

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

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NANCY HANSON,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE BARNHARDT,  
Commissioner of Social Security,

04-C-913-S

Defendant.

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Plaintiff Nancy Hanson brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying her Disability Insurance Benefits (DIB). She asks the Court to reverse the decision of the Commissioner.

Plaintiff applied for benefits on July 8, 2002 alleging disability since June 29, 2002 due to headaches, fatigue, fibromyalgia, stomach problems, breast cancer pain, right shoulder lymphedema, left shoulder pain and bone spurs in her left foot. Her application was denied initially and upon reconsideration. A hearing was held on October 24, 2003 before Administrative Law Judge (ALJ) Leonard A. Nelson. In a written decision dated February 13, 2004 the ALJ found plaintiff not disabled. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on October 1, 2004.

## FACTS

Plaintiff was born on 21, 1962. She completed high school and worked primarily in the restaurant business, most recently as the owner/operator of a supper club. Plaintiff reported that she worked five to six years as a maitre'd in a restaurant.

Plaintiff was first diagnosed with fibromyalgia in 1991 while serving in the military. In April 2002 plaintiff was treated by Dr. Francine Vreisendorp-VanAssen, M.D., a neurologist, for fibromyalgia. She concluded that plaintiff continued to suffer with fibromyalgia and prescribed her Darvocet.

That same day plaintiff also saw Dr. Douglas Redding, M.D., a treating oncologist, for a breast cancer follow-up exam. He indicated that there was no evidence of active disease clinically or based on the exam. He concluded that her numerous joint complaints were more likely related to her fibromyalgia.

Dr. Redding saw plaintiff again in July 2002 and indicated that she had no active cancer. An MRI scan of plaintiff's left shoulder revealed possible tendinitis or a partial tear and a MRI scan of plaintiff's right shoulder revealed mild degenerative changes.

In October 2002 plaintiff was seen by Dr. Vreisendorp-Van Assen who noted that plaintiff's fibromyalgia pain had improved. The doctor refilled plaintiff's Darvocet and planned to see her in four months.

On October 7, 2002 Dr. Joan Crennan, a state agency medical consultant, reviewed plaintiff's record and concluded plaintiff could perform work-related activities consistent with a range of light and sedentary work with limited reaching. Dr. Muceno, a state agency medical consultant, reviewed plaintiff's record on February 13, 2003 and concluded plaintiff could perform light and sedentary work with limited reaching, handling and fingering.

On October 6, 2003 Dr. Karanjia, a neurologist who had treated plaintiff for four years, completed a fibromyalgia residual functional questionnaire. He concluded that plaintiff could sit and stand only two hours each in an eight hour work day and could not work an eight hour day. He noted that plaintiff had multiple myofascial trigger points and met the criteria for fibromyalgia found by the American College of Rheumatology for fibromyalgia.

On October 16, 2003 Lucinda M. Marty, plaintiff's treating rheumatologist, completed a fibromyalgia residual functional capacity questionnaire for plaintiff and determined that she was incapable of low stress jobs and would be absent more than four days a month. She indicated that plaintiff could sit or stand two hours each in an eight hour work day. She noted that plaintiff had multiple trigger points and symptoms of fibromyalgia which met the American College of Rheumatology criteria for fibromyalgia.

At the October 24, 2003 hearing before the ALJ plaintiff appeared with counsel and testified that she could walk for fifteen

minutes at a time, stand for one-half hour at a time and sit for one to two hours at a time. She further testified that she did light housework and some cooking.

Andrew M. Steiner, M.D., appeared and testified as a neutral medical expert. Dr. Steiner testified that plaintiff had fibromyalgia, a mood disorder, left foot pain, left shoulder pain attributed to tendinitis and breast cancer in remission with some residual right upper extremity swelling. He noted that plaintiff displayed some loss of sensation in her big toes but she had no atrophy, no gait problem and no strength or reflex deficits. He concluded she could perform a range of light and sedentary work that accommodated her left shoulder impairment.

Karl Botterbush, Ph.D., a vocational expert, was present at the hearing and had reviewed the record. He testified that were plaintiff limited to light work with only occasional overhead reaching and extended reaching on the left she could perform her past relevant work as hostess. He also testified that there were 4,700 hostess positions in the Wisconsin economy.

In his written decision the ALJ concluded that plaintiff had severe medical impairments of a history of right breast cancer in remission, fibromyalgia with fatigue and chronic pain, chronic daily headaches with superimposed migraine attacks, gastroesophageal reflux disease and hematochezia, irritable bowel syndrome, bilateral shoulder pain probably secondary to rotator

cuff tendinitis involving both shoulders, arm, hand and foot pain, cervical spine pain secondary to osteophyte spurring posteriorly at C5-6 with a mild diffuse disk bulge and low back pain secondary to degenerative changes at T12-L1 with mild disk bulge. He found that none of these impairments singly or in combination met or equaled a listed impairment. He further found that plaintiff did not have a severe mental impairment.

The ALJ concluded that plaintiff retained the residual functional capacity for a range of light exertional work not requiring lifting and/or carrying weight of more than twenty pounds occasionally, ten pounds frequently, with no more than six hours in an eight hour work day standing and no more than occasional overhead work or extended reaching with the left upper extremity. The ALJ specifically rejected the residual functional capacity assessments of plaintiff's treating physicians Dr. Marty and Dr. Karanjia because they were not based on objective medical evidence and were inconsistent and unsupported by the evidence as whole. Based on the testimony of the vocational expert the ALJ found plaintiff was not disabled because she was able to perform her past relevant work as a hostess.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on June 29, 2002, the date she asserts she became unable to work, and continues to meet those requirements through the date of this decision.

2. The claimant has not engaged in disqualifying substantial gainful activity since June 29, 2002, the alleged disability onset date.

3. The medical evidence establishes that the claimant has a history of right breast cancer, in remission, fibromyalgia with fatigue and chronic pain, chronic daily headaches with superimposed migraine attacks, gastroesophageal reflux disease and hematochezia, irritable bowel syndrome, bilateral shoulder pain probably secondary to rotator cuff tendonitis involving both shoulders, arm, hand and foot pain, cervical spine pain secondary to osteophyte spurring posteriorly at C5-6 with a mild diffuse disk bulge, and low back pain secondary to degenerative changes at T12-L1 with a mild disk bulge, but that she does not have an impairment or combination of impairments listed in, or medically equals to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony insofar as it is inconsistent with the residual functional capacity, is found not credible.

5. The claimant has retained the residual functional capacity for a range of light exertional work not requiring lifting and/or carrying weight of more than twenty pounds occasionally, ten pounds frequently, with no more than six out of eight hours on the feet and no more than occasional overhead work or extended reaching with the left upper extremity.

6. The claimant's impairments do not prevent her from performing her past relevant work as a hostess of a restaurant as that position is performed in the national economy. 20 C.F.R. §404.1565.

7. The claimant was not under a "disability" as defined in the Social Security, Act, at any time since June 29, 2002. 20 C.F.R. §404.1520 (f).

## OPINION

This Court must determine whether the decision of the Commissioner that plaintiff was not disabled is based on substantial evidence pursuant to 42 U.S.C. § 405(g). See Arbogast v. Bowen, 860 F. 2d 1400, 1402-1403 (7th Cir. 1988). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971).

Disability determinations are made pursuant to a five-step sequential evaluation procedure. 20 CFR § 404.1520(a)-(f). First, the claimant must not be performing substantial gainful activity. Second, the claimant must have a severe, medically determinable impairment. Third, a claimant will be found disabled if his or her impairment is equal in severity to a listed impairment in 20 C.F.R. Subpart P, Appendix 1. Fourth, if the claimant does not meet the third test, he/she must not be able to perform his/her past work. Fifth, if the claimant cannot perform his/her past work, he or she must not be able to perform any existing jobs available in the national economy given his or her educational background, vocational history and residual functional capacity.

The ALJ found that plaintiff had severe medical impairments of a history of right breast cancer in remission, fibromyalgia with fatigue and chronic pain, chronic daily headaches with superimposed migraine attacks, gastroesophageal reflux disease and hematochezia,

irritable bowel syndrome, bilateral shoulder pain probably secondary to rotator cuff tendinitis involving both shoulders, arm, hand and foot pain, cervical spine pain secondary to osteophyte spurring posteriorly at C5-6 with a mild diffuse disk bulge and low back pain secondary to degenerative changes at T12-L1 with mild disk bulge, but that none of these impairments singly or in combination met or equaled a listed impairment. He concluded that plaintiff retained the residual functional capacity for a range of light exertional work not requiring lifting and/or carrying weight of more than twenty pounds occasionally, ten pounds frequently, with no more than six hours in an eight hour work day standing and no more than occasional overhead work or extended reaching with the left upper extremity.

In determining plaintiff's residual functional capacity the ALJ specifically rejected the residual functional capacity assessments of plaintiff's treating physicians Dr. Marty and Dr. Karanjia because they were not based on objective medical evidence and were inconsistent and unsupported by the evidence as whole. Plaintiff contends that the ALJ erred in disregarding the opinions of Drs. Marty and Karanjia.

In order to be entitled to controlling weight, a medical opinion must be rendered by a treating source, be well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the record.



See 20 C.F.R. §404.1527(d)(2), Social Security Ruling 96-2p. Failure to provide good reasons for discrediting a doctor's opinion is alone grounds for remand. Clifford v. Apfel, 227 F.864, 870 (7<sup>th</sup> Cir. 2000). The ALJ must "minimally articulate his reasons for crediting or rejecting evidence of disability." Scivally v. Sullivan, 966 F.2d 1070,1076 (7<sup>th</sup> Cir. 1992).

The ALJ gave reasons for rejecting the opinions of Dr. Marty and Dr. Karanjia concerning plaintiff's residual functional capacity. One reason was that their opinions were not supported by objective medical evidence. This is not a good reason for discrediting a treating physician's opinion concerning fibromyalgia. Fibromyalgia is an illness with only subjective symptoms. See Sarchet v. Chater, 78 F. 3d 305, 306-307 (7<sup>th</sup> Cir. 1996). It is difficult to determine the severity of plaintiff's fibromyalgia due to the unavailability of objective clinical tests.

Both Dr. Marty and Dr. Karanjia had been treating plaintiff for fibromyalgia and concluded she met the criteria for fibromyalgia found by the American College of Rheumatology for fibromyalgia. They both completed residual functional capacity assessments and indicated that she could sit and stand for two hours each in an eight hour work day. These two opinions by different treating physicians, one a rheumatologist and one a neurologist, are consistent with each other and are reasonably supported by the record.

The ALJ also concluded that these two opinions were inconsistent with the record as a whole. Specifically he noted that two state agency medical consultants and the medical expert who testified at the hearing who had reviewed plaintiff's record but not treated plaintiff found that she could perform light work with limited reaching. In October 2002 Dr. Vreisendorp-Van Assen who treated plaintiff indicated that her fibromyalgia pain was improved in October 2002. The Court cannot find that this evidence is sufficient to support the ALJ's decision that the opinions of Drs. Marty and Karanjia who were treating plaintiff for her fibromyalgia were inconsistent with the record as a whole.

Further, the ALJ found plaintiff's testimony not to be credible with the residual functional capacity that he found. Her testimony, however, is consistent with the opinions of her treating physicians that she could only sit or stand at the most two hours in an eight hour work day.

Based on the record as whole the Court will remand this case to the Commissioner for reconsideration of the weight the opinions of Drs. Marty and Karanjia are to be given in the determination of plaintiff's residual functional capacity. Plaintiff's subjective complaints should also be reconsidered in so far as they are consistent with the weight given to the opinions of Dr. Marty and Dr. Karanjia.

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ORDER

IT IS ORDERED that the above entitled matter is REMANDED to the Commissioner for further proceedings consistent with this opinion.

Entered this 26<sup>th</sup> day of May, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge