

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

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DEREK A. CHAMBERS,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.  
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OPINION AND ORDER

11-cv-117-bbc

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought under 42 U.S.C. § 405(g). Plaintiff Derek A. Chambers seeks reversal of the commissioner's decision that he is not disabled and therefore is ineligible for disability insurance benefits and supplemental security income.

Plaintiff contends that the commissioner's action rests on an erroneous decision by the administrative law judge, who did not believe that plaintiff had fibromyalgia and who found that he could perform his past skilled, sedentary work as a stained glass artist. Although the administrative law judge explained in detail why she did not believe that plaintiff had fibromyalgia and why she believed that he could continue to do his past skilled sedentary work as a stained glass artist, she erred in two important respects. She substituted her own opinion about plaintiff's diagnosis of fibromyalgia for the opinions of two rheumatologists who examined plaintiff, exceeding the scope of her authority, and she did not take into consideration the

assessments of two state agency psychologists. Accordingly, I will remand the case to defendant for further consideration.

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

## RECORD FACTS

### A. Background

Plaintiff Derek A. Chambers filed an application for disability insurance benefits in 2008, when he was about 45, alleging that he had been unable to work since April 1, 2001 because of post traumatic stress disorder, anxiety, back and shoulder pain, attention deficit hyperactivity disorder and an irregular heartbeat. AR 181. After the local disability agency denied his application initially and upon reconsideration, he requested a hearing, which was held on August 20, 2009. Administrative Law Judge Sharon L. Turner heard testimony from plaintiff, a neutral medical expert and a neutral vocational expert. On November 4, 2009, she issued her decision, finding that plaintiff was not disabled. This decision became the final decision of the commissioner on February 8, 2011, when the Appeals Council denied plaintiff's request for review. AR 1-5.

### B. Medical Evidence

Since 2000, plaintiff has seen a number of doctors for chronic pain. In August 2000, he saw Dr. Christine Cox, a rheumatologist, complaining of diffuse, chronic musculoskeletal pain resulting from an automobile accident about five years earlier. AR 678. He told Cox that after the accident, he had seen several doctors in Madison, Marshfield and Chicago about a "motor

tic” he had developed in his shoulders that manifested itself as spontaneous spasms. These resolved over time but he developed diffuse soreness and achiness, coupled with difficulty sleeping. Id. When plaintiff saw Dr. Cox, he was working as a window insulator and teaching stained glass window classes at Madison Area Technical College.

Dr. Cox found “mild trigger point tenderness over plaintiff’s trapezius muscle/medial scapular border SI joints” and some aching pain around the brachial radialis muscles. AR 679. She found no suggestion of an underlying inflammatory arthritis, but noted some myofascial trigger point tenderness and nonrestorative sleep. Id. She suspected that much of plaintiff’s symptomology was aggravated by stress and anxiety and she thought he would benefit from working with the Behavioral Medicine Department and engaging in aerobic exercise. AR 680. In October 2000, Cox wrote plaintiff that his electrical study was “completely normal,” with no evidence of inflammatory arthritis or inflammatory muscle disease. AR 675.

On January 26, 2001, Cox gave plaintiff a diagnosis of myofascial pain disorder and indicated that the cause of his pain was unclear. AR 672. In April 2001, she wrote a letter “to whom it may concern,” saying that plaintiff had a clinical diagnosis of chronic myofascial pain/fibromyalgia. AR 667.

Three years later, in August 2004, an internist at the Marshfield Clinic, AR 372, referred plaintiff to rheumatologist Dr. Howard J. Swanson. Swanson observed that plaintiff had a history of widespread pain. AR 247. He found that plaintiff had full range of motion of shoulders, elbows, wrists and hands, straight leg raising to about 80 degrees, limited forward flexion and some mild lower lumbar complaint of pain with firm percussion on plaintiff’s thoracic and lumbar spine. Id. He observed only slight trigger point tenderness when he

checked all of plaintiff's trigger points. Id. Swanson wrote plaintiff the next day to tell him that x-rays of his lumbar spine and left knee were normal and showed no sign of degenerative or past inflammatory arthritis. He ended by saying that he believed the best approach to plaintiff's chronic pain was adequate treatment with antidepressants and counseling. AR 249.

Plaintiff returned to Dr. Swanson about two years later, in May 2006, complaining of persistent pain in his back, knees and shoulders. AR 251. On examination, Swanson noted some myofascial pain in plaintiff's back and extremities. AR 252. His assessment was fibromyalgia/widespread chronic pain, along with depression and anxiety, for which he prescribed an antidepressant and encouraged plaintiff to decrease his intake of sugary, caffeinated sodas, presumably to help him keep his weight down and develop better sleep patterns. Id.

About 18 months later, on September 12, 2007, plaintiff saw a primary care physician, Dr. Grace Laynes, complaining of widespread pain and of buckling in his left knee. AR 358. On examination, Laynes noted that plaintiff's left knee was mildly swollen and that he had problems with ambulation. She diagnosed possible fibromyalgia and chronic fatigue syndrome. AR 361.

Five days later, plaintiff saw an orthopedist at the Marshfield Clinic in Wausau, Dr. Thomas Garver, for bilateral knee pain. AR 356. Plaintiff told Garver that he thought his "fibromyalgia was kicking up at the knee level." Id. An examination of plaintiff showed normal range of motion of his knees and normal x-rays of his knees. Garver assessed probable patellofemoral knee pain, left greater than right, and told plaintiff he was exaggerating the effect of the fibromyalgia on his knees. Garver recommended physical therapy. AR 357.

On July 8, 2008, plaintiff returned to Dr. Laynes, complaining of back and knee pain and

saying that he was applying for disability and needed to be seen by a neurologist. AR 601. Laynes made the referral and plaintiff saw neurologist Dr. Naomi Arenson on August 22, 2008. AR 597. Arenson questioned the diagnosis of fibromyalgia, noting that plaintiff had had no extensive treatment for it. Id. Her examination of plaintiff disclosed no problems: he had full motor strength, steady gait, normal station, negative straight leg raising and no significant pain when his lower back was palpated. AR 598. She saw nothing on the MRI that suggested an explanation for plaintiff's symptoms. She gave him a coupon to try Lyrica to see whether it might help his diffuse pain. AR 599.

In August 2008, Dr. Laynes told plaintiff that his back pain could not be explained by the MRI and that she was not sure that he had fibromyalgia, which seemed to upset him. AR 596. She referred him to physical therapy and encouraged him to lose weight. Id.

A month later, plaintiff saw Dr. Perico Arcedo, a doctor of physical medicine and rehabilitation at the Marshfield Clinic, still complaining of chronic pain. AR 589. An examination and workup showed no clear cause of plaintiff's back pain. Arcedo noted chronic pain, myofascial pain and a history of fibromyalgia, although plaintiff had "only 10 out of 18 points tender" on examination, short of the 11 points he would need for a diagnosis of fibromyalgia, according to the American College of Rheumatology. AR 592. Arcedo gave plaintiff samples of Lyrica and Cymbalta and advised him to be as physically active as possible. Id.

In June 2009, plaintiff saw another orthopedist at the Marshfield Clinic, Henry Cole III, for right shoulder pain. Cole noted that plaintiff had a history of fibromyalgia and chronic pain. AR 652. Cole diagnosed shoulder impingement and referred plaintiff to physical therapy to

teach him exercises he could do at home for scapular stabilization and rotator cuff strengthening.

Id.

### C. Agency Reviewers

In March 2008, a state agency disability examiner prepared a report on plaintiff, saying, among other things, that he could perform basic unskilled light work. AR 580. In September 2008, a second examiner noted that plaintiff could perform basic demands of unskilled work but that she was unable to fully evaluate his past relevant work. AR 639.

In May 2008, state agency physician Mina Khorshidi assessed plaintiff's physical residual functional capacity as of December 31, 2007, the date on which he was last insured. She listed a diagnosis of chronic pain and found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently and that he could stand, walk or sit six hours in an eight-hour workday. AR 545. She made a second assessment of plaintiff's physical residual functional capacity as of May 2008, finding that plaintiff could lift 20 pounds occasionally and 10 pounds frequently and stand, walk or sit six hours in an eight-hour workday, with limited handling and fingering with one hand. She listed impairments of chronic pain and acute finger fracture. AR 553.

In June 2008, state agency psychologist Roger Rattan completed a psychiatric review technique form for plaintiff, finding that he had an affective disorder. AR 561. Rattan found that plaintiff had mild restrictions of activities of daily living, moderate difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace and no episodes of decompensation. He saw no evidence of the "C" criteria. AR 571-72. Under "Consultant's Notes," he wrote "see ews." AR 573. Assuming that the notation referred to the electronic worksheet, it would have referred to the one completed by "CLQ," a

disability examiner who assessed plaintiff's records and concluded that he was capable of basic unskilled light work as of March 2008. AR 579-86.

Rattan completed a residual functional capacity assessment for plaintiff, finding that he was moderately limited in a number of areas, including the ability to understand, remember and carry out detailed instructions, maintain his attention and concentration for extended periods, perform activities within a schedule, maintain regular attendance, interact appropriately with the general public and set realistic goals or make plans independently of others.

In January 2009, after plaintiff asked for reconsideration of the agency's denial of his application for benefits, state agency psychologist Deborah Pape completed a psychiatric review technique form, finding that plaintiff had an affective disorder, anxiety-related disorders and personality disorders. AR 620. Like Rattan, Pape found that plaintiff had moderate restrictions of activities of daily living, moderate difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace, no episodes of decompensation and no evidence of the "C" criteria. AR 630-31. She completed a mental residual functional capacity assessment, finding, among other things, that plaintiff had moderate limitations in certain areas such as his ability to understand, remember and carry out detailed instructions and in his ability to maintain attention and concentration for extended periods. AR 634-35. Unlike Rattan, she found that plaintiff was not significantly limited in the ability to interact appropriately with the general public and set realistic goals and make plans independently of others. AR 635. She added that, in her opinion, plaintiff's statements about his limitations were only partially credible. She believed that he had the symptoms he had identified but she

found that the intensity of the symptoms and their functional effects were not consistent with the totality of the evidence. AR 636.

In January 2009, state agency physician Pat Chan completed a physical residual functional capacity assessment for plaintiff as of January 2009 and as of December 31, 2007, the date on which plaintiff was last insured. He started with plaintiff's impairments, which he listed as chronic pain, hypertension, fracture of his ring finger, a shoulder problem and obesity. AR 612. He was not persuaded that plaintiff had fibromyalgia because he did not have enough tender points on examinations. Chan found that plaintiff could lift 50 pounds occasionally and 25 pounds frequently, stand, sit or walk six hours in an eight-hour workday. AR 613. Chan was persuaded from the medical evidence that plaintiff's statements were only partially credible. He did not find the intensity of the symptoms consistent with the totality of the evidence. He added that if the symptoms were as pervasive as plaintiff had alleged, his doctors would have been prescribing more potent medications and considering more surgical intervention. AR 617.

#### D. Hearing Testimony

At the administrative hearing, plaintiff testified that he had used a cane most of the time for the previous two years, although it had not been prescribed by a doctor. AR 32-33. He testified that he did odd jobs for a family in exchange for rent money, AR 33, and that he had done stained glass work. AR 36.

Plaintiff said that he had worked with the Wisconsin Division of Vocational Rehabilitation, starting in 2002, with the goal of opening his own glass shop, and he met his goal in 2004 when he opened his own glass shop in downtown Wausau. AR 38. Despite his hopes,



the shop was not a success because he had trouble dealing with the landlord and difficulty communicating with customers. AR 45.

Plaintiff described his disability as not being able to sit or stand for too long, unable to raise his arms above his head, short attention span and trouble dealing with people. AR 38. He testified that his fibromyalgia caused his physical limitations, that he was taking high blood pressure medication and Tylenol-PM, that he had difficulty sleeping at night because of back pain and that he used rings above his bed to help him turn over. AR 41.

Licensed clinical psychologist Dr. Craig C. Rath testified as a neutral medical expert. He started out with a listing of plaintiff's impairments: affective disorder, 12.04 (mood disorder not otherwise specified with depressed and anxious features); personality disorder with histrionic and dependent traits, 12.08; and substance abuse with last documented use in July 2007, 12.09. AR 51. It was Rath's opinion that plaintiff would have mild restrictions in the activities of daily living and moderate restrictions in social functioning and maintaining concentration, persistence or pace, id., and that he was limited to working in "a moderate stress environment from all sources," AR 53, in a job that was not inherently stressful and had no overly high production quotas. Plaintiff's global assessment of functioning scores were primarily in the 60s, indicating mild to moderate scores. He seemed to have friends, indicating to Rath that he would not have "an issue with co-workers," and he had no apparent impaired concentration, although "he might be overwhelmed with overly stressful production quotas[,] say on an assembly line." Id. Rath saw no objective evidence that plaintiff's psychological symptoms would prevent him from completing an eight-hour work day and a 40-hour work week. Id.

Jeanine Metildi, a neutral vocational expert, testified that plaintiff had worked as a

stained glass artist (DOT # 142.061-054), which is classified as sedentary and skilled work, with a specific vocational preparation of eight. AR 55. She said that he had also worked as a glazier of stained glass (DOT # 779.381-010), which is classified as a medium exertion and skilled job with a specific vocational preparation of seven. AR 56. In response to a question from the administrative law judge, Metildi testified that an individual of plaintiff's age, education level and work experience who could perform light work with moderate stress from all sources, such as a job that was not inherently stressful and had no overly close supervision, high production quota or rapid assembly line work, could perform plaintiff's past work as a stained glass artist. AR 56. If the person had to change positions frequently, he could perform work as a self-employed person. AR 57. She confirmed that her testimony was consistent with the Dictionary of Occupational Titles. Id.

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

In reaching her conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. At step one, she found that plaintiff had not engaged in substantial gainful activity since April 1, 2001, his alleged onset date. At step two, she found that he had severe impairments of chronic pain; mood disorder, not otherwise specified, with depression and anxiety features; personality disorder, not otherwise specified, with histrionic and dependent traits; and obesity. AR 20. She found that plaintiff did not have a medically determinable impairment of attention deficit hyperactivity disorder. AR 21.

In addition, the administrative law judge found that plaintiff did not have a medically determinable impairment of fibromyalgia, but she found that his chronic pain was a severe

impairment. In doing so, she considered the medical evidence, including Dr. Cox's diagnosis of fibromyalgia, but noted the absence of the 11 out of 18 trigger points required by the American College of Rheumatology diagnostic criteria. AR 21.

At step three, the administrative law judge found that neither plaintiff's musculoskeletal impairments nor his mental impairments singly or in combination met or equaled any listed impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 19. In finding that the mental impairments fell short, she relied on the opinions of medical expert Rath, plaintiff's testimony and the medical evidence. AR 23. She noted that plaintiff had indicated that he was not sociable and had problems dealing appropriately with people, but, as Rath had found, plaintiff had a peer network with whom he was able to work and associate and this would translate into the ability to get along with co-workers. AR 22. In addition, she observed that when defendant was attending group therapy sessions, he "continually chose to go to the session rather than to stay home alone"; he took a leadership role in the group and was constantly engaging with other members of the group; and he had friends whom he was helping move. AR 23. She did not discuss the reports prepared by psychologists Roger Rattan or Deborah Pape.

The administrative law judge noted that plaintiff had moderate difficulties in concentration, persistence and pace and claimed to have problems handling money and an attention span of only 15 minutes and difficulty handling stress and change. She also noted that over the years, he had sought help actively from the Division of Vocational Rehabilitation and he was taking classes and learning QuickBooks software as part of his attempt to start a business. Id. (citing Exh. 2F). In addition, he was taking an active part in his counseling group and helping it put group information into an Excel spreadsheet. Id. (citing Exh. 5F 2). He exhibited

an ability to perform tasks on the computer that required skill and was continuing to talk about his desire to start a business based on his ability to make stained glass, a task requiring great skill. He said he wanted to make a business out of stained glass in the future as he had done in the past. Id.

The administrative law judge found no evidence in the record of episodes of decompensation, despite plaintiff's allegations that he had had extensive inpatient treatment because of a suicide attempt in 2001 and had had more recent suicidal ideation. AR 23-24.

Finishing up step four, the administrative law judge found that plaintiff retained the residual functional capacity to perform light work with no more than moderate stress from all sources, except for occasionally lifting and carrying 20 pounds or frequently lifting and carrying 10 pounds; no more than moderate stress from all sources; no inherently stressful jobs such as an emergency medical technician; no overly close supervision; and no high production, quota or rapid assembly work. AR 24-25. She noted that plaintiff had been prescribed anti-depressant medications but was not fully compliant in taking them and that he continued to complain of depressive symptoms even after his treatment ceased, although he gave no reason for stopping the treatment.

In determining residual functional capacity, the administrative law judge assessed plaintiff's credibility according to 20 C.F.R. § 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. She considered plaintiff's testimony that he was unable to sit, stand, walk or lie down for any length of time and found it not entirely credible, AR 25, explaining in detail what she relied upon in making this credibility determination. AR 26-27.

- Plaintiff's delay in seeking community care services;

- The lack of consistency between plaintiff's statements and the objective medical evidence, including his MRI's and x-rays;
- Plaintiff's complaints of inability to interact with others, in the face of evidence that he was involved with his counseling group and was even recorded as being a leader in the group;
- His use of rings to turn himself in bed, as contrasted with his statements that he was considering cutting his hair because he could not lift his arms up to wash it; and
- His doctor's September 7, 2007 statement that plaintiff was exaggerating the effects of fibromyalgia when he wore a knee brace for his complaints of knee pain.

AR 25-27.

She found that plaintiff could perform his past relevant work as a stained glass artist as he actually performed it and as it is generally performed. In making this determination, she relied on the testimony of the vocational expert that an individual of plaintiff's age, education, work experience and residual functional capacity could perform plaintiff's past work as a stained glass artist. She then found plaintiff not disabled and did not go on to consider step five. AR 27.

## OPINION

### A. Fibromyalgia

Plaintiff's first objection to the administrative law judge's decision is that she failed to find that his fibromyalgia was a severe impairment. Instead, she found that "the allegation of fibromyalgia was not medically determinable," explaining that she had considered the following medical evidence:

- Dr. Cox's April 2, 2001 note that plaintiff had a diagnosis of fibromyalgia,

with no medical notes to support the diagnosis. AR 21.

- Dr. Cox's August 16, 2000 note that she had found no evidence of significant degenerative arthritis or inflammatory arthritis, that the lab results did not explain the pain that plaintiff was experiencing, that the etiology of plaintiff's pain was "not really clear" although he had some myofascial trigger point tenderness and nonrestorative sleep, that she thought a lot of his symptomology was aggravated by his stress and anxiety and that she did not identify any trigger points or make any diagnosis of fibromyalgia. Id.
- Dr. Cox's October 27, 2000 note that she found no evidence of underlying inflammatory arthritis upon examination of plaintiff. Id.
- June 2004 and March 2006 doctors' notes of "a history of fibromyalgia," but no medical reports indicating an actual diagnosis of fibromyalgia until May 17, 2006 and even then the diagnosis was not based on a listing of at least 11 trigger points out of the 18 required by the diagnostic criteria of The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia: Report of the Multicenter Criteria Committee, 33 Arthritis & Rheumatism 160 (1990). Id. (citing AR 251-52).
- A 2008 evaluation noting only 10 trigger points. Id. (citing AR 591).

(Her only mention of Swanson's diagnosis was by date (May 17, 2006).

In reaching her decision that plaintiff did not have fibromyalgia, the administrative law judge made her own diagnosis, despite the findings to the contrary of both of the rheumatologists (Cox and Swanson) who examined plaintiff. It is true that no doctor found the necessary 11 trigger points and that other doctors (Arenson, Laynes and Arcedo) questioned the diagnosis, but no doctor found definitively that plaintiff did not have fibromyalgia and Arenson, Laynes and Arcedo are not rheumatologists.. In refusing to accept that diagnosis, the administrative law judge substituted her own judgment for that of two doctors trained in rheumatology, the speciality in which fibromyalgia falls. Sarchet v. Chater, 78 F.3d 305, 308 (7th Cir. 1996) ("Fibromyalgia is a rheumatological disorder and the relevant specialist is a

rheumatologist.”).

As the administrative law judge noted, one of the rules of thumb for determining fibromyalgia is that the patient have tenderness in at least 11 of 18 particular locations throughout the body and plaintiff had only ten. It can be assumed that both Dr. Cox and Dr. Swanson were aware of this rule, yet they diagnosed fibromyalgia when they examined plaintiff. I conclude that in the face of this evidence, the administrative law judge erred in concluding that the record did not support the diagnosis and in her consequent failure to find it a severe impairment at step two.

This error might have been harmless had the administrative law judge considered the symptoms of plaintiff’s fibromyalgia in assessing his residual functional capacity. The commissioner argues that she did so by considering his chronic pain a severe impairment, since chronic pain is a component of fibromyalgia. She did find that plaintiff suffered chronic pain and that it was a severe impairment. However, she went on to find that the objective medical evidence did not support plaintiff’s allegations of disabling pain or of disabling fatigue. This compounded the error. As the Court of Appeals for the Seventh Circuit has explained, “pain all over” and fatigue and disturbed sleep are the principal symptoms of fibromyalgia. Sarchet, 78 F.3d at 306. Moreover, she accounted for the severe chronic pain only by limiting plaintiff to light work, without explaining how he could work with such pain eight hours a day, five days a week. Accordingly, this case must be remanded for consideration of plaintiff’s symptoms of fibromyalgia in determining his residual functional capacity.

### C. Past Relevant Work

Plaintiff challenges the administrative law judge's finding that he could perform his past relevant work as a stained glass artist, contending that she erred in finding that he could perform his past relevant work, which was skilled. He takes issue with this mental residual functional capacity assessment on the ground that the state agency psychologists found that he was limited to unskilled work. The evidence is to the contrary; neither of the two state agency psychologists (Pape and Rattan) who examined plaintiff made such a finding. Only the initial disability examiners found that he was limited in that respect.

However, the administrative law judge erred in failing to mention Pape's and Rattan's assessments and the weight to be given to them. She did not discuss Rattan's opinion that plaintiff was moderately limited in his ability to maintain his concentration, persistence and pace, to interact appropriately with the public and to set realistic goals. She should have considered these limitations in deciding whether to give weight to the vocational expert's opinion that plaintiff could work successfully at his past relevant work as a stained glass artist, particularly when the record showed that his previous attempt to do so had run aground when he was unable to work with his landlord. It is true that Pape did not share Rattan's assessment that plaintiff was moderately limited in the areas of interacting with the public and setting realistic goals, but because the administrative law judge made no mention of either psychologist's assessment, she never explained why she believed Pape over Rattan.

On remand, the administrative law judge should consider both assessments in determining plaintiff's residual functional capacity and then re-consider whether he could perform his past relevant skilled work.



ORDER

. IT IS ORDERED that plaintiff Derek Chambers's motion for summary judgment, dkt. #10, is GRANTED and this case is REMANDED to the commissioner under sentence four or 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

Entered this 28th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge