

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

JEFF KOCH,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

06-C-183-S

Defendant.

Plaintiff Jeff Koch 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 or to remand for further proceedings.

Plaintiff applied for DIB on October 2, 2003 alleging disability since January 14, 2002. His application was denied initially and upon reconsideration. A hearing was held on July 28, 2005 before Administrative Law Judge (ALJ) David K. Gatto. In a written decision dated November 23, 2005 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 March 22, 2006.

FACTS

Plaintiff was born on June 27, 1964. He has a GED and his past work experience includes work as a truck driver, gas station supervisor and restaurant cook.

In January 2002 plaintiff injured his back at work. He was treated by Larry Plummer, a physician's assistant, at the Duluth Clinic on January 15, 2002 who told him not to return to work.

On February 22, 2002 plaintiff was seen by Dr. Matthew Eckman, a board certified physical medicine and rehabilitation specialist. An MRI of plaintiff's lumbar spine revealed some dehydration at L3-4 and L4-5, with a small disc protrusion at L4-5. Plaintiff was diagnosed with lumbar strain with L4-5 disc degeneration and protrusion and some left sciatica, including some left L5 radiculitis, if not radiculopathy. On March 22, 2002 plaintiff was given a lumbar epidural steroid injection.

On March 26, 2002 Dr. James Callahan, a neurosurgeon, performed a laminectomy on plaintiff. On the date of discharge, March 28, 2002, Dr. Callahan noted plaintiff's surgery went well and had relieved his leg pain. Dr. Callahan recommended that plaintiff remain off work and follow up with Dr. Eckman.

Dr. Eckman saw plaintiff on April 30, 2002 and indicated he was improving postoperatively. On May 13, 2002 Dr. Eckman saw plaintiff and concluded that he had a steady gait and good power in the lower extremities.

On August 19, 2002 Dr. Eckman indicated that plaintiff could return to light duty work that entailed standing/walking 1 to 4 hours in an 8 hour work day, sitting 1 to 3 hours in an 8 hour work day, driving 1 to 3 hours in an 8-hour work day, occasional bending

and squatting, no climbing and changing positions as needed. Dr. Eckman recommended plaintiff start working 4 hours a day.

In June 2002 Robert Barnett, Jr. M.D., performed an independent medical evaluation of plaintiff and noted plaintiff was six feet three inches tall and weighed 430 pounds. He concluded that plaintiff could return to work on October 1, 2002 without restrictions.

On November 4, 2002 Dr. Eckman reevaluated plaintiff and recommended that he not work. By January 2003 plaintiff had improved. Dr. Eckman diagnosed plaintiff with lumbar strain, postoperative laminectomy with residual L5 radiculopathy in the left, gradually improving. He indicated that plaintiff could return to light duty work. Dr. Eckman continued plaintiff on light duty work restrictions in April, July, September and December 2003.

In February 2004 plaintiff returned to Dr. Eckman complaining of a flare up of low back pain. Dr. Eckman recommended that plaintiff not work.

Plaintiff was seen by Dr. Eckman in May 2004. Dr. Eckman stated that plaintiff had chronic lumbar strain, post lumbar laminectomy at L4-4 with some residual left L-5 radiculopathy. He recommended that plaintiff not return to work. On June 24 and September 20, 2004 Dr. Eckman also recommended that plaintiff not return to work.

On July 2, 2004 plaintiff had a nerve conduction velocity test. The study revealed he had no active L-5 radiculopathy with only mild sensorimotor peripheral neuropathy.

In October 2004 physical therapist Jeff Kittelson performed a functional capacity evaluation on plaintiff. Mr. Kittleson recommended work restrictions of sitting 4 hours, standing 2 and one-half hours and walking 4 hours in an 8-hour work day, no squatting, climbing heights, crouching or balancing, occasional crawling, no lifting from floor to waist, lifting from waist-level 45 pounds occasionally and 35 pounds frequently and the opportunity to change positions as needed.

On January 25, 2005 plaintiff returned to Dr. Eckman. Dr. Eckman reported that plaintiff was taking Oxycontin and Neurontin. Dr. Eckman diagnosed plaintiff with chronic lumbar strain postoperatively, with a left L5 radiculopathy, degenerative joint disease of his left knee, nicotine abuse, morbid obesity and likely sleep apnea. Dr. Eckman opined that plaintiff was not capable of working.

At the July 28, 2005 hearing before the ALJ plaintiff appeared with counsel and testified that he had pain radiating into his hip and down his leg. He testified that he took a week vacation to Georgia. He further testified that he took Oxycontin and Neurontin for pain. Plaintiff testified that he went to the gym and walked, lifted 25-30 pound weights and swam. He also testified that he

worked in the yard, cleaned up weeds and recently shoveled two wheelbarrow loads of dirt.

A medical expert, Julianne Koski, M.D., testified after relistening to the testimony and reviewing the medical record. She testified that none of plaintiff's impairments met or equaled any listed impairment. The expert concluded that plaintiff could lift twenty pounds occasionally and ten pounds frequently from the waist up with no squatting or crouching, no climbing ladders or scaffolding, only occasional crawling or kneeling and rare stairs. She also stated that plaintiff should avoid dangerous machinery and any detailed or complex work. Upon questioning by plaintiff's attorney, the expert stated that plaintiff could stand two hours and sit six hours in an 8 hour work day with a sit/stand option at will.

Edward Utities, 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 advising that plaintiff retained the residual functional capacity to lift from waist-level twenty pounds occasionally and ten pounds frequently, to stand and walk no more than two hours and to sit six hours in an 8 hour work day with a sit/stand option at will, with no squatting, crouching, climbing ropes, ladders or scaffolds, occasional crawling or kneeling, rare

climbing of stairs, no operation of machinery or driving and to understand, remember and carry out simple, routine, repetitive tasks.

The expert testified that such an individual could not perform plaintiff's past work but could perform work as final assembler, bench hand, lens inserter, lamp shade assembler and numerous other similar occupations of which there are 5,000 within the state.

In his decision the ALJ concluded that plaintiff had severe impairments of morbid obesity, degenerative joint disease of the left knee, degenerative disc disease of the lumbar spine, status post lumbar discectomy in March 2002, narcolepsy, sleep apnea, varicose veins, diabetes mellitus type II, hypertension, hyperlipidemia and depression. The ALJ concluded that none of these impairments considered individually or in combination meet or equal the requirements of any impairments listed in Appendix 1, Subpart P of the regulations.

The ALJ considered the September 30, 2002, January 24, 2003, April 9, 2003 and December 8, 2003 opinions of Dr. Eckman, plaintiff's treating physician, that plaintiff could do light duty work. He stated, "Dr. Eckman's opinion for the above mentioned period is given controlling weight, as he was able to provide a detailed, longitudinal picture of the claimant's medical impairments and his opinion is consistent with the medical evidence (20 CFR 404.1527(d)(2)). Social Security Ruling 96-2p." The ALJ

did not give controlling weight to Dr. Eckman's January 25, 2005 opinion that plaintiff was not employable. The ALJ found, "Dr. Eckman's January 2005 opinion is inconsistent with the medical evidence with his own examinations, and with the claimant's activities of daily living."

The ALJ concluded that plaintiff retained the residual functional capacity to lift from waist-level twenty pounds occasionally and ten pounds frequently, standing and walking no more than two hours and sitting six hours in an 8 hour work day with a sit/stand option at will, with no squatting, crouching, climbing ropes, ladders or scaffolds, occasional crawling or kneeling, rare climbing of stairs and no operation of machinery or driving. He further found that plaintiff retained the capacity to understand, remember and carry out simple, routine, repetitive tasks.

The ALJ made the following findings:

1. The claimant met the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act on January 14, 2002, his alleged onset date of disability, and is insured for benefits through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since January 14, 2002.
3. The claimant's morbid obesity, degenerative joint disease of the left knee, degenerative disc disease of the lumbar spine, status post lumbar discectomy in March 2002,

narcolepsy, sleep apnea, varicose veins, diabetes mellitus type II, hypertension, hyperlipidemia and depression are considered "severe" based on the requirements in the Regulations 20 CFR 404.1520(c).

4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision.

6. The claimant has the residual functional capacity for lifting no more than twenty pounds occasionally and ten pounds frequently, standing and walking no more than two hours total time out of an eight hour day, sitting six hours out of an eight hour day, with a sit/stand option at will. Lifting would be from the waist level only. Pushing and pulling with the upper extremities would be limited to twenty pounds occasionally and ten pounds frequently. He can do no squatting, crouching, climbing ropes, ladders or scaffolds. He can do occasional crawling or kneeling. Climbing of stairs would be rare, meaning less than occasional up to 1/6 of the work day. There would be no operation of machinery and no driving as part of his job. He retains the capacity to understand, remember, and carry out simple, routine repetitive tasks.

7. The claimant is unable to perform his past relevant work as a truck driver, gas station supervisor or restaurant cook. (20 CFR 404.1565).

8. The claimant is a younger individual (20 CFR 404.1563).

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

10. The claimant has no transferable skills with his residual functional capacity (20 CFR 404.1568).

11. Considering the claimant's residual functional capacity, age, education and relevant work history, he is able to make a vocational adjustment to work that exists in significant numbers in the national economy, examples of which are: final assembler, bench hand assembler, lens inserter and lamp shade assembler.

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 4504.1520(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 found that plaintiff had severe impairments which did not meet or equal a listed impairment. The ALJ gave controlling weight to Dr. Eckman's September 30, 2002, January 24, 2003, April 9, 2003 and December 8, 2003 opinions that plaintiff could do light duty work because they were supported by the medical evidence. He discounted Dr. Eckman's January 25, 2005 opinion that plaintiff could not work because it was inconsistent with the medical evidence.

The ALJ concluded that plaintiff retained the residual functional capacity to lift from waist-level twenty pounds occasionally and ten pounds frequently, standing and walking no more than two hours and sitting six hours in an 8 hour work day with a sit/stand option at will, with no squatting, crouching, climbing ropes, ladders or scaffolds, occasional crawling or kneeling, rare climbing of stairs and no operation of machinery or driving. He further found that plaintiff retained the capacity to understand, remember and carry out simple, routine, repetitive tasks.

The ALJ found that plaintiff could not perform his past work but that he was not disabled because he could perform a significant number of jobs available in the regional economy.

Plaintiff argues that the ALJ improperly discounted Dr. Eckman's January 2005 opinion that plaintiff could not work. He argues that the ALJ ignored Dr. Eckman's 2004 and 2005 treatment notes. Although these notes are not mentioned in the ALJ's decision, the notes together with Dr. Eckman's 2005 opinion are inconsistent with the objective medical evidence in the record.

Dr. Barnett, an independent medical consultant, concluded in June 2002 that plaintiff could return to work on October 1, 2002. In July 2004 plaintiff had a nerve conduction velocity test which indicated he had no radiculopathy. In October 2004 a physical therapist concluded that plaintiff could work with work restrictions of sitting 4 hours, standing 2 and one-half hours and walking 4 hours in an 8-hour work day, no squatting, climbing heights, crouching or balancing, occasional crawling, no lifting from floor to waist, lifting from waist level 45 pounds occasionally and 35 pounds frequently and the opportunity to change positions as needed. The medical expert testified at the 2005 hearing that plaintiff could lift twenty pounds occasionally and ten pounds frequently from the waist up with no squatting or crouching, no climbing ladders or scaffolding, only occasional crawling or kneeling and rare stairs. She also stated that

plaintiff could stand two hours and sit six hours in an 8 hour work day with a sit/stand option at will but should avoid dangerous machinery and any detailed or complex work. This medical evidence in the record supports the ALJ's conclusion that plaintiff retained the ability to perform some work existing in the national economy in 2004 and 2005 as well as in the latter part of 2002 and all of 2003.

The plaintiff's own testimony of his daily activities also supports the ALJ's conclusion that plaintiff retained the residual functional capacity to perform some work. Plaintiff testified that he went to the gym and walked, lifted 25-30 pound weights and swam and that he worked in the yard, cleaned up weeds and recently shoveled two wheelbarrow loads of dirt. These activities are consistent with the residual functional capacity that the ALJ found plaintiff retained.

The ALJ properly discounted Dr. Eckman's 2005 opinion that plaintiff could not work because it was inconsistent with the medical evidence and plaintiff's testimony concerning his daily activities. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2); SSR 96-2p. There is substantial evidence in the record that supports the ALJ's conclusion that plaintiff retained the residual functional capacity to do some work.

Plaintiff also argues that he is entitled to a closed period of disability from January 14, 2002 until January, 2003 because he

was unable to work for this 12 month period. His treating physician Dr. Eckman, however, indicated that in September 2002 plaintiff could return to light duty work. There is no medical evidence that supports the plaintiff's argument that he could not work for the twelve month period from January 14, 2002 until January 2003.

There is substantial evidence to support the Commissioner's finding that plaintiff was not disabled because he could perform jobs existing in the national economy. Accordingly, the Commissioner's decision will be affirmed.

ORDER

IT IS ORDERED that plaintiff's motion to reverse the decision of the Commissioner is DENIED.

IT IS FURTHER ORDERED that the decision of the defendant Commissioner denying plaintiff Disability Insurance Benefits (DIB) is AFFIRMED.

Entered this 29th day of September, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge