

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

ERWIN L. DAVIS,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,
Commissioner of Social Security,

05-C-585-S

Defendant.

Plaintiff Erwin L. Davis brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying him Disability Insurance Benefits (DIB) after September 23, 2004. He asks the Court to reverse the decision.

Plaintiff applied for DIB on October 24, 2001 alleging disability beginning October 5, 2001 due to degenerative disc disease. His application was denied initially and upon reconsideration. A hearing was held on October 19, 2004 before Administrative Law Judge (ALJ) Robert M. Senander. In his February 23, 2005 written decision the ALJ found plaintiff disabled from October 5, 2001 through September 23, 2004 but not thereafter. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on September 16, 2005.

FACTS

Plaintiff was born on July 21, 1952 and graduated from high school. His past relevant work includes work as an account executive sales representative and an automobile salesman.

On October 9, 2001 plaintiff saw Dr. Ade R. Dillon for lower back pain which he described as 9 on a scale of 1-10. The pain worsened with bending, lifting twisting or sitting but he could obtain relief by lying down. Physical examination indicated tenderness of plaintiff's lower lumbar spine.

On March 22, 2002 plaintiff was seen by Dr. Dillon for lower back pain. He was prescribed physical therapy.

An MRI on December 17, 2002 showed plaintiff had degenerative scoliosis of the lower spine with prominent changes at the L3-L5 levels. An x-ray in August 2003 showed mild degenerative changes in plaintiff's lower back. On December 4, 2003 plaintiff had a lumbar epidural steroid block.

On January 8, 2004 plaintiff reported to Dr. Dillon that his lower back pain was worse. An MRI revealed degenerative changes and a large disc herniation in plaintiff's lower spine which compromised his spinal canal. Dr. Dillon referred plaintiff to neurosurgeon Dr. John Neal. Dr. Neal performed surgery on plaintiff's lower back on February 11, 2004. The surgery successfully decompressed the nerve roots in plaintiff's lower back. On March 29, 2004 Dr. Neal found that plaintiff had full

muscle strength in his legs and feet. Plaintiff reported that his back pain was 85-90% resolved.

On May 10, 2004 Dr. Dillon reported that a physical examination of plaintiff revealed there was no significant tenderness to the thoracolumbar spine. On July 9, 2004 plaintiff had colon surgery to remove a portion of his right colon because of cancer. On August 15, 2004 plaintiff saw Dr. Dillon for a return of his back complaints.

Dr. Dillon examined plaintiff on September 24, 2004 because his symptoms of lower back pain were persisting. Plaintiff had some tenderness to palpitation of the lower lumbar spine, but was able to flex forward to touch his mid lower legs with his fingertips. Sensation to pin prick and vibration were present in both lower extremities. Plaintiff demonstrated normal knee flexion and extension strength and was able to toe and heel walk. Dr. Dillon scheduled an MRI of plaintiff's lumbar spine. This MRI showed degenerative changes at multiple discs. His previous disc herniation at L4-5 had been removed but he had some lateral recess stenosis and foraminal stenosis at L4-5. There was no nerve root compression noted.

On November 24, 2004 Dr. Dillon completed a lumbar spine questionnaire for plaintiff. He noted that plaintiff could sit for 30 minutes at a time, walk for thirty minutes at a time, sit for two hours in an eight hour work day, stand for two hours in an

eight hour work day, walk five minutes every thirty minutes, could lift twenty pounds frequently, rarely crouch or climb ladders, and occasionally twist, stoop, and climb stairs. Dr. Dillon noted the plaintiff could work eight hours a day forty hours a week.

At the October 19, 2004 hearing before the ALJ plaintiff appeared with counsel and testified that since undergoing his back surgery in February 2004 his back pain had improved. He testified that he could stand for 20-30 minutes at a time, could sit for an hour at a time as long as he was able to shift positions, had problems with twisting, bending and stooping but could lift up to 10 pounds. Plaintiff took Ibuprofen and Vicodin for pain which he stated had improved to a 3 to 4 on a 1 to 10 pain scale since the surgery.

On February 11, 2002 Dr. James McDermott, a state agency physician, reviewed plaintiff's medical records and found he was limited to occasional lifting of 20 pounds and frequent lifting of 10 pounds. He concluded he was limited on standing and walking to 6 hours in an 8 hour day. On September 23, 2003 Dr. Baumblatt, another state agency physician, affirmed Dr. McDermott's assessment.

David Ostwald, a vocational expert, was present at the hearing and had reviewed the record. The ALJ asked the expert whether an individual with the claimant's age, education, work experience and residual functional capacity could perform any jobs in the regional

economy. The ALJ advised that after September 23, 2004 plaintiff retained the residual functional capacity to perform a significant range of light work with a sit/stand option every thirty minutes, only occasional twisting, stooping or bending and no climbing ladders.

The expert testified that with these limitations plaintiff could perform his past work as a salesman and could also perform a significant number of jobs available in the national economy.

In his decision the ALJ concluded that plaintiff was disabled from October 5, 2001 through September 23, 2004 based on the medical records and plaintiff's testimony which he found credible. He then concluded that plaintiff experienced medical improvement after September 23, 2004 and no longer had a "severe" impairment. He further stated, " After September 23, 2004 the plaintiff no longer had an impairment which caused significant limitations in his ability to perform basic-work-related activities."

The ALJ made the following findings:

1. The claimant meets the nondisability requirements for the period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits as of the established onset date.
2. The claimant has not engaged in substantial gainful activity since October 5, 2001.
3. The medical evidence established that the claimant has the following "severe" impairments: degenerative disc disease.

4. The claimant has no impairment that meets or equals the criteria of any impairment listed in Appendix 1, Subpart P, Regulations No. 4.

5. For reasons discussed in this decision, the claimant's allegations of disabling symptoms and limitations are credible to the extent that they support a finding of "disability" during the period October 5, 2001 through September 23, 2004, but not thereafter.

6. After carefully considering the entire records, including the claimant's allegations of disabling symptoms and limitations, a finding is warranted that during the period October 5, 2001 through September 23, 2004, the claimant's medically determinable impairments precluded the following work related activities to perform a limited range of "light" work activity. Since that date the claimant's condition precluded the following work activities to perform a significant range of "light" work activity.

7. The claimant is unable to perform the requirements of his past relevant work prior to September 23, 2004.

8. The claimant's assertions concerning his ability to work are credible.

9. After September 23, 2004 the claimant retained the residual functional capacity to perform a significant range of "light" work activity.

10. On October 5, 2001 the claimant was forty-nine years old. He has a diploma of general education and a "skilled" work background.

11. Based on those vocational characteristics and the residual functional capacity reported above, during the period October 5, 2001

through September 23, 2004, the claimant was capable of performing a limited range of "light" work activity. Considering the claimant's additional limitations he could not make an adjustment to any work that existed in significant numbers in the national economy and a finding of "disabled" is therefore reached within the framework of Medical-Vocational Rule 96-8. Consequently, the undersigned finds that during the period October 6, 2001 through September 23, 2004, the claimant was "disabled" with the meaning of the Social Security Act, as amended. However, after September 23, 2004, the claimant's condition improved and he was able to perform a significant range of "light" work activity.

12. The claimant was under a disability, as defined in the Social Security Act, from October 5, 2001 through September 23, 2004, but not thereafter (20 CFR § 404.1520(g)).

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 concluded that plaintiff suffered a severe impairment of lower back pain from October 9, 2001 to September 23, 2004 and was disabled for that time period. He further concluded that plaintiff experienced medical improvement after September 23, 2004 and no longer suffered a severe medical impairment at step two of the sequential evaluation procedure.

When an ALJ finds that an individual is entitled to only a closed period of benefits substantial evidence must demonstrate that the claimant has experienced medical improvement. 42 U.S.C. § 423(f)(1); Jones v. Shalala, 10 F.3d 522 (7th Cir. 1993). Plaintiff argues that the ALJ's conclusion that plaintiff did not suffer a severe impairment after September 23, 2004 is not supported by the substantial evidence.

The medical evidence indicates that after plaintiff had back surgery on February 11, 2004 his pain was 85-90% improved. Although in September 2004 he again experienced some back pain it was not at the level he had experienced prior to his surgery. The

September 9, 2004 medical notes of Dr. Dillon indicate that plaintiff's previous disc herniation at L4-5 had been removed but he had some lateral recess stenosis and foraminal stenosis at L4-5 but there was no nerve root compression noted. Plaintiff's testimony at the hearing indicated his back pain had improved after the surgery. There is substantial evidence to support the ALJ's conclusion that plaintiff no longer had a severe impairment after September 23, 2004.

Since the ALJ found at the second step of the sequential analysis that after September 23, 2004 plaintiff no longer had a severe impairment which caused significant limitations in his ability to perform basic work-related activities, he did not have to reach the subsequent steps of the sequential analysis. The Commissioner met her burden of finding plaintiff not disabled after September 23, 2004 by finding he no longer had a severe impairment because of significant medical improvement.

Plaintiff argues that the ALJ erred in discounting Dr. Dillon's November 25, 2004 report of his residual functional capacity. The ALJ addressed the report and his conclusion concerning plaintiff's residual functional capacity was sufficiently consistent with that report. Since plaintiff no longer suffered a severe impairment the ALJ did not need to address plaintiff's residual functional capacity to determine that he was not disabled.

Plaintiff also argues that the ALJ erred in his credibility finding. The ALJ, however, found plaintiff credible. Since the ALJ found that plaintiff did not have a severe impairment after September 23, 2004 he did not have to address plaintiff's credibility concerning his pain after that date. SSR 96-7p and 20 C.F.R. §404.1529(c) (3) (I)-(vii).

There is substantial evidence to support the Commissioner's finding that plaintiff was disabled from October 9, 2001 through September 23, 2004 but not thereafter because he no longer had a severe impairment. Accordingly, the Commissioner's decision will be affirmed.

ORDER

IT IS ORDERED that the plaintiff's motion to reverse the decision of the Commissioner finding plaintiff not disabled after September 24, 2004 is DENIED.

IT IS FURTHER ORDERED that the decision of the defendant Commissioner denying plaintiff Disability Insurance Benefits after September 23, 2004 is AFFIRMED.

Entered this 6th day of March, 2006.

BY THE COURT:

s/_____
JOHN C. SHABAZ
District Judge