

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

MICHAEL HART,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

05-C-647-S

Defendant.

Plaintiff Michael Hart 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) and Supplemental Security Income (SSI). He asks the Court to reverse the decision.

Plaintiff applied for DIB on January 18, 2002 alleging disability since November 7, 2001 because of back problems, learning disorder, personality disorder, dysthymia and history of drug and alcohol use. His application was denied initially and upon reconsideration. A hearing was held on June 24, 2004 before Administrative Law Judge (ALJ) Ira S. Epstein. In a written decision dated December 14, 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 September 23, 2005.

FACTS

Plaintiff was born on January 13, 1967. He graduated from high school and worked in the past as a laborer, janitor, assembler and bindery worker.

In November 2001 plaintiff experienced back problems. He was diagnosed at an Urgent Care clinic with lumbar strain. On December 3, 2002 he saw Kristine Metz, a nurse practitioner, for low back pain. She reported that plaintiff's back strain was resolved and that he could lift 50 pounds. His x-rays were normal. Plaintiff missed his next appointment which was scheduled for February 21, 2002.

On May 7, 2002 plaintiff saw Richard W. Hurlburt, Ph.D. for a mental status evaluation at the request of the state agency. Dr. Hurlburt administered the Wechsler Adult Intelligence Scale-Third edition test. Plaintiff had a full scale intelligence quotient of 84 which placed his intellectual functioning in the low average range. There was an 11 point discrepancy between his performance IQ of 91 and his verbal IQ of 80 which was consistent with plaintiff's previously diagnosed learning disability. Dr. Hurlburt commented that plaintiff had some symptoms of depression and anger issues. Dr. Hurlburt noted that plaintiff had an adequate memory, normal concentration and normal abilities of abstraction.

On May 23, 2002 state agency reviewing psychologist Keith E. Bauer, Ph.D., reviewed the record and completed a "Mental Residual

Functional Capacity Assessment.” Dr. Bauer indicated that plaintiff had moderate restrictions in his activities of daily living and social functioning, mild difficulties in maintaining concentration, persistence and pace and no episodes of decompensation.

In September 2002, plaintiff was seen by Marco C. Dotti, M.D., for a neurological consultation. It was noted that plaintiff had the possibility of a protruding disk and was scheduled for an MRI.

On November 19, 2002 state agency reviewing physician, M. J. Baumblatt, concluded plaintiff could lift 50 pounds occasionally and 25 pounds frequently. He also indicated that plaintiff was limited to standing/walking for 6 hours in an 8 hour day and sitting 6 hours in an 8 hour day.

Douglas Cybela, Ph.D., treated plaintiff from September 26, 2002 through December 19, 2002. During that time period Dr. Cybela had scheduled nine sessions with plaintiff who did not attend four of these. On May 1, 2003 Dr. Cybella completed a “Mental Impairment Questionnaire” for plaintiff and indicated that plaintiff would experience frequent deficiencies of concentration, persistence and pace that would result in failure to complete tasks and repeated episodes of deterioration. He also indicated that plaintiff would miss work more than three times a month.

On December 18, 2003 while plaintiff was in jail he saw William Sullivan, M.D., a psychiatrist, for depression. Dr. Sullivan prescribed a combination of two medications for him. Dr.

Sullivan reported that plaintiff was showing a very satisfactory response to the medication. On April 8, 2004, Dr. Sullivan reported that plaintiff's moods were consistently good, that he had good energy, that his frustration and anger were under good control and he was sleeping well at night. Dr. Sullivan noted that plaintiff had completed several positive job interviews.

At the June 24, 2004 hearing before the ALJ plaintiff appeared with counsel and testified that he had been in learning disabilities classes throughout his entire school history. He also testified that he had back pain at a level six on a scale of one to ten, with 10 being the worst. Plaintiff estimated that he could lift 20-25 pounds, walk for three blocks and stand for one to one and one-half hours. Plaintiff testified that he washed dishes, swept the floor and drove. He also testified that he had spent two and one-half years in prison.

Dr. N. Timothy Lynch, Ph.D., a medical expert, testified that plaintiff had an affective disorder and a personality disorder but he did not have mental retardation. The expert referred to the B criteria of Listings 12.04 and 12.08 and agreed with Dr. Cybela that plaintiff had slight limitations in his activities of daily living and moderate limitations of social functioning. Dr. Lynch disagreed with Dr. Cybela's opinion that plaintiff had frequent problems with concentration because intelligence testing showed a digit span score of 10, which demonstrated plaintiff had adequate

attention and concentration abilities. Dr. Lynch also found that based on Dr. Sullivan's notes concerning plaintiff that he would not have episodes of decompensation in work or work-like settings.

William S. Dingess, 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 expert advised that plaintiff retained the residual functional capacity to perform light, low stress jobs that allowed for a sit/stand option and provided for limited contact with co-workers and supervisors.

The expert testified that although this person could not perform his past jobs, there would be other jobs in the state of Wisconsin he could perform: 1,000 machine operator jobs, 500 hand packaging jobs, 6000 assembly jobs, 500 production inspector jobs and 1,000 unskilled clerical positions. When the ALJ added the limitation of not working around machinery, the expert eliminated the machine operator position and one fourth of the assembly jobs.

On July 29, 2004 Dr. Sullivan completed a form indicating he agreed with Dr. Cybela's findings. On September 28, 2004 wrote a letter indicating that plaintiff's several medical and psychiatric conditions rendered him unemployable at the present time.

In his December 14, 2004 decision the ALJ concluded that plaintiff retained the residual functional capacity to perform low-

stress, unskilled light exertional level work allowing for a sit/stand option that involves only limited bending and twisting, limited interaction with the public and no involvement with moving machinery. The ALJ advised that plaintiff's complaints suggest a greater severity of impairment than is shown by the objective medical factors and plaintiff's daily activities. The Alj concluded that based on the framework of vocational Rule 202.20 and the vocational expert's testimony, plaintiff was not disabled because he could perform a significant number of jobs that existed in the economy.

The ALJ made the following findings:

1. The claimant is not engaging in substantial gainful work activity.
2. The medical evidence establishes the claimant has severe back problems, learning disorder, personality disorder not otherwise specified, history of drug and alcohol use and dysthymia, but does not have an impairment or combination of impairments listed in or medically equal to one listed in the Listing of Impairments.
3. When the claimant's subjective complaints and allegations about his limitations and impairments are considered in light of all the objective medical evidence as well as the record as a whole, they do not reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful work activity.
4. The claimant has the residual functional capacity to perform low-stress, unskilled light exertional level work allowing for sit/stand option that involves only limited

bending and twisting, limited interaction with the public and no involvement with moving machinery.

5. The claimant is a younger individual with a high school education.

6. The claimant is unable to perform his past work.

7. Considering the claimant's vocational factors in light of the testimony of the vocational expert and the framework of vocational Rule 202.20, the claimant is "not disabled."

8. The claimant is not under a "disability" as defined in the Social Security Act and is not entitled to or eligible for a period of disability, disability benefits or supplemental security income under the provisions of Sections 216(I), 223 and 1614(a)(3), respectively.

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 retained the residual functional capacity to perform low-stress, unskilled light exertional level work allowing for sit/stand option that involves only limited bending and twisting, limited interaction with the public and no involvement with moving machinery. The ALJ concluded that based on the framework of vocational Rule 202.20 and the vocational expert's testimony, plaintiff was not disabled because he could perform a significant number of jobs that existed in the economy.

Plaintiff claims that the ALJ did not properly assess his credibility. The ALJ's credibility decision must be upheld unless it is "patently wrong." Powers v. Apfel, 207 F.3d 421, 435 (7th Cir. 2000). The ALJ is required to assess plaintiff's allegations of pain and limitations under Social Security Ruling 96-7p and 20 C.F.R. 404.1529(c). 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. The ALJ specifically addressed these factors to determine that plaintiff's subjective complaints were not completely credible.

The ALJ's credibility determination must be affirmed because it is supported by the record as a whole. The ALJ did not err in finding that plaintiff's testimony was not fully credible.

Plaintiff also claims that the ALJ failed to afford proper weight to the opinions of plaintiff's treating physicians, Dr. Cybela and Dr. Sullivan. 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. It may be that the opinions of Dr. Cybella and Dr. Sullivan who treated plaintiff are not entitled to controlling weight because they are not supported by medically acceptable clinical and laboratory diagnostic techniques and are inconsistent with other medical evidence in the record, but the ALJ does not state this in his decision. He articulates no reasons for

not accepting the opinion of Dr. Cybella that plaintiff had frequent deficiencies of concentration and repeated episodes of deterioration and would miss three days of work a month. The ALJ also did not give any reasons for rejecting Dr. Sullivan's opinion that plaintiff was not employable even though Dr. Sullivan's notes clearly did not support this conclusion.

Failure to provide good reasons for discrediting a doctor's opinion is alone grounds for remand. Clifford v. Apfel, 227 F.3d 863, 870 (7th Cir. 2000). The ALJ must "minimally articulate his reasons for crediting or rejecting evidence of disability." Scivally v. Sullivan, 966 F.2d 1070, 1076 (7th Cir. 1992). It is the responsibility of the ALJ and not the Commissioner's attorney to articulate the weight to be given to the opinions of the plaintiff's treating physicians. See Dixon v. Massanari, 270 F.3d 1171, 1176 (7th Cir. 2001). The ALJ failed to articulate any reasons for rejecting Dr. Cybela's and Dr. Sullivan's opinions concerning plaintiff's mental limitations.

The Court will remand this action for a determination of the weight to be given the opinions of plaintiff's treating physicians and the reasons these opinions were rejected. The ALJ shall clearly articulate his reasons for discounting the opinions of Dr. Cybela and Dr. Sullivan.

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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 29th day of March, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge