

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

ALEXANDER A. WEFEL,

Plaintiff,

v.

MEMORANDUM AND ORDER

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

06-C-642-S

Defendant.

Plaintiff Alexander A. Wefel brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision terminating his social security benefits. He asks the Court to reverse the decision.

Plaintiff was notified on August 11, 2004 that his disabilities had ceased as of August 2004 and his benefits were being terminated. Plaintiff's motion for reconsideration was denied. A hearing was held on September 9, 2005 before Administrative Law Judge (ALJ) David K. Gatto. In a written decision dated October 19, 2005 the ALJ found plaintiff was no longer under a disability as defined by the Act because he was capable of performing a significant number of jobs in the economy as of August 1, 2004. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on May 24, 2006.

FACTS

Plaintiff was born on September 20, 1972. He attended school through the eighth grade. His prior work experience included work as a dishwasher, factory worker, blackjack dealer and stocker.

Plaintiff has been treated by Dr. C.T. Bowe for addiction and headaches. In February 2004 Dr. Bowe reported that plaintiff had no anxiety attacks and was working on vocational rehabilitation. In March 2004, Dr. Bowe indicated that plaintiff had no significant pain and was able to handle the two migraines he experienced without medication. During this time period plaintiff's drug tests were negative.

In the summer of 2004 Dr. Bowe reported that plaintiff had drug tests that were positive for marijuana. He advised plaintiff that he would place plaintiff in a half-way house if he did not stop using marijuana.

Dr. Bowe found that when plaintiff abused substances he meets the criteria for a finding of disability. He did not make any assessment of plaintiff's abilities when he was abstaining from drugs. His treatment records confirm plaintiff had significant improvement during periods of abstinence with recommendations for vocational rehabilitation. Plaintiff continues to see Dr. Bowe on a monthly basis.

In July 2004 plaintiff's treatment records were reviewed by R. Rattan, Ph.D., a state agency psychological consultant. Dr. Rattan

found plaintiff moderately limited in the ability to understand, remember and carry out detailed instructions; maintain attention, concentration and pace for extended periods including a normal workday and work week; accept instructions and respond appropriately to criticism from supervisors and set realistic goals or plan independently. The psychologist concluded that plaintiff had shown medical improvement and was capable of performing a simple, repetitive job. Dr. Rattan's restrictions were reviewed and affirmed by J. Rizzo, Ph.D.

When plaintiff abstains from drug use he is able to adequately care for his personal needs, prepare simple meals, clean his house and drive. He was also able to maintain friendships, interact appropriately during group sessions and attend Narcotics Anonymous on a regular basis. He also played card games and took care of his dog.

At the September 9, 2005 hearing before the ALJ plaintiff appeared with counsel and testified that he had a panic disorder with agoraphobia, migraine headaches and a polysubstance abuse issues. He testified that he took Diazepam for his panic attacks and Fioricet for his Migraines and wore a Fentanyl patch for opioid maintenance. Plaintiff also testified that every two days he went to the pharmacy in Luck to exchange his Fentanyl patches. Plaintiff further testifies that his medications decreased his anxiety and panic attacks. Plaintiff's mother also testified that

she was protective payee for his funds and administered his medications.

A medical expert, Karen Butler, Ph.D., testified after listening to the testimony and reviewing the medical record. She testified that plaintiff's panic, depression and anxiety had all improved in 2004 and that his substance abuse dependence had not improved. She testified that putting aside plaintiff's substance abuse, he was capable of repetitive work with low to moderate standards for pace and production and with brief and superficial contact with the public, co-workers and supervisors. Dr. Butler testified that with the substance abuse plaintiff's concentration, persistence and pace would be markedly limited and his activities of daily living would be moderately limited with no episodes of decompensation.

William Villa, 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 perform simple, routine, entry-level repetitive work with three to four-step instructions and tasks, low to moderate standards for pace and production, with brief and superficial contact with the public, co-workers and supervisors, and only occasional exposure to fumes and gases. She testified that such a person would be unable to perform plaintiff's past work but that he

could perform a significant number of jobs existing in the national economy including 3,600 office cleaner positions and 1,100 to 1,300 non-production assembler positions.

In his October 19, 2005 decision the ALJ concluded that plaintiff had severe impairments of dysthymia, a panic disorder, a polysubstance abuse disorder and a history of borderline intellectual functioning. The ALJ concluded that the severity of the plaintiff's combination of impairments met the requirements of Listing 12.09 of the Listing of Impairments and that he was disabled due to his substance addiction disorder. The ALJ then determined that absent his drug use plaintiff does not have an impairment that meets or equals the criteria of any listed impairment according to 20 C.F.R. 404.1535. Specifically, the ALJ found that when plaintiff does not use drugs he has only moderate limitation in activities of daily living, social functioning, concentration, persistence or pace, no episodes of decompensation of extended duration and no evidence of the C criteria of the Listings. The ALJ found that plaintiff had experienced medical improvement since June 26, 2002 which was related to the ability to work.

The ALJ then found that plaintiff retained the residual functional capacity to perform simple, routine, repetitive work involving low to moderate standards for pace and production and brief and superficial contact with the public, co-workers and

supervisors. Based on the vocational expert's testimony, the ALJ found that plaintiff was not disabled because he could perform 3,600 office cleaner jobs and 1,110-1,300 assembly jobs available in the Wisconsin regional economy.

The ALJ made the following findings:

1. The claimant was found to be disabled within the meaning of the Social Security Act in a determination dated June 26, 2002.
2. The claimant has not engaged in substantial gainful activity since that date.
3. The claimant's current impairments of dysthymia, a panic disorder, a history of borderline intellectual functioning, and a substance addiction disorder, meet the criteria of Listing 12.09, Appendix 1, Subpart P, Regulations No. 4.
4. The claimant, when maintaining abstinence from substances, does not have an impairment, or combination of impairments, that individually, or in combination, meets or medically equals the severity of any impairment listed in Appendix, Subpart P, Regulations No.4.
5. The claimant's substance addiction disorder is a material factor in the finding of disability.
6. The impairments present as of June 26, 2002, were an anxiety disorder, dysthymia, a personality disorder, and borderline intellectual functioning.
7. The medical evidence establishes that there has been improvement in the claimant's impairments since June 26, 2002.
8. The medical improvement is related to the claimant's ability to work.

9. The medical evidence establishes that the claimant is currently severely impaired by dysthymia, an anxiety disorder, a polysubstance addiction disorder and a history of borderline intellectual functioning.

10. The claimant's description of subjective symptoms is credible to the extent that it could reasonably cause some limitation of function, but the allegation made by the claimant of total disability is not credible, due to significant inconsistencies in the record as a whole.

11. The claimant, when abstaining from substances, retains the residual functional capacity to perform simple routine, repetitive work involving low to moderate standards for pace and production, and brief and superficial contact with the public, co-workers and supervisors.

12. The claimant is currently 33 years of age, which is considered to be a younger individual under the Regulations, and he has a limited eighth grade education.

13. The claimant is unable to perform his past relevant work as a dishwasher, factory worker, blackjack dealer and stock person because the demands of the jobs exceed his residual functional capacity.

14. Considering the claimant's residual functional capacity, when abstaining from substances, age, education, and relevant work history, he is able to make a vocational adjustment to work which exists in significant numbers in the national economy examples of which are an office cleaner and a fishing floats and lures assembler.

15. The claimant's disability ceased on August 1, 2004.

On January 16, 2006 Dr. Bowe wrote a letter to the Appeals Counsel stating that plaintiff was disabled because of his severe opioid dependency and chronic fluctuating pain. The doctor also indicated plaintiff was disabled because of the time spent at the pharmacy for every other day medication dispensing and time spent seeing his physician.

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.

Plaintiff argues that the ALJ improperly concluded that plaintiff had shown medical improvement since the date of the decision in June 26, 2002 when he was found to be disabled. See 20 C.F.R. 404.1594(d)(1). The medical records of Dr. Bowe subsequent to that date for periods in which plaintiff was not abusing substances show plaintiff had decreased anxiety with less panic attacks and decreased pain.

In addition Dr. Rattan, a state agency psychologist, reviewed plaintiff's medical records and concluded that plaintiff had shown medical improvement and was capable of performing a simple, repetitive job. At the hearing before the ALJ a medical expert. Karen Butler, Ph.D., testified after listening to the testimony and reviewing the medical record that plaintiff's panic, depression and anxiety had all improved in 2004. She concluded that putting aside plaintiff's substance abuse, he was capable of performing a simple repetitive job with brief and superficial contact with the public, co-workers and supervisors.

There is substantial evidence in the record to show that plaintiff showed medical improvement since he was found disabled in 2002. The ALJ also correctly determined that this improvement increased his residual functional capacity to work.

Plaintiff argues that the ALJ incorrectly disregarded the opinion of his treating physician in determining his residual, functional capacity. Dr. Bowe concluded that the plaintiff's combination of impairments when he abused substances met a Listed Impairment. This finding is consistent with his treatment records and the opinion of the medical expert, Dr. Butler. The ALJ found consistent with these opinions that plaintiff would meet a listed impairment when he was using drugs.

The regulation, 20 C.F.R. 404.1535, requires the ALJ to find whether plaintiff would be disabled if he maintained abstinence. Dr. Bowe has made no assessment of plaintiff's capabilities absent his drug abuse. His medical records, however, show plaintiff's symptoms have significantly improved during his period of abstinence. These records support the conclusion of Dr. Butler that while abstaining from using drugs plaintiff had the residual capacity to perform simple repetitive jobs with brief superficial contact with the public, co-workers and supervisors. The ALJ properly concluded based on the medical records of Dr. Bowe and the testimony of Dr. Butler that plaintiff's residual functional capacity to perform work had increased.

There is substantial evidence to support the Commissioner's finding that plaintiff was no longer disabled as of August 1, 2004 because he could perform jobs existing in the national economy. Accordingly, the Commissioner's decision will be affirmed.

Wefel v. Astrue, 06-C-642-S

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 15th day of May, 2007.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge