

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

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KAREN UPPERTON,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,  
Commissioner of Social Security,

05-C-618-S

Defendant.

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On March 23, 2006 judgment was entered in favor of plaintiff remanding the case for further proceedings. On April 4, 2006 plaintiff moved to alter or amend the judgment to either remand for an award of benefits or with specific instructions for the ALJ to follow. This motion has been fully briefed and is ready for decision.

Plaintiff Karen Upperton brought 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). Plaintiff applied for DIB on February 2, 1998 alleging an onset of disability January 31, 1997 due to chronic fatigue syndrome, fibromyalgia and chemical, food and mold sensitivities. Her application was denied initially and upon reconsideration. A hearing was held on October 20, 1999 before Administrative Law

Judge (ALJ) Arthur Schneider. In a June 29, 2000 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 July 25, 2002.

Plaintiff filed a civil case in this court, Case No. 02-C-534-C which was assigned to Judge Barbara B. Crabb. The parties entered into a "joint motion to reverse and remand" with specific instructions for the ALJ to follow on remand which Judge Crabb granted on September 22, 2003.

The Appeals Council entered an order on March 30, 2004 remanding the matter to an ALJ for further proceedings consistent with the order of the court. ALJ Schneider held a supplemental hearing on June 29, 2005 in Madison, Wisconsin. On August 24, 2006 the ALJ issued his written decision finding plaintiff not disabled. The Appeals Council did not take jurisdiction within 60 days and the ALJ's decision became the final decision of the Commissioner.

Plaintiff filed this civil case on October 21, 2005. Judgment was entered on March 23, 2006 remanding the case to the Commissioner.

#### FACTS

Plaintiff was born on April 8, 1950 and her insured status expired on September 30, 2002. She completed the twelfth grade and worked as a job specialist at the Blackhawk Technical College.

In February 1997 Dr. David Morris of Allergy Associates of LaCrosse, Ltd. treated plaintiff for severe allergies to formalin, phenol, ethanol, dusts and molds. In October 1999 Dr. Morris concluded that plaintiff continued to be chemically sensitive and was still unable to work in an environment where she would be exposed to even relatively small amounts of chemicals and molds.

Dr. George F. Kroker, M.D., also of Allergy Associates, noted that plaintiff's severe chemical sensitivity caused cognitive dysfunction and chronic fatigue. He suggested that she work at home for better control of her work environment.

In July 1997 Dr. Wayne Konetzki, Fellow of the American Academy of Environmental Medicine, reviewed plaintiff's medical records and examined her. He concluded that plaintiff's Chemical Sensitivity disorder caused her to be permanently disabled for all types of employment.

In June 1998 Dr. Daniel G. Malone, a rheumatologist at the University of Wisconsin Hospital and Clinics, treated plaintiff for fibromyalgia. He noted that plaintiff had diarrhea and increased pain and fatigue. Dr. Malone found that she would likely be absent from work more than three times a month as a result of her impairments. He also noted that her ability to work at a regular job on a sustained basis was limited by her multiple chemical sensitivities.

Dr. Malone referred plaintiff to Dr. William A. Merrick, a psychologist, for neuropsychological testing. He concluded that she had a cognitive disorder.

In 1999, Dr. Joseph Kovaz, the medical advisor of the Chronic Fatigue Syndrome program at the University of Wisconsin Hospitals and Clinics, stated that plaintiff met all the criteria for a diagnosis of Chronic Fatigue Syndrome. He concluded that plaintiff's symptoms were disabling. The record contains three reports of Dr. Kovaz from 2002, 2004 and 2005 reaffirming his conclusion that plaintiff was disabled.

A 2000 red blood cell study indicates the altered shape of plaintiff's red blood cells which is consistent with the conditions of Fibromyalgia and Chronic Fatigue Syndrome.

At the June 29, 2005 hearing before the ALJ plaintiff appeared with counsel and testified that she experienced a lot of fatigue and pain and that her chemical sensitivity problem continued.

Richard Welitte, a vocational expert, testified at the hearing that if an individual had to avoid exposures to fumes, odors, dust, etc., he or she could not perform plaintiff's past work or any jobs in the economy.

The ALJ found that plaintiff had severe impairments but none were medically equivalent to a listed impairment. He also found that she was not disabled because she could perform her past

relevant work as well as other jobs existing in the national economy.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on 1-31-07, the date the claimant stated she became unable to work, and continued to meet them through 9-30-02, but not thereafter.

2. The claimant has not engaged in substantial gainful activity since 1-21-97.

3. The medical evidence establishes that the claimant has "severe" chronic fatigue syndrome, fibromyalgia, chemical, food and mold sensitivities, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No.4.

4. The claimant's subjective complaints and allegations about her limitations and impairments are 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. 20 CFR 404.1529 and SSR 96-7p.

5. The claimant has the residual functional capacity to perform occasional lifting and carrying up to 20 lbs. and frequent lifting and carrying up to 10 lbs. The claimant has the ability to sit 6 out of 8 hours and stand 6 out of 8 hours in an 8 hour workday. The claimant must avoid exposure to heavy concentrations of fumes, odors, dusts and gases. She is precluded from working in a poorly ventilated area. While close proximity to people is permissible, such as in an airplane or in a store, the claimant must avoid actual physical contact with co-workers and the general public.

6. The claimant is able to perform her past relevant work as an employment counselor in a job service office.

7. The claimant was 52 years old at the time of her date last insured(9-30-02), which is defined as a person closely approaching advanced age. (20 CFR §404.1563).

8. The claimant has a high school education (20 CFR §404.1564).

9. The claimant has acquired work skills, such as general office skills, keyboard typing, writing, interviewing techniques, and decision-making, which she demonstrated in past work, and which, considering her residual functional capacity, can be applied to meet the requirements of other work (20 CFR § 404.1568).

10. Based on an exertional capacity for light work, and the claimant's age, education and work experience, section 404.1569 and Rule 202.15, Table No. 2, Appendix 2, Subpart P, Regulations Now 4 would direct a conclusion of "not disabled."

11. Although the claimant's exertional and nonexertional limitations do not allow her to perform the full range of light work, using the above-cited framework for decision making and considering the testimony of the vocational expert, there are a significant number of jobs in the national economy which she could perform. Examples of such jobs are: office helper (3,000 sedentary and 2,000 light jobs in the state of Wisconsin); information clerk (700 sedentary and 100 light jobs in the state of Wisconsin); and security guard/watch monitor (1,100 sedentary and 600 light jobs in the state of Wisconsin).

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 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 was not disabled because she could perform her past relevant work as an employment counselor in a job service office as well as a significant number of other jobs

in the national economy. The Court must determine whether this conclusion is supported by substantial evidence.

Plaintiff and the Commissioner agree that this case should be remanded. Plaintiff seeks to amend the March 23, 2006 judgment of remand to state that benefits should be awarded or in the alternative to include specific instructions. The Commissioner requests a remand in order to further develop the record concerning plaintiff's medical condition and to comply with the original September 22, 2003 remand order.

Pursuant to the first remand the ALJ was ordered to review, analyze and weigh all treating physician opinions of record. He was also ordered to review Dr. Baumblatt's opinion that plaintiff should avoid all exposure to pulmonary and environmental irritants in determining plaintiff's residual functional capacity. The ALJ was also ordered to make a detailed credibility finding and to consider the impact of plaintiff's obesity, Dr. Merrick's opinion. The results of chemical sensitivity testing and Dr. Kroker's statements that plaintiff should consider working at home.

The parties agree that the ALJ did not identify the weight given to various opinions of record or articulate the reasons for discounting medical opinions. Further, he did not consider the impact of plaintiff's obesity on her residual functional capacity.

The Court must determine whether a second remand is necessary to correct these errors or whether the Commissioner's decision



should be reversed and benefits awarded. An award of benefits is only appropriate where all factual issues have been resolved and the record can yield but one supportable conclusion. See Campbell v. Shalala, 988 F. 2d 741, 744 (7<sup>th</sup> Cir. 1993). Further, where an ALJ does not follow the law of the case upon remand and the record continues to demonstrate uncontradicted medical opinions that the claimant is disabled, remand for an award of benefits is an appropriate remedy. Wilder v. Apfel, 153 F.3d 799, 802, 804 (7<sup>th</sup> Cir. 1998).

Dr. Konetzki, a specialist in environmental medicine, found that plaintiff was so sensitive to numerous products that she would be unable to work. Dr. Morris, an allergy specialist, concluded that plaintiff's allergies would preclude her from working in an environment where she would be exposed to even relatively small amounts of chemicals and molds. Dr. Baumblatt, a state agency physician, reviewed and evaluated plaintiff's file and concluded that plaintiff must avoid exposure to "fumes, odors, dusts, gases, poor ventilation, etc." Vocational experts at both hearings testified that with this limitation plaintiff could not perform her past relevant work nor other work existing in the economy.

Dr. Kovaz, medical advisor of the Chronic Fatigue Syndrome program at the UW Hospitals and Clinic, stated that plaintiff had Chronic Fatigue Syndrome and that her symptoms were disabling. No opinion of record contradicted this opinion. Dr. Malone,

plaintiff's treating rheumatologist, concluded that plaintiff's fibromyalgia was disabling.

Because the uncontradicted medical opinions of record support the conclusion that plaintiff is disabled, the March 23, 2006 judgment of remand shall be amended to provide that the Commissioner's decision is reversed and benefits are awarded.

ORDER

IT IS ORDERED that judgment entered March 23, 2006 is AMENDED to provide that the Commissioner's decision is reversed and that DIB benefits are awarded plaintiff from January 31, 1997 to September 30, 2002.

Entered this 25<sup>th</sup> day of May, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge