

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

HELEN M. YOURCHUCK,

Plaintiff,

v.

MEMORANDUM AND ORDER

LINDA S. MCMAHON,
Commissioner of Social Security,

06-C-420-S

Defendant.

Plaintiff Helen M. Yourchuck 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). She asks the Court to reverse the decision or to remand for further proceedings.

On October 31, 2001 plaintiff applied for DIB alleging disability beginning January 1, 2000 due to lower back pain. Her application was denied initially and upon reconsideration. On December 6, 2002 plaintiff filed a request for a hearing. Administrative Law Judge John H. Pleuss denied her request as untimely.

On January 15, 2003 plaintiff filed a timely request for review of this decision with the Appeals Council. On June 11, 2003 the Appeals Council granted plaintiff's request and vacated the order of dismissal finding that plaintiff had good cause for filing

an untimely request for hearing and remanded the case for further proceedings.

A hearing was held on June 30, 2005 before Administrative Law Judge (ALJ) John H. Pleuss. On July 25, 2005 in a 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 March 30, 2006.

FACTS

Plaintiff was born on October 25, 1971. She has a high school diploma. Her past relevant work experience was as a file clerk.

Plaintiff has a history of lower back pain. She began treatment with Gretchen C. Considine, a certified physician's assistant (PA), in 1998 following a right knee arthroscopy. On August 31, 1999 PA Considine saw plaintiff for back pain and concluded plaintiff had a lumbrosacral strain. Plaintiff began physical therapy on November 9, 1999.

On January 21, 2000 plaintiff saw Dr. William R. Neidermeier, an orthopedist, for low back pain. Dr. Neidermeier noted that plaintiff was significantly overweight and had poor abdominal muscle tone. X-rays taken that day indicated some anterior marginal osteophytes at L3-4 and some minimal disc space narrowing at L3-4. He recommended plaintiff take anti-inflammatory medication, use a TENS unit for pain and continue physical therapy.

Plaintiff attended physical therapy on January 25, 2000 and February 25, 2000. Plaintiff was taking Darvocet and Naprosyn.

On October 9, 2001 plaintiff saw chiropractor Dr. James Wenger who diagnosed her with thoracic and lumbar segmental dysfunction with pain in her thoracic spine and lumbago. Mr. Wenger treated plaintiff on October 9, 12, 22 and 25, 2001.

On October 29, 2001 plaintiff saw PA Considine for lower back pain. Considine noted plaintiff had a BMI of 40 (morbid obesity) and recommended plaintiff engage in regular aerobic activity as part of a weight loss regimen.

On February 19, 2002 plaintiff saw Dr. Neidermeier. X-rays taken of her lumbrosacral spine were unchanged from January 21, 2000. An MRI performed on plaintiff's spine on March 1, 2002 showed a degenerative disc at L3-4. Dr. Neidermeier recommended that plaintiff take a conservative approach to treating her back pain.

On August 28, 2002 a State agency physician, John McDermott, M.D., completed a Residual Functional Capacity (RFC) form for plaintiff. He concluded that plaintiff could lift and carry up to 50 pounds for up to one-third of the work day and could perform at the medium range of exertion.

On October 21, 2002 plaintiff saw Dr. Michael Lamson for her lower back pain. Upon examination Dr. Lamson found plaintiff to be limited in forward flexion. Dr. Lamson recommended plaintiff try

aquatic therapy and start a weight loss program. Plaintiff went to physical therapy for her low back pain from October 28, 2002 to November 20, 2002.

On November 12, 2002 plaintiff saw PA Considine for her low back pain. PA Considine encouraged plaintiff to swim. Considine noted that plaintiff's obesity contributed to her chronic low back pain and recommended that she consult with a nutritionist.

On December 10, 2002 PA Considine completed a Lumbar Spine Residual Functional Capacity Questionnaire for plaintiff. She concluded that plaintiff can sit for only fifteen minutes at a time and stand for only ten minutes at a time. She concluded that plaintiff could sit, stand or walk for about two hours each in an 8 hour work day. She also concluded that plaintiff can lift and carry less than 10 pounds on a frequent basis and rarely twist, stoop, bend, crouch or climb a ladder. Considine noted that plaintiff would miss more than four days of work in a month because of her physical impairments.

Dr. Lamson saw plaintiff on December 16, 2002 and noted that the aquatic therapy he had prescribed had not provided any relief to plaintiff.

On February 19, 2003 state agency physician Dr. McDermott completed an RFC form on plaintiff finding her capable of light work. On April 16, 2003, Michael Baumblatt, M.D., another state agency physician, affirmed this finding.

On May 3, 2004 plaintiff weighed 218 pounds when she saw PA Considine. PA Considine wrote plaintiff a two month prescription for a Duragesic patch and encouraged plaintiff to continue to exercise to lose weight. On June 29, 2004 plaintiff reported to PA Considine that the patch was not helpful but she had lost six pounds.

On December 12, 2004 at her next visit with PA Considine plaintiff weighed 219 pounds and reported that she continued to have lower back pain. Considine prescribed Lidoderm patches and oxycontin for plaintiff. On February 10, 2005 plaintiff saw Considine for back pain and received a refill of her Oxycontin prescription. Considine also refilled plaintiff's Ranitidine prescription and gave her some Celebrex samples.

On February 22, 2005 PA Considine prescribed Zithromax, Oxycontin, Ranitidine, Naprosyn, Lidoderm, Vicodin and Fluoxetine HcL to control her lower back pain.

At the June 30, 2005 hearing before the ALJ plaintiff appeared with counsel and testified that her low back pain is an 8 on a 10 point scale with ten being the most painful. She testified that the pain restricts her daily activities. She further testified that her medication makes her sick to her stomach and dizzy and affects her concentration. Plaintiff also testified that she would be frequently absent from any job. At the hearing plaintiff who is four feet eleven inches tall weighed 205 pounds.

Jacquelyn Wenckman, a vocational expert, testified at the hearing after listening to the testimony and reviewing the record. The ALJ asked Wenckman whether an individual of plaintiff's age, education, past work experience and the residual functional capacity could perform plaintiff's past work as a file clerk. Plaintiff retained the residual functional capacity to perform light work with no more than occasional climbing, stooping, bending, crouching, crawling or kneeling and with a sit/stand option.

The vocational expert testified that the hypothetical individual could perform plaintiff's past work as a file clerk. The expert also testified that this hypothetical individual could perform other jobs in the state economy including information clerk (1,039), ticket taker(1,300), inspector (3,700) and greeter (6,000).

The ALJ found that plaintiff had severe degenerative disc disease and obesity but that she did not have an impairment or combination of impairments that meets or equals a listed impairment found in 20 C.F.R. Part 404, Subpart P, Appendix 1. He found pursuant to 20 C.F.R. §404.1529 and SSR 96-7p that plaintiff's subjective complaints were not fully credible when considered in light of all the objective medical evidence and clinical findings together with the entire record. Although the ALJ listed plaintiff's daily activities in his decision, he did not indicate

how they support his credibility finding. In his decision the ALJ did not address the effectiveness or side effects of the pain medications prescribed to plaintiff.

The ALJ concluded that plaintiff had the residual functional capacity to perform light work with no more than occasional climbing, stooping, bending, crouching, crawling or kneeling. He also found that plaintiff must be able to exercise a sit/stand option because she cannot sit or stand for more than 30 minutes at a time. The ALJ concluded that plaintiff was not disabled because she could perform her past relevant work as a file clerk as well as other jobs that existed in the Wisconsin economy.

The ALJ made the following findings:

1. The claimant met the disability insured status requirements of the Act on 1-1-00, the date the claimant stated she became unable to work and continues to meet them through 6-30-06.
2. The claimant has not engaged in substantial gainful activity since 1-1-00.
3. The medical evidence establishes that the claimant has "severe" degenerative disc disease and obesity, 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 CFR404.1529 and SSR9 96-7p.

5. The claimant has the residual functional capacity to perform light work but is precluded from more than occasional climbing, stooping, bending, crouching, crawling or kneeling. The claimant must be able to exercise a sit/stand option so that she does not sit or stand for more than 30 minutes at a time.

6. The claimant is able to perform her past relevant work as a file clerk.

7. The claimant is 34 years old, which is defined as a younger person (20 CFR § 404.1563).

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

9. The claimant does not have any acquired work skills which are transferable to the skilled or semi skilled work functions 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 202.20, Table No. 2, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

11. Although the claimant's exertional and nonexertional limitations do not allow her to perform a full range of light work, using the above-cited rule as a 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: information clerk (1,039 jobs in the state of Wisconsin); ticket taker (1,300 jobs in the state of Wisconsin); inspector (3,700 jobs in the state of Wisconsin); and monitor/greeter (6,000 jobs in the state of Wisconsin).

12. The claimant was 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 had severe degenerative disc disease and obesity but that she did not have an impairment or combination of impairments that meets or equals a listed impairment found in 20 C.F.R. Part 404, Subpart P, Appendix 1. He found pursuant to 20 C.F.R. §404.1529 and SSR 96-7p that plaintiff's subjective complaints were not fully credible when considered in light of all the objective medical evidence and clinical findings together with the entire record.

The ALJ concluded that plaintiff had the residual functional capacity to perform light work with no more than occasional climbing, stooping, bending, crouching, crawling or kneeling. He also found that plaintiff must be able to exercise a sit/stand option because she cannot sit or stand for more than 30 minutes at a time. The ALJ concluded that plaintiff was not disabled because she could perform her past relevant work as a file clerk as well as other jobs that existed in the Wisconsin economy.

Plaintiff contends that the ALJ erred in his assessment of plaintiff's 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).

In his decision the ALJ refers to the Social Security Ruling 96-7p which lists the other evidence he can consider in determining the credibility of plaintiff's complaints. The ruling requires the ALJ to consider the claimant's daily activities, the duration,

frequency and intensity of the pain, precipitating and aggravating factors, the dosage, effectiveness and side effects of the medication and functional restrictions.

At the hearing plaintiff testified that the medications she took made her sick to her stomach and dizzy and affect her concentration. The record shows that as of February 25, 2005 plaintiff was prescribed Zithromax, Oxycontin, Ranitidine, Naprosyn, Lidoderm, Vicodin and Fluoxetine HCL to control her pain. Both Oxycontin and Vicodin are narcotic medications which may cause the side effects to which plaintiff testified.

In deciding that plaintiff's complaints were not fully credible, the ALJ failed to mention the medications or their side effects. He also failed to discuss why plaintiff's daily activities made plaintiff's complaints not fully credible. In her brief the Commissioner also fails to address plaintiff's argument that the ALJ failed to discuss the effectiveness and side effects of the medications.

Plaintiff's use of prescribed narcotic pain medications may suggest her subjective complaints of back pain are credible. The ALJ made no finding that the medicine plaintiff was taking was not necessary to treat plaintiff's severe impairment of back pain. The fact that plaintiff is taking prescribed pain medications for her back pain should have been considered by the ALJ in determining

plaintiff's credibility. The ALJ should also have considered both the effectiveness and side effects of the medication.

The Court cannot uphold the ALJ's credibility determination because the ALJ has not addressed the strength or side effects of plaintiff's medications. Further, the ALJ has not made a sufficient finding that plaintiff's daily activities are inconsistent with her allegations of pain.

The Court will remand the above entitled matter to the Commissioner for further proceedings. On remand the Commissioner should address plaintiff's credibility and the reasons for his determination, specifically addressing plaintiff's pain medications and their side effects together with her daily activities.

Plaintiff also argues that the ALJ improperly determined her RFC and improperly found her disabled at Steps Four and Five. The Court need not address these issues. On remand after the ALJ determines whether plaintiff's complaints are credible based on her medications and their possible side effects and her daily activities, he may need to make a new determination of plaintiff's RFC and whether or not she is disabled at Steps Four and Five.

This case will be remanded to the Commissioner for those further proceedings described herein.

Yourchuck v. McMahon, 06-C-420-S

ORDER

IT IS ORDERED that the above entitled matter is REMANDED to the Commissioner for further proceedings consistent with this opinion.

Entered this 15th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge