

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

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AMANDA R. JOHNSON,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.<sup>1</sup>

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OPINION AND  
ORDER

06-C-604-C

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Amanda Johnson seeks reversal of the commissioner's decision that she is not disabled and therefore is ineligible for disability insurance benefits under Title II of the Social Security Act, codified at 42 U.S.C. §§ 416(i) and 423(d). Plaintiff contends that the decision of the administrative law judge who denied her claim at the hearing level is not supported by substantial evidence. She argues that in finding that her mental impairments did not meet or equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1, the judge relied solely on the opinion of a physician who did not specialize in mental disorders or impairments and who had not examined plaintiff. Plaintiff does not challenge the administrative law judge's finding that her physical impairments did not render her disabled. I find that, contrary to

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<sup>1</sup> Michael Astrue was sworn in as Commissioner of Social Security on February 12, 2007. The case caption has been changed to reflect the new defendant.

plaintiff's view of the record, it shows that the administrative law judge did not rely on the physician's testimony or opinions in finding that plaintiff's mental impairments did not meet or equal social security listings for depression or anxiety related disorders. I conclude that the administrative law judge had substantial evidence for his skeptical view of the Psychiatric Review Technique Form prepared by plaintiff's treating psychologist, in light of her progress notes. Therefore, I am denying plaintiff's motion for summary judgment and affirming the administrative law judge's decision.

The following facts are drawn from the administrative record (AR):

## RECORD FACTS

### A. Procedural History

Plaintiff filed applications for Social Security Disability Insurance Benefits on April 6, 2004, alleging that she had learning problems and problems with her hearing, feet and ankles. After the local disability agency denied her applications initially and upon reconsideration, plaintiff requested a hearing, which was held on January 18, 2006 before Administrative Law Judge Roger Thomas in Eau Claire, Wisconsin. Plaintiff was represented by counsel. The administrative law judge heard testimony from plaintiff, neutral medical expert Dr. Andrew Steiner and neutral vocational expert Karl Botterbusch. AR 16. On April 25, 2006, the administrative law judge issued his decision, finding plaintiff not disabled.

AR16-23. This decision became the final decision of the commissioner on August 22, 2006, when the Appeals Council denied plaintiff's request for review. AR 6-8.

### B. Background

Plaintiff was 27 years old on the date of the hearing, making her a "younger person" for the purposes of her applications for disability benefits. AR 72; 20 C.F.R. § 404.1563(c). Although plaintiff has a twelfth grade education, she was in special education classes throughout school. AR 102, 165, 367. Her past work experience includes child care assistant, janitor and factory worker. AR 97.

Plaintiff has borderline intellectual functioning and a long history of symptoms of depression and anxiety. In conjunction with earlier applications for benefits, she was evaluated by three different consulting psychologists for the Social Security Administration in 1997, 2001 and 2002. (Although some findings by these consulting psychologists may be favorable to plaintiff, she has not relied on any of them. Therefore, I will not address these early evaluations.)

### C. Medical Evidence

#### 1. Dr. Patricia Fettes

On April 24, 2004, plaintiff saw Dr. Patricia Fettes, a psychologist, for depression and post-traumatic stress issues. Plaintiff reported experiencing depression since childhood because she was sexually abused by two uncles when she was between the ages of five and 16. She told Fettes that her father has a history of alcohol and marijuana dependence and he was physically and mentally abusive. For three years, plaintiff lived with her grandmother, who was an alcoholic, while her father was in prison. Plaintiff reported that her husband yells at her, calls her names and has had an affair. She stated that she had received some counseling in the past and was currently attending group therapy for people in abusive relationships. AR 165-66, 246-47.

Plaintiff reported that she had been working in a daycare center but quit when she was hospitalized for pancreatitis. She stated that she wanted to return to work at the daycare center but it did not have work for her. Fettes noted that plaintiff was a good historian and motivated to obtain treatment. She observed that plaintiff had a memory within normal limits, depressed mood, constricted affect, normal thought form and content and intact judgment. She diagnosed plaintiff with recurrent major depression of moderate to severe intensity, probable post traumatic stress disorder and borderline intellectual functioning and noted that she suffered from stress and marital problems. Fettes assigned

plaintiff a global assessment of functioning score of 45, indicating serious symptoms or impairment. See DSM-IV at 34. She recommended psychotherapy and antidepressant medication. AR 166-67, 247-48.

Plaintiff saw Dr. Fettes for therapy about every two weeks between June 2004 and January 2006. AR 240-245, 249-79, 348-50. On June 7, 2004, Fettes noted that plaintiff had begun taking Prozac a month earlier but had reported no real improvement. AR 244. On June 21, 2004, plaintiff reported that her mood was better but her irritability, energy level and sleep had not improved. AR 242. By July 2, 2004, plaintiff reported improvement in her symptoms but still feeling fatigued. She also reported that her husband did not want her to work. Fettes described plaintiff's depression as mild in intensity. AR 241.

Fettes noted that plaintiff's depression was in partial remission between August and October 2004, AR 240 and 276-79, and generally of mild intensity between December 2004 and July 2005. AR 260-75. In August 2005, she noted that plaintiff's mood seemed improved. AR 259. Between August 2005 and January 2006, she noted that plaintiff's depression was in partial remission and her mood was neutral. AR 249-59. In August 2005, plaintiff reported that she had been attending church, had gone on a social outing with a friend and her children and was planning another outing with a friend. She also looked into taking classes but could not afford it. AR 258-59. On September 27, 2005, Fettes collected information from plaintiff for her disability claim. Plaintiff reported concentration

problems, avoiding crowds, feeling detached, avoiding get-togethers and dissociating as a result of memories of past sexual abuse. AR 253-54.

On November 28, 2005, plaintiff discussed her worries about hosting a Tupperware party and her son's birthday party. Fettes described plaintiff's mood as more positive and her affect as brighter. AR 249. During most visits with Fettes, plaintiff reported being the primary caretaker of her children and brought her children with her because her husband refused to watch them. AR 240-279.

During an office visit on January 9, 2006, plaintiff reported being anxious about the possibility of working because she had been yelled at by past employers. Plaintiff told Fettes that in her job as a hospital cleaner from 1991 to 1992, she had a hard time keeping up with required tasks and was written up and yelled at several times for not completing her work on time. Plaintiff reported that she left that job because she was moving. Plaintiff also reported that her husband was not supportive of her looking for work. AR 348-50. Relying on plaintiff's reports during that office visit, Fettes completed a Psychiatric Review Technique assessment of plaintiff, indicating that plaintiff met the listings for affective disorders (12.04) and anxiety related disorders (12.06). Under the B criteria of the listings, Fettes noted the following:

- Moderate restriction of daily activities because plaintiff's poor motivation, irritability and anxiety prevent her from doing housework at times.

- Marked difficulties maintaining social functioning because plaintiff avoids crowds, is afraid to make friends and needs to be alone often.
- Frequent deficiencies in concentration and persistence or pace because plaintiff tested borderline (second percentile) for concentration, attention and working memory on October 13, 2000; worried repeatedly about her slow work pace at a cleaning job from 1991-1992; and was unable to follow a schedule without significant help from co-workers in her daycare job from 2002-2003.
- Continual episodes of deterioration or decomposition in work settings. At her daycare job, plaintiff was sent home frequently (once a week) or to a room to calm down (more than once a week) because she became distressed working with the large number of children and with certain tasks.

AR 351-59.

Also on January 9, 2006, plaintiff's vocational rehabilitation counselor, Susan Olson, noted that plaintiff required assistance to obtain employment in the past and has benefitted from job coaching. She wrote that plaintiff's jobs did not last more than four to five months because her "lack of judgment and insight into her problems generally result in chaotic events that lead to self-termination despite the employers' attempts to be understanding."

AR 148.

## 2. St. Croix Medical Center

Since 2003, plaintiff had been seeing Dr. Daniel Sullivan, Dr. Kristen Stevens and other physicians at St. Croix Medical Center for a variety of physical conditions. AR 187-

239, 280-347. On Fettes's recommendation, plaintiff saw Dr. Sullivan on May 4, 2004 for medication to treat her depression. Plaintiff reported losing her temper easily and feeling tired, down, overwhelmed and frustrated. Sullivan prescribed Prozac 20mg. AR 190, 302. Throughout 2004 and 2005, Sullivan and Dr. Stevens continued to monitor plaintiff's depression and prescribe antidepressants. AR 288-92, 294, 296-98, 301.

On July 30, 2004, Sullivan increased plaintiff's Prozac dosage to 40mg and wrote that plaintiff reported that she was doing fairly well but was still having some difficulties. AR 188, 301. In a December 29, 2004 office visit with Dr. Stevens, plaintiff reported that she stopped her medication because it made her tired, so Stevens prescribed Wellbutrin XL 150mg. AR 294, 296-98. On January 14, 2005, plaintiff reported doing well on Wellbutrin and Stevens noted that her mood was good, affect was fair and memory was intact. AR 294. On February 22, 2005, plaintiff reported that her mood was better and she felt less depressed. AR 291. On April 19, 2005, plaintiff reported to Stevens that her depression was well-controlled. AR 288.

### 3. Consulting physician assessments

On June 2, 2004, a state disability agency consulting physician, Dr. Arden Mahlberg, completed a Psychiatric Review Technique assessment of plaintiff, noting that she was impaired by 1) an affective disorder (12.04) as evidenced by recurrent, moderate to severe



major depression and 2) mental retardation (12.05) as evidenced by her borderline intellectual function. Under the B criteria of the listings, Mahlberg rated plaintiff's functional limitation from mild to moderate in all areas. AR 168-82. Mahlberg also completed a Mental Residual Functional Capacity Assessment form on which he indicated that plaintiff was not significantly or moderately limited in all areas except the ability to understand, remember and carry out detailed instructions, in which he rated her as markedly limited. AR 183-85. Another state agency consulting physician affirmed both assessments on September 16, 2004. AR 168, 185.

#### D. Hearing Testimony

Plaintiff testified that she is the primary caretaker of her children, then aged six and two. She was living with her husband, who was on disability. AR 366. Plaintiff testified that she was getting along with her husband and that he wanted her to work. AR 377.

Plaintiff testified that she finished high school in special education classes. AR 367. She can read and write a little and add and subtract on paper or with a calculator. AR 368. Plaintiff testified that she drives. She has a checkbook but does not know how to balance it. AR 367-68. Her husband does all the cooking, dishes and cleaning because no one ever showed her how to do those things. She has learned how to make hot dogs, warm up canned vegetables and make sandwiches, and she stated that she could prepare meals if someone

showed her how. AR 368-70. She grocery shops with her husband, who tells her what to buy. AR 370.

With regard to her depression, plaintiff testified that for about two hours a day, she has difficulty concentrating, gets nervous around other people, and does not like going out. She takes medication, which helps with those feelings. AR 372-73. Plaintiff testified that she would not remember to take any of her medications if she did not put them in a cup every day. AR 377.

Plaintiff testified that she worked as a hospital cleaner for about a year but quit because she moved. She stated that she was slow at her job and received three warnings from her employer. Plaintiff also testified that she had worked 25 hours a week for a year in a daycare center but left when she had a child. She had a job coach the entire time she worked for the daycare center to help her remember her assignments. AR 374-76.

Dr. Andrew Steiner, a neutral medical expert, testified that plaintiff had several psychiatric and physical diagnoses of record. In response to questioning by the administrative law judge, Steiner testified that none of plaintiff's physical conditions met or equaled a social security medical listing. AR 378-80. In response to a hypothetical question from the administrative law judge, the vocational expert, Karl Botterbusch, testified that the person described could not perform any of plaintiff's past work but could perform light work as a cleaner in a hotel or motel. AR 381-82.

#### E. The Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. See 20 C.F.R. § 404.1520. At step one, he found that plaintiff had not engaged in substantial gainful activity since May 24, 2002, her alleged onset date. At step two, he found that plaintiff was severely impaired by borderline intellectual functioning, major depressive disorder, sleep apnea, obesity, migraine headaches and a history of pancreatitis. AR 16, 18.

At step three, the administrative law judge found that plaintiff did not have an impairment or combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. In reaching this conclusion, he relied on the testimony of the medical expert that none of plaintiff's physical impairments met or equaled a listing. With regard to plaintiff's mental impairments, he found that plaintiff did not meet the criteria of any listed impairment because she had only mild limitations in carrying out daily activities and maintaining social functioning; mild difficulties maintaining concentration, persistence and pace; and no repeated episodes of decomposition. 20 C.F.R. 404, Subpart P, Appendix 1, Listing 12.00 (listings for mental disorders); 20 C.F.R. § 404.1520a(c) (special technique for mental impairments). In reaching this decision, the administrative law judge noted that Fettes's treatment notes indicated that plaintiff's depression had been mild in severity or in partial remission since April 2004. He noted that

plaintiff is entirely responsible for her young children because her husband refuses to care for them; she has maintained a long-term, albeit volatile, relationship with her husband; she can get along at least superficially with others in public because she goes shopping and attends a support group; and she has not had repeated episodes of decompensation of extended duration. The administrative law judge also cited a social security Function Report dated August 29, 2004, in which plaintiff reported being able to do the following:

- Prepare sandwiches, pizza, frozen dinners and soup
- Wash dishes, vacuum, mop and shop for food, clothes and toys
- Personal care
- Attend a support group once a month

AR 19-20 (citing Exh. B-4E, AR 111-18).

At step four, the administrative law judge assessed plaintiff's residual functional capacity, taking into account plaintiff's subjective complaints regarding her symptoms and limitations, as well as the various medical opinions in the record. He determined that plaintiff had the residual functional capacity to perform work with the following limitations: lifting and carrying up to 20 pounds occasionally and 10 pounds frequently; standing and walking up to six hours and sitting two hours a day; simple, unskilled work requiring routine, repetitive concrete tasks; no requirements for reading or high levels of communication; and no high production goals. In reaching his conclusion, the administrative law judge gave little weight to the opinion of Fettes, determining that it was based solely on plaintiff's subjective

reports and inconsistent with prior treatment notes and diagnoses. The administrative law judge found that plaintiff's subjective complaints were not entirely credible for the following reasons: plaintiff's mental status waxes and wanes depending on situational stressors; her treating physician characterized her depression as mild or in partial remission; plaintiff had a limited work record, but held a job for one year and left only because she moved; plaintiff's reports of daily activities were not consistent; and plaintiff was the sole caretaker of her two children. AR 20-21.

Relying on the testimony of the vocational expert, the administrative law judge found that plaintiff could not perform her past relevant work because it exceeded the exertional limitations of her residual functional capacity assessment. AR 21. However, he found that the vocational expert's testimony was sufficient to satisfy the commissioner's burden at step five to show that another job existed in significant numbers in the national economy that plaintiff could perform, namely a motel cleaner. AR 22.

## OPINION

### A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971). When reviewing the commissioner’s findings under § 405(g), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the administrative law judge regarding what the outcome should be. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to differ about a claimant’s disabled status, the responsibility for that decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a “critical review of the evidence” before affirming the commissioner’s decision, id., and the decision cannot stand if it lacks evidentiary support or “is so poorly articulated as to prevent meaningful review.” Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002).

#### B. Analysis

Plaintiff’s sole claim is that the administrative law judge erred in rejecting the opinion of Fettes that plaintiff meets the criteria of Listings 12.04 (Affective Disorders) and 12.06 (Anxiety Related Disorders) and relied improperly on the opinion of the neutral medical expert, Dr. Steiner, who is not a psychologist. Dkt. #6 at 7-8 (citing Groves v. Apfel, 148 F.3d 809, 811 (7th Cir. 1998) (administrative law judge failed to mention opinion and

medical records of treating physician, relying entirely on testimony of non-examining physician with no expertise in claimant's impairments)).

As an initial matter, I note that the administrative law judge did not rely on the testimony of the neutral medical expert with regard to plaintiff's mental impairments. As the commissioner points out, the administrative law judge accepted Dr. Steiner's conclusion that none of plaintiff's *physical* impairments met or equaled a listing. AR 19. Further, Dr. Steiner was careful in his hearing testimony to limit his responses to plaintiff's physical impairments. AR 379-80. The record does not support plaintiff's claim that the administrative law judge relied improperly on Steiner's opinion in finding that plaintiff's mental impairments did not meet the criteria of a listing.

Contrary to plaintiff's argument, the administrative law judge was not required to accept Fettes's opinion merely because she was plaintiff's treating psychologist. Rather, "the weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslie v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). However, when the record contains well supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the

regulation. Id. These factors include the number of times the treating physician has examined the claimant, whether the physician is a specialist in the condition claimed to be disabling, how consistent the physician's opinion is with the evidence as a whole and other factors. 20 C.F.R. § 404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion. Id.

The administrative law judge rejected Fettes's opinion in favor of those of the state agency consulting physicians, who determined that plaintiff was impaired by depression and borderline intellectual functioning but did not meet the listings for these impairments. In reaching this conclusion, the administrative law judge explained that Fettes's January 2006 findings were inconsistent with her prior diagnoses, noting that since April 2004, she had described plaintiff's depression as mild in severity or in partial remission. The administrative law judge also noted that Fettes's findings were inconsistent with her treatment notes from the previous two years, which reported that plaintiff was entirely responsible for her young children because her husband refused to care for them, that she had maintained a long term, albeit volatile, relationship with her husband; that she got along at least superficially with others in public because she went shopping and attended a support group and that she had not had repeated episodes of decompensation of extended duration.

The administrative law judge pointed out that the evidence of functional loss cited by Fettes apparently was obtained from plaintiff during one office visit, occurring on the



same day that Fettes completed the Psychiatric Review Technique form. AR 348-59. He also cited a social security Function Report dated August 29, 2004, in which plaintiff reported being able to prepare sandwiches, pizza, frozen dinners and soup; wash dishes; vacuum; mop; shop for food, clothes and toys; perform personal care; and attend a support group once a month. AR 19-20 (citing Exh. B-4E, AR 111-18).

Each of these findings is supported by substantial evidence in the record. Although Fettes saw plaintiff approximately every two weeks from April 2004 to January 2006, her progress notes do not detail diagnoses or observations that would support the severity of impairments described in her January 9, 2006 assessment. After plaintiff began counseling and antidepressants in the spring of 2004, Fettes's notes show that her symptoms improved. By August 2004, her depression was in partial remission and did not elevate to more than mild in intensity. Starting in August 2005, Fettes described plaintiff's mood as neutral and by November 2005, she rated plaintiff's mood as more positive and her affect as bright.

The doctor's treatment notes also do not describe significant functional loss with respect to plaintiff's daily activities or concentration, persistence or pace. Although Fettes noted in a few reports that plaintiff was working on her social functioning, by the summer of 2005, plaintiff was attending church, going on social outings with friends and ready to explore taking classes. In November 2005, plaintiff reported that she was hosting a Tupperware party and birthday party.

Plaintiff argues that the administrative law judge was obligated to accept Fettes's opinion because it was "echoed" by plaintiff's other treating physicians and by her vocational counselor. Apart from noting the opinion of her vocational counselor, plaintiff fails to cite any specific evidence in the record to support this argument. Because plaintiff has failed to develop this argument adequately, it is waived. Kramer v. Banc of America Securities, LLC, 355 F.3d 961, 964 n.1 (7th Cir. 2004) (perfunctory and undeveloped arguments are waived). In any case, to the extent that plaintiff may be referring to Drs. Sullivan and Stevens, her argument is unpersuasive. Sullivan prescribed medication for plaintiff's depression; by July 2004, he noted that she was doing fairly well. In 2005, Stevens noted that plaintiff's depression had improved and was well controlled. Although plaintiff's vocational counselor described her inability to maintain employment, plaintiff worked for a year as a child care assistant, AR 91, and left because she was hospitalized for pancreatitis after the birth of her second child, AR 197-99, 247, 375. In April 2004, plaintiff told Fettes that she would like to return to work at the daycare center but it did not have work for her. AR 246-48. The statements of plaintiff's treating physicians and vocational counselor do not "echo the severity of impairments assessed by Fettes."

It is evident that plaintiff has severe mental impairments. The administrative law judge could have reached a different conclusion based on the record before him. However, the court's reviewing authority does not extend to deciding whether the administrative law

judge reached the “best” decision or the one that the court might have reached; it is limited to deciding whether the decision he did make is supported by substantial evidence. If it is, that is the end of the court’s task. I find that each of the administrative law judge’s findings is supported by the evidence. Added together, these findings justify his determination to afford little weight to Fettes’s opinion and find that plaintiff’s mental impairments do not meet or equal the listings. Plaintiff has raised no other challenges to the administrative law judge’s decision. Accordingly, the decision of the commissioner will be affirmed.

#### ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Amanda Johnson’s appeal is DISMISSED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 17th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge