitled to accept the vocational expert's conclusion, even if that conclusion differs from the Dictionary's—for the Dictionary, after all, just records other unexplained conclusions and is not even subject to cross-examination. If the basis of the vocational expert's conclusions is questioned at the hearing, however, then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable." Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002). Because plaintiff did not question the vocational expert's report, the administrative law judge was entitled to defer to it. Plaintiff forfeited her opportunity to raise this challenge.

It appears that plaintiff's real challenge is to the correctness of the holding in Donahue. If so, she should raise the issue before the court of appeals. This court has no authority to ignore the holding.

ORDER

IT IS ORDERED that the order entered herein on May 4, 2005, is VACATED. FURTHER, IT IS ORDERED that the United States Magistrate Judge's report is ADOPTED and the decision of defendant Jo Anne Barnhart denying plaintiff Nancy Prochaska's application for Disability Insurance Benefits and Supplemental Security Income is AFFIRMED.

Entered this 10th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge