

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

JANET B. LAROSE,

Plaintiff,

v.

MEMORANDUM AND ORDER

MICHAEL J. ASTRUE,
Commissioner of Social Security,

06-C-533-S

Defendant.

Plaintiff Janet B. Larose brings 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 of the Commissioner or to remand for further proceedings.

Plaintiff applied for benefits on April 10, 2002 alleging disability due to fibromyalgia. Her application was denied initially and upon reconsideration. A hearing was held on June 10, 2003 before Administrative Law Judge (ALJ) Paul Tierney. In a written decision dated August 26, 2003 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 28, 2006.

FACTS

Plaintiff was born on June 11, 1959. She completed high school and worked as a program assistant/secretary.

Plaintiff was diagnosed with fibromyalgia in 1998 by her treating physician Dr. Thomas W. Lundquist. He referred her for physical therapy in August of 1998.

On July 29, 1998 plaintiff saw Dr. John J. Jacks, an occupational medicine specialist. He recommended that she lift only 10 pounds on a frequent basis and 20 pounds occasionally with frequent changes of position but should avoid heavy pushing and pulling.

Plaintiff was seen for rheumatologic consultation by Dr. Lon A. Blaser. He diagnosed her with Fibromyalgia and encouraged her to increase her aerobic activity.

On January 27, 1999 Dr. Lundquist prescribed Flexeril and Zoloft for plaintiff. In February 1999 plaintiff was referred to Dr. David Florence, an occupational medicine specialist. Dr. Florence restricted plaintiff to work in the home allowing for bed rest 4 times a day 20 minutes at a time and exercises 3 times per day, 10 minutes at a time. He concluded that she could perform a wide range of light work.

On March 20, 2002 plaintiff saw Dr. Lundquist and noted an increased generalized muscle aching. Dr. Lundquist prescribed Zoloft for her.

On September 16, 2002 plaintiff saw Dr. Marlon J. Navarro who recommended anti-inflammatories and vigorous aerobic exercise. He referred her to physical therapy. Plaintiff's laboratory results

for sedimentation rate, CMP, CK, urinalysis, CBC with differential and TSH were all normal.

Plaintiff had regular chiropractic treatments from 1997 through 2003. On July 2, 2000 Dr. Rick C. Draeger, plaintiff's chiropractor, completed a Functional Capacity Evaluation Form for plaintiff. He limited her to 6 hours sitting and to 3 hours standing/walking. He also limited her to occasional lifting of 25-34 pounds and continuous lifting up to 24 pounds. Dr. Draeger noted that plaintiff needed frequent breaks.

On June 28, 2002 Dr. Lundquist prepared a report concerning plaintiff's work restrictions. He found that she could not sit or stand for more than 15 minutes at a time and would need periods to walk around during an eight hour day every 15 minutes for 15 minutes in duration. He also concluded that she would need unscheduled breaks to lie or sit down.

A state agency medical consultant reviewed plaintiff's record in September 2002 and found that plaintiff could perform the physical demands of light work. A state agency physiological report dated May 2002 indicated that there was no evidence that plaintiff had a mental impairment that significantly diminished her ability to perform work-related activities.

At the August 26, 2003 hearing before the ALJ plaintiff appeared with counsel and testified that she worked for 19 years for the Wisconsin Department of Natural Resources as a program

assistant. She testified that she had pain all over her body but that it was probably worse in her upper back, shoulders and neck. Plaintiff testified that she was receiving chiropractic adjustments and pain medications including Flexural, Zoloft and Clinoril to control pain. She testified that she could stand or walk about 15 minutes at a time and sit for 15 minutes at a time. She indicated that if she worked full time she would need to lie down two or three times during the work day for one-half hour.

Peter Ihle, M.D., appeared and testified as a neutral medical expert. Dr. Ihle testified that plaintiff could perform light work with a sit/stand option with occasional bending, twisting, squatting and overhead work. He also noted that she would need to take a 15 minute extra break in the morning and in the afternoon.

Karl Botterbush, Ph.D., a vocational expert, was present at the hearing and had reviewed the record. The ALJ asked the expert whether an individual of plaintiff's age, education, past work experience and residual functional capacity could perform her past work. He asked the expert to assume that the individual could lift 10 pounds frequently and 20 pounds occasionally, could sit, stand walk for a total of six hours in an eight hour day with a sit/stand option, could occasionally bend, twist, squat, work overhead, no climbing ladders and with regular breaks where she would have an opportunity to be able to do her stretching exercises 3 times a day

for 10 minutes. The expert testified that plaintiff could perform her past work as a program assistant.

In his written decision the ALJ concluded that plaintiff had a severe impairment of Fibromyalgia but did not have a medically determinable impairment of depression. He found that plaintiff's fibromyalgia did not meet or equal a listed impairment. The ALJ stated in his decision that the plaintiff's "allegation of inability to perform any work activity is not fully consistent with her actual functional capacities, the medical evidence and the overall evidence of record." He further found that there was a lack of objective evidence suggesting a finding of disability and stated, "The undersigned did not place controlling weight on the opinions of the treating examiners given the statements indicating that their opinions are based on claimant's self-reports."

The ALJ concluded that plaintiff retained the residual functional capacity for lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing and/or walking 6 hours of an 8 hour day; sitting 6 hours of an 8 hour day; sit/stand option; regular breaks to perform stretching exercises, generally 3 times per day, 10 minutes at a time; occasional bending, squatting, kneeling, and overhead work; and no climbing ladders. Based on the testimony of the vocational expert the ALJ found plaintiff was not disabled because she was able to perform her past relevant work as a secretary.

The ALJ made the following findings:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant's fibromyalgia is a severe impairment, based upon the requirements in the Regulations. 20 CFR § 404.1521.
4. This medically determinable impairment does not meet or equal one of the listed impairments in Appendix 1, Subpart P, Regulation No.4.
5. The undersigned finds the claimant's allegations regarding her limitations are not fully credible for the reasons set forth in the body of this decision.
6. The undersigned has carefully considered all of the medical opinion in the record regarding the severity of the claimant's impairment. 20 CFR § 404.1527.
7. The claimant has the following residual functional capacity: lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing and/or walking 6 hours of an 8 hour day; sitting 6 hours of an 8 hour day; sit/stand option; regular breaks to perform stretching exercises, generally 3 times per day, 10 minutes at a time; occasional bending, squatting, kneeling, and overhead work; and no climbing ladders.
8. The claimant's past relevant work as a secretary does not require the performance of work-related activities precluded by her residual functional capacity. 20 CFR § 404.1565.

9. The claimant's medically determinable fibromyalgia does not prevent the claimant from performing her past relevant work.

10. The claimant is not under a "disability" as defined in the Social Security Act, at any time through the date of this decision. 20 CFR §404.1520(e).

11. The claim filed on April 17, 2000 is not reopened.

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.

In his written decision the ALJ concluded that plaintiff had a severe impairment of Fibromyalgia but did not have a medically determinable impairment of depression. He found that plaintiff's fibromyalgia did not meet or equal a listed impairment. The ALJ stated in his decision that the plaintiff's "allegation of inability to perform any work activity is not fully consistent with her actual functional capacities, the medical evidence and the overall evidence of record."

The ALJ concluded that plaintiff retained the residual functional capacity for lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing and/or walking 6 hours of an 8 hour day; sitting 6 hours of an 8 hour day; sit/stand option; regular breaks to perform stretching exercises, generally 3 times per day, 10 minutes at a time; occasional bending, squatting, kneeling, and overhead work; and no climbing ladders. Based on the testimony of the vocational expert the ALJ found plaintiff was not disabled because she was able to perform her past relevant work as a secretary.

Plaintiff contends that the ALJ erred in disregarding the opinions of Dr. Thomas Lundquist, plaintiff's treating physician. He found that she could not sit or stand for more than 15 minutes at a time and would need periods to walk around during an eight

hour day every 15 minutes for 15 minutes in duration. He also concluded that she would need unscheduled breaks to lie or sit down.

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. Failure to provide good reasons for discrediting a doctor's opinion is alone grounds for remand. Clifford v. Apfel, 227 F.864, 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).

The ALJ did not place controlling weight on the opinion of the treating physician given the statements indicating that the opinions are based on plaintiff's self-reports. He also found that there was a lack of objective medical evidence supporting a finding of disability. These are not good reasons for discrediting a treating physician's opinion concerning fibromyalgia. Fibromyalgia is an illness with only subjective symptoms. See Sarchet v. Chater, 78 F. 3d 305, 306-307 (7th Cir. 1996). It is difficult to determine the severity of plaintiff's fibromyalgia due to the unavailability of objective clinical tests.

Accordingly, the Court will remand plaintiff's case to the Commissioner for further proceedings to reconsider Dr. Lundquist's opinion and whether it should be given controlling weight. The Alj should also determine what weight to give the opinion of Dr. Draeger, plaintiff's chiropractor.

The ALJ found plaintiff's testimony not to be credible with the residual functional capacity that he found. Her testimony, however, is consistent with Dr. Lundquist's report and the testimony of the medical expert Dr. Ihle that she would need to take a 15 minute extra break in the morning and in the afternoon. The Court cannot affirm the ALJ's finding that plaintiff's testimony was not fully credible.

In his determining plaintiff's residual functional capacity the ALJ did not mention the medical expert's opinion that she would need to take an additional break in the morning and in the afternoon. This opinion should have been addressed.

Based on the record as whole the Court will remand this case to the Commissioner for reconsideration of the weight the opinions of Dr. Lundquist and Dr. Ihle are to be given in the determination of plaintiff's residual functional capacity. Plaintiff's subjective complaints should also be reconsidered in so far as they are consistent with the weight given to the opinions of Dr. Lundquist and Dr. Ihle. In determining plaintiff's credibility the factors listed in SSR 96-7 should also be considered.

Larose v. Astrue, 06-C-533-S

ORDER

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

Entered this 19th day of March, 2007.

BY THE COURT:
/s/
JOHN C. SHABAZ
District Judge