

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

WILLIAM T. POHL,

Plaintiff,

OPINION AND ORDER

v.

06-C-603-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Plaintiff William Pohl brings this action for judicial review of a final decision of defendant Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The subject of this appeal is plaintiff's March 8, 2004 application for a period of disability and disability insurance benefits under the Social Security Act. Defendant has filed a motion to remand the case pursuant to sentence four of § 405(g). Plaintiff opposes remand, arguing that further administrative proceedings are unnecessary and the court should order an immediate award of benefits. I am denying defendant's motion and ordering further briefing because defendant has not provided a satisfactory explanation for the motion to remand.

From the administrative record and the parties' submissions, I find the following facts for the purpose of deciding the commissioner's motion.

FACTS

Plaintiff applied for disability insurance benefits on March 8, 2004, alleging that he was disabled as of February 28, 2003, because of incontinence resulting from prostate cancer surgery. After plaintiff filed his application but before his June 10, 2005 administrative hearing, his prostate cancer returned, requiring a series of radiation treatments. On May 24, 2006, the administrative law judge issued a decision denying plaintiff's application. Applying the familiar five-step sequential evaluation, 20 C.F.R. § 404.1520, the administrative law judge found at step two that plaintiff had the severe impairments of prostate cancer status post radical prostatectomy and radiation and residual urinary stress incontinence. At step three, she observed that although plaintiff's cancer had recurred, the condition was not severe enough to be deemed presumptively disabling because plaintiff had not undergone hormonal therapy and his cancer had not resulted in visceral metastases, as required by the relevant listing.¹ At steps four and five, the administrative law judge recognized that plaintiff had problems with incontinence, but not such severe problems as to prevent plaintiff from performing the full range of work requiring light

¹The relevant listing reads as follows:

Prostate gland--carcinoma.

A. Progressive or recurrent despite initial hormonal intervention.

OR

B. With visceral metastases.

20 C.F.R., Pt. 404, Subpt. P, App. 1, 13.24.

exertion. Accordingly, the administrative law judge found that plaintiff was not disabled at any time up to the date of her decision.

On August 18, 2006, the Appeals Council denied plaintiff's request for review, making the decision of the administrative law judge the final decision of the commissioner. On August 31, 2006, plaintiff filed a new application for disability insurance benefits. The social security administration decided that application in plaintiff's favor, finding that he was disabled as of May 25, 2006.

OPINION

In his initial brief, plaintiff argued that the administrative law judge made a number of errors, including failing to consider whether plaintiff's condition was medically equal to the listing for prostate cancer, failing to give controlling weight to the opinion of plaintiff's treating urologist, ignoring important evidence in plaintiff's favor, improperly rejecting the opinion of a consulting psychologist, and reaching a determination at step five that is not supported by substantial evidence. Defendant subsequently filed a motion to reverse the decision and remand plaintiff's application pursuant to sentence four of § 405(g) for the purpose of considering whether plaintiff's impairments meet or equal the listing for prostate cancer and, if necessary, establishing an onset date of disability. In addition, the commissioner seeks an order directing the agency on remand to obtain a vocational expert, if necessary, and to evaluate plaintiff's favorable August 2006 application to determine whether it ought to be reopened.

The commissioner's motion will be denied because several questions remain unanswered. First, although it appears that the commissioner is conceding that the administrative law judge did not give adequate consideration to the question whether plaintiff's condition met or equaled the listing for prostate cancer, he has not articulated his position with respect to the other issues raised by plaintiff. The commissioner suggests that he thinks that factual issues remain that must be resolved in the first instance by the agency and that these relate to the opinions of plaintiff's treating urologist and the consulting psychologist. Yet it is difficult to see what factual issues would remain if the court were to find that the administrative law judge erred in discounting the opinion of plaintiff's treating urologist, who stated that plaintiff was disabled because of his incontinence.

Additionally, it is unclear from the commissioner's briefs why in the absence of a remand order, he cannot simply ascertain from one of his experts whether prostate cancer that has recurred after surgery is medically equal in duration and severity to prostate cancer that has recurred "despite initial hormonal intervention," as set forth in the listing. Nor has the commissioner specified what additional information, if any, an expert would need to ascertain in order to make this determination.

Finally, it is unclear why, if the only question is whether plaintiff's condition met or equaled the listing on or before the administrative law judge's decision, plaintiff would be allowed to present additional evidence or testimony on remand.

Although I understand the commissioner's desire to reconcile this application with plaintiff's subsequent favorable application, the subsequent application is not before this

court. If the commissioner has grounds to believe error was committed with respect to that application, he may reopen that determination, as allowed by his internal rules and regulations without court authorization. As for the application pending before the court, a more complete briefing of the issues is required in order to ascertain whether the administrative law judge committed errors warranting additional administrative proceedings or an award of benefits to plaintiff.

Accordingly,

ORDER

The motion of defendant for an order remanding this case is DENIED. The commissioner shall submit a brief in response to Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment no later than July 10, 2006. Plaintiff shall submit a reply to the commissioner's brief no later than July 24, 2006.

Entered this 20th day of June, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge