

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

ROGER E. KRUEGER,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,
Commissioner of Social Security,

05-C-590-S

Defendant.

Plaintiff Roger E. Krueger 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). He asks the Court to reverse the decision.

Plaintiff applied for DIB on November 1, 2002 alleging disability beginning February 18, 2002 due to back pain and vertigo. His application was denied initially and upon reconsideration. A hearing was held on July 22, 2004 before Administrative Law Judge (ALJ) Guy E. Fletcher. In his February 23, 2005 written decision 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 September 9, 2005.

FACTS

Plaintiff was born on March 6, 1955 and graduated from high school. His past relevant work includes dispatcher and maintenance.

Plaintiff was first treated for severe back pain by Dr. Frederick Perryman in January 2002. An MRI indicated there was some disc bulging and herniation in plaintiff's lumbar spine. Dr. Perryman prescribed pain medications for him. When plaintiff did not improve Dr. Perryman referred him to a back specialist.

In May 2002 plaintiff saw Dr. Margaret Anderson at Spine Care specialists. She diagnosed plaintiff with chronic intermittent mechanical low back pain with multilevel degenerative disc disease. She concluded that plaintiff could perform sedentary to light work but should avoid repetitive bending. Dr. Anderson recommended lumbar stabilization exercises and walking.

Plaintiff applied for a disability retirement pension from the State of Wisconsin. A disability examination was performed at Lutheran Hospital on August 7, 2002. From this examination plaintiff qualified for a state disability pension based on unpredictable episodes of severe back pain.

As of October 31, 2002 plaintiff was taking Diazepam, Methocarbamol and Ibuprofen for his back pain and spasms. In June 2002 he began taking Celebrex and Robaxin for his pain and spasms.

In January 2003 Dr. McDermott, a state agency physician, reviewed the record medical evidence and concluded plaintiff could perform light work with no additional limitations. In March 2003 Dr. Baumblatt, a state agency physician, reviewed the record evidence and affirmed Dr. McDermott's assessment.

In January 2004 plaintiff was seen on an emergency basis at Riverview Hospital for severe abdominal pain. An x-ray of his cervical spine indicated degenerative changes.

At the July 22, 2004 hearing before the ALJ plaintiff appeared with counsel and testified that in May 2002 he could stand for 2-3 hours but at the time of the hearing he could stand for only 1 hour. He further testified that he has back spasms once a month. Plaintiff testified that his pain level is 3 to 4 on a scale of ten on a normal day but it is 10 on a bad day.

Richard Willette, 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 plaintiff retained the residual functional capacity to perform work that involved lifting 20 pounds occasionally and 10 pounds frequently and standing six hours in an eight hour day with a sit/stand option every thirty minutes.

The expert testified that such an individual would have difficulty performing his past relevant work as an emergency dispatcher but could perform a significant number of jobs (10,00) which exist in the economy including clerk and security monitor.

In his February 23, 2005 decision the ALJ concluded that plaintiff suffered from severe impairments of degenerative disease

in his spine and vertigo which did not meet or equal the requirements of any impairment in Appendix 1, Subpart P, Regulations No.4. He concluded plaintiff retained the residual functional capacity to perform work that involved lifting 20 pounds occasionally and 10 pounds frequently and standing six hours in an eight hour day with a sit/stand option every thirty minutes. Although the ALJ found that plaintiff might be able to perform his past relevant work as an emergency dispatcher, he also found that there were a significant number of jobs available in economy which he could perform. He concluded that plaintiff was not disabled.

The ALJ made the following findings:

1. The claimant has not engaged in substantial gainful activity since February 18, 2002.
2. The claimant met the disability insured status requirements of the Act at least through the date of this decision.
3. The claimant is suffering from severe impairments, namely, chronic low back and neck pain due to degenerative disease, and vertigo, but his condition does not meet or equal the requirements of any impairment listed in Appendix 1, Subpart P, Regulations No. 4.
4. The claimant's testimony does not indicate that all work activity would be precluded and is not entirely consistent with the restrictions given to him by his physicians.
5. The claimant is limited to performing work which would allow him to sit and stand for six hours in a day, alternate sitting and standing, and lift 10 pounds frequently and 20 pounds occasionally.

6. The claimant is able to perform his past relevant work as an emergency dispatcher.
7. The claimant is currently 49 years old which is defined as younger individual.
8. The claimant has a high school education.
9. The claimant does have work skills but due to the claimant's age the issue of transferability is not material.
10. The claimant is capable of performing a significant number of jobs which exist in the economy including clerks and security monitors of which over 10,000 exist in the local area.
11. The claimant has not been under a "disability", as defined in the Social Security Act, at any time through the date of this decision.

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 Arboqast 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 from severe impairments of degenerative disease in his spine and vertigo which did not meet or equal the requirements of any impairment in Appendix 1, Subpart P, Regulations No.4. He also concluded plaintiff retained the residual functional capacity to perform work that involved lifting 20 pounds occasionally and 10 pounds frequently and standing six hours in an eight hour day with a sit/stand option every thirty minutes. The ALJ found plaintiff was not disabled because there were a significant number of jobs available in the economy that he could perform.

Plaintiff argues that the ALJ erred because he did not make any assessment of plaintiff's credibility. The only statement in the ALJ's decision concerning plaintiff's credibility is in finding No. 4 which states: "The claimant's testimony does not indicate that all work activity would be precluded and is not entirely consistent with the restrictions given to him by his physician."

The regulations require the following factors to be considered in determining whether plaintiff's subjective complaints are credible: 1) support of plaintiff's complaints by objective medical evidence,; 2) plaintiff's daily activities; 3) precipitating or aggravating factors; 3) type, dosage and effectiveness of medication; 5) treatment other than medication; 6) any measures used to alleviate pain and 7) functional limitations and restrictions. In his decision the ALJ does not discuss any of these factors in determining plaintiff's credibility. The ALJ's finding concerning plaintiff's credibility is conclusory, and he fails to build an accurate and logical bridge between the evidence and the result. Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir. 1996). Accordingly the Court cannot affirm the ALJ's credibility finding.

Plaintiff further argues that the ALJ did not give weight to the disability decision by the State of Wisconsin. Although the State of Wisconsin's finding is not binding on the Social Security Administration it is entitled to some weight and should be considered. See Davel v. Sullivan, 902 F.2d 559, 561 (7th cir. 1990). In his decision the ALJ mentions the State of Wisconsin's disability decision but does not articulate the weight to be given it. It is the responsibility of the ALJ and not the Commissioner's attorneys to articulate the weight to be given to the state

