IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN R. DOBBS,

OPINION AND ORDER

Plaintiff,

11-cv-125-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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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 John R. Dobbs seeks reversal of the commissioner's decision that he was not disabled at the time the decision was made and therefore is not eligible for disability insurance benefits and supplemental security income. The case arises in an unusual context. At some point after plaintiff received the adverse decision on his first application, he filed a second application, alleging the onset of disability on November 5, 2009, and was awarded benefits. He contends now that because the administrative law judge failed to give him proper advice about the benefits of counsel, he was prejudiced. He did not have the medical records counsel could have obtained for him, which would have showed his entitlement to benefits.

Plaintiff contends also that because his second application succeeded, SSR 83-20 should apply and his case should be remanded so that defendant can determine whether he qualified

for benefits earlier than November of 2009. It is not necessary to decide this issue because plaintiff has shown that he was prejudiced by the inadequate advice he was given and is entitled to a remand of his case.

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

RECORD FACTS

A. Background

Plaintiff John R. Dobbs was born on November 16, 1962. AR 32. He has an eighth grade education, AR 43, and past relevant work as a security guard and laborer. AR 31.

In December 2007, when he was 45, plaintiff filed applications for disability benefits, alleging that he had been unable to work since October 2007 because of his hip condition. AR 118-20, 134. On June 16, 2009, he submitted a list of medical treatment he had received, including treatment by Dr. J. P. Milbauer in 2005. After the local disability agency denied his application initially and upon reconsideration, he requested a hearing, which was held on August 4, 2009 before Administrative Law Judge Sharon L. Turner. The administrative law judge heard testimony from plaintiff, a neutral medical expert and a neutral vocational expert. On November 4, 2009, the administrative law judge issued her decision, finding plaintiff not disabled. This decision became the final decision of the commissioner on February 10, 2011, when the Appeals Council denied plaintiff's request for review.

B. Medical Evidence

When the administrative law judge made her decision in November 2009, the only

medical evidence she had was a report from the Moundview Memorial Hospital emergency room of a visit by plaintiff on July 23, 2009 after he had twisted his left hip while washing his car. He complained of pain in the hip. An x-ray indicated osteoarthritic changes of the left hip. Plaintiff was given Demerol and sent home with a prescription of Vicodin. AR 209-212.

After the administrative law judge made her decision, plaintiff hired counsel who obtained and submitted additional medical records to the appeals council prepared by Dr. Milbauer. The first set of records included the April 19, 2005 office note of Dr. John P. Milbauer, in which Milbauer noted that plaintiff had had pains since childhood in his left groin, left thigh and left buttock that worsened with prolonged standing or walking. Dkt. #11-1. He noted also that the internal rotation of plaintiff's left hip was limited to five degrees and that x-rays showed deformity of the femoral head on the left. He knew of no surgical procedure that would help plaintiff's condition. He prepared a restriction form limiting some of the activities he performed at his work for a cable laying company and suggested that he look at vocational rehabilitation training. Id. The second group of records included the report of a December 16, 2009 visit to Milbauer and a work capacity questionnaire that Milbauer completed after this visit. In the notes of the visit, Milbauer noted plaintiff's report of constant pain in his left groin radiating to the buttock, thigh and left knee and Milbauer's belief that plaintiff's degenerative changes were worse than they had been in 2005. He noted plaintiff's abnormal gait, one inch shortening of his left leg secondary to the dysplastic hip on the left and limited motion of his left hip. AR 252. In the work capacity questionnaire, Milbauer found from the December 16, 2009 examination and x-ray that pain caused plaintiff to be incapable of performing "low stress" jobs. Plaintiff could sit for only two hours at one time, stand for 30 minutes at a time and walk one

block. AR 238-39. He found also that plaintiff could sit six hours in an eight-hour work day and stand or walk less than two hours and that every 20 minutes he would have to walk for 15 minutes. AR 240-41. Milbauer noted that plaintiff needed to use a cane or other assistive device when standing or walking, AR 242, and that he could rarely lift 10 pounds, twist, stoop or climb stairs and never crouch, squat or climb ladders. Finally, he indicated that plaintiff would be absent from work more than four days a month. AR 243.

C. Consulting Physicians

The record before the administrative law judge included a January 23, 2008 report from consulting physician, Ward Jankus, who performed a physical examination of plaintiff at the request of the state disability agency. AR 188-90. Jankus noted plaintiff's left hip joint restriction, discomfort, pain and abnormal gait. An x-ray showed marked deformity of the left hip joint. Jankus diagnosed early childhood left hip problems with "probable progressive degenerative changes. AR 190. In his opinion, plaintiff could walk for about 20 minutes, stand for 30-60 minutes and sit for an hour and that if he had an eight-hour shift, he could stand for about five hours, so long as the other three hours did not involve standing and he did not have to do heavy labor, lifting, squatting, ladder-climbing, etc. AR 188-190.

On February 7, 2008, state agency physician Robert Callear completed a physical residual functional capacity assessment for plaintiff, listing marked deformity of left hip joint as the diagnosis. AR 192. Callear found that plaintiff could lift 10 pounds occasionally and less than 10 pounds frequently and that in an eight-hour workday, he could stand or walk two hours and sit six hours. AR 193. On April 4, 2008, Dr. Jessica Tinianow affirmed Dr. Callear's physical

residual functional capacity assessment. AR 204.

D. Hearing Testimony

At the outset of the hearing, the administrative law judge first addressed plaintiff's right to representation at the hearing and told him that if he wished to obtain representation she would grant him a 30-60 day continuance. AR 37-38. She gave him the following information:

> You have the right to be represented by an attorney or a non-attorney. A representative can help you obtain information about your claim, submit evidence, explain medical terms, help protect your rights and make any request you give any notice about the proceedings before me [sic]. A representative may not charge a fee, or receive a fee, unless we approve it.
>
> If you appoint a representative, however, you may be responsible for certain expenses such as obtaining and/or copying medical records. Some legal service organizations offer legal representation free of charge if you satisfy their qualifying requirements. And Ms. Hanks, who's in the room with you has a list of organizations in response, and that maybe they have services available to you.

AR 38. She also advised plaintiff that he had the right to proceed without a representative and that if he did so, she would help him obtain medical and non-medical records, but that a representative could present his evidence in a way that would be most favorable to his case. AR 39. She asked him whether he understood his right to representation and he said that he did. AR 38-39. At first, he said he wanted a continuance but that the attorneys he had talked to wanted him to sign a waiver permitting them to get more fees than what was approved. The administrative law judge said that the Social Security Administration did not approve these agreements, but she did not say that any fees he would have to pay for counsel would be limited to 25% of his past-due benefits for work done before the agency and that for work done before

a court, the amount paid would have to be approved by the court. After being told that it would be 60-90 days before he could have another chance for a hearing, plaintiff changed his mind and decided to proceed without counsel. AR 39-40.

Plaintiff testified at the hearing that he had last worked in October 2007, that he could do some vacuuming and some dishes, that he could sit or stand for an hour at a time and that he did not use a cane or walker to walk. AR 42. He mowed his lawn on a riding law mower, drove a car with no limitations and smoked about a half-pack of cigarettes a day. He took baby aspirin and Benadryl. AR 45.

In response to a question from the administrative law judge, plaintiff said he had not been getting any medical treatment since he stopped working because he had no insurance. AR 47. He testified that he could not work because of pain in his left hip, AR 48, but did not explain that the pain was caused by a deformity of his hip. The administrative law judge asked plaintiff whether there was anything else he wanted to tell her about his condition and his ability to work and he said that there was not. AR 50.

The administrative law judge called an orthopedic surgeon, Dr. Joseph E. Jensen, to testify as a neutral medical expert. He asked plaintiff whether he had sought any medical treatment and plaintiff told him he had seen Dr. Milbauer, who had not recommended surgery. AR 50-51. Jensen testified that plaintiff had been examined by Dr. Jankus, who concluded that plaintiff had early onset hip dysplasia with significant limitation of left hip motion of approximately 70 percent of normal. AR 54. Jensen noted that plaintiff did not take strong pain medications or walk with a cane and that the record lacked evidence of evaluations and treatments. AR 54-55. He testified to his conclusion that plaintiff did not have a

musculoskeletal impairment that met or equaled Listing 1.02A, AR 55, but that he retained the residual functional capacity to lift and carry up to 20 pounds occasionally and stand or walk four hours in an eight hour work with the opportunity to sit for five minutes every hour and to sit six hours in an eight-hour work day. Further, plaintiff could occasionally manage stairs, ramps, operate pedals with his left foot and walk on uneven terrain. He could frequently bend, stoop, crouch, kneel and crawl. AR 56.

Finally, the administrative law judge called Alan Boroskin as a neutral vocational expert, asking him to assume an individual who could perform the work to which Dr. Jensen had testified. Boroskin testified that the hypothetical individual could not perform plaintiff's past relevant work as a security guard or as a laborer, but that he could perform unskilled occupations such as document preparer, DOT # 249.587-018, of which there were 2,400 jobs in Wisconsin, and assembly, DOT # 734.687 (900 jobs in Wisconsin). He testified that his testimony was consistent with the Dictionary of Occupational Titles. AR 61.

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. 20 C.F.R. §§ 404.1520, 416.920. At step one, she found that plaintiff had not engaged in substantial gainful activity since October 18, 2007, his alleged onset date. At step two, she found that he had a severe impairment of left hip dysplasia and deformity. AR 29. At step three, she found from the testimony of the medical expert that plaintiff did not have an impairment that met or medically equaled any impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 29.

The administrative law judge found that plaintiff retained the residual functional capacity to perform sedentary work and to stand four hours in an eight-hour work day if he was able to sit for up to five minutes every sixty minutes; could occasionally operate foot controls with his left foot; could occasionally climb stairs and walk on uneven terrain; and could frequently but not constantly bend, stoop, kneel, crouch and crawl. AR 29-30. In determining this 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 his testimony that he had disabling left hip pain, but found that the medical evidence failed to support his subjective complaints and she noted that he had had minimal treatment. She also considered that plaintiff did not take any strong medication that would impair his ability to work and that he did not have any side effects from the regular medication that he took. Finally, she considered plaintiff's activities, including driving a car without restrictions, performing yard work by riding his law mower and walking without a cane. She concluded that his testimony was not credible to the extent it was inconsistent with his ability to perform limited sedentary work. AR 31.

At step four, the administrative law judge found that plaintiff could not perform his past relevant work. AR 31. At step five, she found from the testimony of the vocational expert that plaintiff would be able to perform representative unskilled occupations such as document preparer, DOT # 249.587-018 and assembly, DOT # 734.687-018. She noted that under SSR 00-4p, the vocational expert's testimony was consistent with the information contained in the Dictionary of Occupational Titles. AR 32. The administrative law judge found plaintiff not disabled from October 18, 2007 through the date of her decision. AR 33.

Plaintiff filed a second application for disability benefits and supplemental security benefits, which was granted in May 2011. He was found to be disabled as of November 5, 2009, the day after the administrative law judge issued her decision in this case.

OPINION

A. Waiver of Counsel

Plaintiff contends that his waiver of his right to counsel was ineffective because the administrative law judge failed to advise him that counsel could help him obtain medical records and failed to tell him about the cap on fees to 25% of an award and the usual practice of contingency fees. (Although he argued at first that the administrative law judge failed to ask him for a written waiver, he has not pursued this point but concentrated instead on the alleged inadequacies in her explanation of his rights.)

The right to counsel at a disability hearing is statutory, 42 U.S.C. § 406; 20 C.F.R. 404.1700, although the right may be waived. Such a waiver will be upheld if the administrative law judge has performed her duty to advise the claimant properly. This requires her to explain to pro se claimants "'(1) the manner in which an attorney can aid in the proceedings; (2) the possibility of free counsel or a contingency arrangement; and (3) the limitation on attorney fees to 25 percent of past due benefits and required court approval of the fees.'" Skinner v. Astrue, 478 F.3d 836, 841 (7th Cir. 2007) (quoting Thompson v. Sullivan, 933 F.2d 581, 584 (7th Cir. 1991)).

Although the administrative law judge advised plaintiff that a representative could help him obtain information about his claim and submit evidence, she did not explain the

contingency arrangement or the limitation on attorney fees. Without this advice, plaintiff did not have enough information to make a valid waiver of his right to counsel.

(I find it surprising that administrative law judges do not use a script for the information they are required to convey to uncounseled claimants; doing so would help insure that they cover each of the statutorily-required factors.) In this case, the administrative law judge failed to carry out her responsibility to advise plaintiff of his right to counsel in terms that would have allowed him to make an intelligent decision. As a result, the burden is on the commissioner to show that the administrative law judge fully and fairly developed the record. Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994). This duty requires that the administrative law judge "'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" Thompson, 933 F.2d at 585 (quoting Smith v. Secretary of Health, Education and Welfare, 587 F.2d 857, 860 (7th Cir. 1978)). If the commissioner establishes that the administrative law judge did this, plaintiff may rebut the showing by demonstrating prejudice or an evidentiary gap. Binion, 13 F.3d at 245.

Plaintiff argues that the lack of the 2005 Milbauer record shows that the administrative law judge failed to fully and fairly develop the record. Even though plaintiff testified that he had seen Dr. Milbauer, the administrative law judge did not attempt to obtain these medical records, despite her assurances to plaintiff that if he proceeded without counsel she would help him obtain records. On the other hand, the commissioner argues that the Milbauer records were not relevant because Milbauer saw plaintiff in 2005, prior to his alleged onset date. Even so, the records would have been helpful to the medical expert in assessing plaintiff's condition. More important, if she had contacted Milbauer for these records she could have obtained a current

assessment and opinion from him. (A few months later, Milbauer assessed plaintiff's degenerative changes as having worsened over the preceding four years and found him disabled by pain from performing even a low stress job. AR 252. The commissioner agreed and awarded disability benefits.) Because the commissioner has not established that the administrative law judge fully and fairly developed the record, this case must be remanded.

On remand the administrative law judge should consider Milbauer's 2005 and 2009 treatment notes and opinions in determining whether plaintiff was disabled as of October 2007. The administrative law judge should also consider whether the fact that plaintiff has been found disabled on his second application as of the day after the date of her decision is relevant to her decision that plaintiff was not disabled before that date.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff John Dobbs's application for disability insurance benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 19th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge