

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

JAMES A. McCAIN,

Plaintiff,

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

11-cv-132-bbc

Plaintiff James McCain is seeking review of a decision of the Commissioner of Social Security denying his claim for disability insurance benefits and supplemental security income. Plaintiff alleged disability as a result of degenerative disc disease of the lumbar spine and right shoulder, a learning impairment, a vision deficit and anger problems. He contends that the administrative law judge erred in four respects: (1) she ignored significant evidence of his disc disease; (2) failed to take into consideration the opinions of his treating physician; failed to obtain a waiver from plaintiff of his right to counsel; and (4) failed to develop the record adequately. Because the record supports plaintiff's contentions, his case must be remanded for further proceedings.

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

FACTS

A. Background

Plaintiff James A. McCain, Jr. was born on April 20, 1975. AR 53. He has an eleventh grade education and attended special education classes. AR 54. He had past relevant work as a saw operator. AR 43.

On November 22, 2007, plaintiff filed applications for disability benefits and supplemental security income, alleging that he had been unable to work since March 15, 2005 because of a learning impairment, problems with his vision and his anger and shoulder, back and left leg pain. AR 106-116, 126. After the local disability agency denied plaintiff's application initially and upon reconsideration, he requested a hearing, which was held on June 9, 2009 before Administrative Law Judge Gail Reich. The administrative law judge heard testimony from plaintiff, two neutral medical experts and a neutral vocational expert. On September 18, 2009, the administrative law judge issued her decision, finding plaintiff not disabled. AR 37-45. This decision became the final decision of the commissioner on October 25, 2010, when the Appeals Council denied plaintiff's request for review. AR 9-11.

B. Medical Evidence

1. Shoulder surgery

Dr. Nick Weiss performed surgery on plaintiff's right shoulder on September 29, 2005. AR 244. Plaintiff recovered well from the surgery but continued to have some discomfort in his shoulder when performing overhead activities. AR 281-82.

2. Emergency room treatment

The record contains reports of three visits to the emergency room of the Amery Regional Medical Center. At the first of these, in March 2007, plaintiff was complaining of back pain. He was prescribed muscle relaxants and referred to a chiropractor. AR 337-39. He returned to the emergency room in May 2007, reporting back pain. AR 333-34. He was seen again in the emergency room on June 5, 2007, given a diagnosis of left sciatica and low back muscle spasm and prescribed Flexeril, a muscle relaxant. AR 361.

3. Treatment by Dr. Ryan

On April 11, 2007, plaintiff saw Dr. Ann Ryan, complaining of left hip pain but pointing to his left sacroiliac joint area and left buttock. AR 343. He also reported pain shooting down his legs. Plaintiff requested a referral to counseling for escalating anger and explosive type behavior. On examination, Ryan noted positive straight leg raising at 30 degrees on the left and 60 degrees on the right. She referred him to physical therapy. Id.

On June 9, 2007, plaintiff had a magnetic resonance imaging scan (MRI) of his lumbar spine. According to the report, he had disc desiccation and loss of disc height at L4-L5, “with a diffuse disc bulge and a small central to left paracentral protrusion” and the L5 nerve root compressed between the disc and the facet joint. AR 355.

Dr. Ryan saw plaintiff on June 11, 2007 and explained the results of the MRI. AR 365. She advised him that the MRI results confirmed that his left L5 nerve root was pinched. On examination, plaintiff had a positive straight left leg raise at about 60 degrees.

She discussed conservative treatment measures with him and referred him to Dr. Dubois, an orthopedist. Id.

Plaintiff returned to Dr. Ryan on November 14, 2007, to say that he had not seen Dubois because he did not have insurance. AR 364. Ryan diagnosed low back pain and left-sided radiculopathy, and restricted plaintiff to light duty with no bending and minimal twisting, climbing or squatting. She limited him to standing or walking four hours at a time and sitting four or five hours at a time with frequent position changes. Ryan concluded that plaintiff had failed conservative treatment and needed to see a back surgeon. Id.

Plaintiff returned to Dr. Ryan in February 2008, reporting continuing pain. AR 363. He had not been able to obtain physical therapy or see an orthopedist because he was uninsured. Ryan updated plaintiff's work restrictions to sedentary duties with no bending, minimal twisting, climbing and squatting, standing and walking four hours at a time and sitting four to five hours at a time with frequent position changes. Again, Ryan recommended back surgery. AR 363.

C. Consulting Physicians

On February 16, 2007, plaintiff saw Dr. Steven Brown for a disability evaluation. AR 295-97. On examination, Brown found that plaintiff could walk with a normal gait, tandem walk, walk on heels and toes and squat. He noted that plaintiff's "[g]rip strength seems to be a little diminished in the right hand but I am not sure that was real." Ar 296. Brown also noted tenderness in plaintiff's right shoulder and some limited motion. He concluded that

plaintiff would not be able to perform any work that required use of the right arm beyond isolated use of the right hand and that he was handicapped by limited education and no high school diploma. Id.

On March 8, 2007, state agency physician Robert Callear completed a physical residual functional capacity assessment. He listed right shoulder injury as plaintiff's diagnosis. AR 303. Callear found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently and stand, sit or walk six hours in an eight-hour workday. AR 304. He found plaintiff to be limited in reaching in all directions. AR 306.

On June 4, 2007, state agency physician Dar Muceno affirmed Dr. Callear's physical residual functional capacity assessment. AR 345.

On March 13, 2007, state agency psychologist Jack Spear completed a psychiatric review technique form, finding that plaintiff had an affective disorder. AR 315. Spear found that plaintiff had mild restrictions of activities of daily living, moderate difficulties in maintaining social functioning, mild difficulties in maintaining concentration, persistence or pace and no episodes of decompensation. He noted no evidence of the "C" criteria. AR 325-26.

Spear also completed a mental residual functional capacity assessment, finding that plaintiff was markedly limited in his ability to interact appropriately with the general public. AR 312. He also found that plaintiff was moderately limited in (1) his ability to maintain attention and concentration for extended periods; (2) his ability to work in coordination with or proximity to others without being distracted by them; (3) his ability to accept

instructions and respond appropriately to criticism from supervisors; (4) his ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes; (5) his ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; and (6) his ability to respond appropriately to changes in the work setting. AR 311-12.

On July 2, 2007, state agency psychologist Michael Mandli affirmed Spear's assessments. AR 346.

D. Hearing Testimony

At the June 9, 2007 hearing, plaintiff was represented by Michael H. Casper, a non-attorney representative. AR 52. In his opening statement, Casper said that the evidence showed that plaintiff had a nerve impingement at L5, which would meet listing 1.04A. He amended the date of plaintiff's onset of disability to January 1, 2007. AR 53. (The record is unclear about plaintiff's alleged onset date. The hearing transcript and the first page of the administrative law judge's decision refer to the amended alleged onset date as January 1, 2007. However, in her findings, the administrative law judge refers to October 1, 2007 as the amended alleged onset date. For the purpose of this decision, I will use the January 1, 2007 as the amended alleged onset date of plaintiff's disability.)

Plaintiff testified that he had last worked at a casino but stopped working when he hurt his back. AR 54. He lived with a friend and her two children and spent his time lying down or sitting on a chair, reading books. AR 55.

The administrative law judge called Dr. Kenneth Gerber to testify as a neutral medical expert about plaintiff's physical impairments. AR 56. Gerber testified that plaintiff had degenerative disc disease of the lumbar spine and degenerative joint disease of the right shoulder, but that these impairments singly or in combination did not meet or equal a listed impairment. Id. Gerber concluded that plaintiff could sit for six hours in an eight-hour work day and could lift and carry 10 to 20 pounds with occasional "posturals (INAUDIBLE), your Honor, to the right arm." AR 56.

The administrative law judge called Michael Glazer, Ph.D., to testify as a neutral medical expert as to plaintiff's mental impairments. AR 57. (In her decision, the administrative law judge refers to this witness as "Michael Lace." The transcript shows "Michael Glazer.") Glazer testified that plaintiff's mental impairments could be described as depressive disorder with some long term anger issues. Id. He testified that he would limit plaintiff to brief and superficial contact with supervisors, the general public and co-workers. AR 57-58.

Last, the administrative law judge called Bradley Smith Jones to testify as a neutral vocational expert. She asked Jones whether an individual with plaintiff's characteristics who was capable of limited light unskilled work could perform plaintiff's past work. Jones testified that he could not but that he could perform representative occupations such as bench assembler, counter clerk, general cashier and information clerk. Plaintiff's representative asked the expert whether an individual who could not use his right arm at all could perform the identified jobs. The expert testified that the individual could not perform

those jobs but could perform the occupation of surveillance system monitor. The administrative law judge re-questioned Gerber as to the use of plaintiff's right arm. Gerber referred to Dr. Brown's notes and stated that plaintiff would not be able to perform any work that required use of the right arm beyond isolated use of the right hand. AR 61-62.

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 1, 2007, his amended alleged onset date. At step two, she found that plaintiff had a severe impairment of degenerative disc disease of the lumbar spine and right shoulder, obesity, depression, learning disorder and possible personality disorder. AR 43. At step three, relying on the testimony of the medical experts, the administrative law judge found 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 37, 44. She addressed the interplay of plaintiff's obesity with his other impairments and concluded that it did not elevate plaintiff to listing level severity, but that it was a major factor in limiting his capacity to stand, walk and perform postural activities. In reaching her conclusion that plaintiff did not have a listed musculoskeletal impairment of his spine or shoulder or listed impairments of depression, learning disorder or personality disorder, she relied on the finding by medical expert Gerber that plaintiff did not have listed impairment 1.04, Disorders of the spine,

because he had no lack of motor or reflex loss. AR 38.

The administrative law judge found that plaintiff retained the residual functional capacity to perform work requiring lifting and carrying up to 20 pounds occasionally and 10 pounds frequently, sitting for six hours in an eight-hour workday, standing or walking for four hours in an eight-hour workday and occasionally reaching overhead with the right arm and performing postural activities. AR 44. She found that plaintiff could perform simple and repetitive tasks requiring no more than brief and superficial contact with supervisors, coworkers and the general public. AR 44.

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. First, she considered plaintiff's testimony that he spent his time sitting down and reading and concluded that evidence in the record reflected that he was more active. AR 38. She noted that he had acknowledged doing some laundry, cleaning, shopping and caring for his personal needs. AR 39. Second, she considered that he had had limited treatment for any conditions other than his right shoulder and that any drowsiness caused by Percocet had not been shown to interfere with his work functioning. Id. She concluded that plaintiff's testimony was not credible to the extent it was not consistent with the residual functional capacity she had found he retained. AR 44.

The administrative law judge summarized the medical evidence as follows. Plaintiff had right shoulder surgery in October 2005 and an examination in 2007 by Dr. Brown, a consulting specialist in internal medicine. In March 2007, plaintiff sought emergency room

treatment for a five day history of lumbar spine pain radiating to both legs. In April 2007, he returned to the emergency room, complaining of left hip pain and was given a diagnosis of low back pain with left-sided radiculopathy. He was referred to physical therapy and prescribed mild pain relievers. He returned to the emergency room six weeks later with complaints of lower back pain, shooting down his left leg. AR 40.

Next, the administrative law judge addressed the testimony of the medical experts. She accepted their opinions as to the work plaintiff could perform. She noted that Dr. Gerber had testified that plaintiff had degenerative disc disease but that the record contained no specific diagnostic testing. AR 41.

At step four, the administrative law judge found that plaintiff could not perform his past relevant work. AR 44. At step five, the administrative law judge relied on the testimony of the vocational expert to find that plaintiff would be able to perform several light, unskilled jobs including bench assembler, counter clerk, parking lot cashier and information clerk. She concluded that the vocational expert's testimony augmented rather than conflicted with the Dictionary of Occupational Titles and she deferred to his updates and professional knowledge of how jobs are actually performed in the competitive market. The administrative law judge concluded that plaintiff was not disabled. AR 33.

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). 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). When the administrative law judge denies benefits, she must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Failure to Consider Significant Evidence

Plaintiff contends that the administrative law judge failed to consider a line of significant evidence: the June 9, 2007 magnetic resonance imaging scan and Dr. Ann Ryan's treatment notes. The commissioner argues unpersuasively that the administrative law judge considered Ryan's April 7, 2007 notes even though she did not mention Ryan by name, but he does not say anything about the administrative law judge's failure to address the results of the MRI indicating that plaintiff had nerve root compression.

This failure is significant for two reasons. First, the administrative law judge stated in her decision that she was relying on Gerber's opinion that plaintiff had degenerative disc disease "although there does not appear to be any specific diagnosis [sic] testing in that regard." AR 41. This conclusion is incorrect; plaintiff had had a diagnostic MRI, a fact that neither Gerber nor the administrative law judge acknowledged or addressed.

Second, both Gerber and the administrative law judge found that plaintiff's spine disorder did not meet or equal a listed impairment. To meet this listing, an individual must have a spine disorder resulting in a compromise of a nerve root or the spinal cord with evidence of neuro-anatomic distribution of pain, limitation of motion of the spine and motor loss (atrophy with associated muscle weakness or muscle weakness), accompanied by sensory or reflex loss, and, if there is involvement of the lower back, positive straight leg raising test (sitting and supine). 20 C.F.R. Part 404, Subpart. P, Appendix 1, 1.04A, Disorders of the spine. In making their determination, neither Gerber nor the administrative law judge considered the MRI showing the nerve root compression or the positive straight leg raising tests performed by Ryan as late as February 2008. In the end, the record may not support a finding that plaintiff's impairment met a listing, but the administrative law judge should have considered the evidence in making that determination. To "build a logical and accurate bridge from the evidence to his conclusion," the administrative law judge must "articulate, at some minimum level, her analysis of the evidence." Dixon v. Massanari, 270 F.3d 1171, 1177 (7th Cir. 2001).

C. Treating Physician's Opinions

In addition, the administrative law judge failed to consider Dr. Ryan's November 2007 and February 2008 opinions regarding plaintiff's restrictions. AR 364, 363. The commissioner argues that these opinions were not inconsistent with the residual functional capacity that the administrative law judge found, but his argument misses the point. Ryan

was plaintiff's treating physician from April 2007 until February 2008 and the administrative law judge should have considered her opinions and determined the weight to be given to them.

The commissioner has established a regulatory framework instructing administrative law judges how to evaluate medical opinions, including opinions from state agency medical or psychological consultants. 20 C.F.R. §§ 404.1527(d), 416.927(d). Generally, opinions from sources who have treated the plaintiff are entitled to more weight than non-treating sources and opinions from sources who have examined the plaintiff are entitled to more weight than opinions from non-examining sources. 20 C.F.R. §§ 404.1527(d)(1) and (2), 416.927(d)(1) and (2). In addition, the administrative law judge is to consider the source's medical specialty and expertise, supporting evidence in the record, consistency with the record as a whole and other explanations regarding the opinion. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005); 20 C.F.R. §§ 404.1527(d)(3)-(6), 416.927(d)(3)-(6). The administrative law judge "must explain in the decision" the weight given to the various medical opinions in the record. 20 C.F.R. §§ 404.1527(f)(2)(ii); 416.927(f)(2)(ii). An administrative law judge must provide "good reasons" for the weight she gives a treating source opinion, id., and must base her decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999). By itself, an opinion of a non-examining physician is not sufficient to provide the evidence necessary to reject a treating physician's opinion. Gudgel v. Barnhart, 345 F. 3d 467, 470 (7th Cir. 2003).

In this case, the administrative law judge did not address Ryan's opinions, which

makes it impossible to determine the weight she gave them or the reasons why she rejected them, if she did. Therefore, the case must be remanded so that the opinions of the treating physician can be considered. On remand the administrative law judge should consider the results of the June 7, 2007 MRI and Dr. Ryan's subsequent treatment notes.

Finally, plaintiff contends that the administrative law judge erred in not obtaining a waiver of his right to counsel from him and in not developing the record adequately. It is not necessary to decide these claims now that the case will be remanded.

ORDER

IT IS ORDERED that plaintiff James A. McCain, Jr.'s motion for summary judgment dkt. #10, is GRANTED. The decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff James A. McCain, Jr.'s application for disability insurance benefits is REVERSED and the case is REMANDED to the commissioner under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

Entered this 12th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge