

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

WALTON KELLOGG,

OPINION AND ORDER

Plaintiff,

11-cv-372-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This case concerns an application filed by Walton Kellogg for Supplemental Security Income benefits in May 2007, in which he alleged that he has been disabled since November 18, 2006 as a result of obesity, degenerative joint disease of the right hip and knee, foot and knee pain and hypertension. After a hearing on October 20, 2009, Administrative Law Judge David K. Gatto found plaintiff not disabled. This decision became defendant's final decision when the Appeals Council denied review on March 29, 2011.

On appeal, plaintiff contends that the administrative law judge erred in finding that plaintiff's combination of impairments did not meet or equal the severity of a listed impairment and in assessing plaintiff's credibility. I conclude that plaintiff is correct and

that this case must be remanded.

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

FACTS

A. Medical Evidence

On October 9, 2006, when he was 33, plaintiff went to an urgent care center because of pain in his lower back and right hip. He was seen by Dr. Bosheng Yang, who diagnosed a low back sprain for which he prescribed Ibuprofen and a muscle relaxant. AR 239.

On October 27, 2006, plaintiff was seen at a clinic with continued back pain and right groin and thigh pain. He reported that physical therapy, chiropractor visits and ibuprofen had not helped his pain. On examination, plaintiff was found to have decreased internal and external rotation of both hips. An x-ray showed degenerative joint disease of the right hip. AR 241-42.

On November 24, 2006, plaintiff saw Dr. Matthew J. Kirsch, reporting a one-to-two year history of right hip and low back pain. The pain, which was “achy” and sharp, was better with standing and worse with sitting. AR 244. On examination, Kirsch found that plaintiff had a shortened right-sided gait pattern and limited right hip rotation. An x-ray of the right hip showed flattening of the femoral head with fair maintenance of the joint space. Kirsch suspected early degenerative arthritis. AR 245.

On December 6, 2006, Kirsch gave plaintiff an injection of Kenalog and Lidocaine in his right hip. AR 246. A February 6, 2007, a magnetic resonance imaging scan showed a small fluid build-up in plaintiff's right hip. On February 9, 2007, Kirsch suggested to plaintiff that he use an ambulation aid as needed and that he stop smoking and lose weight. AR 249-50. When plaintiff returned to see Kirsch on February 27, 2007, he reported that the injection had not helped and that the pain was worse with weight bearing and better with rest. AR 247.

On March 21, 2007, plaintiff was treated by Nurse Practitioner Mary Kramer for right foot pain. She diagnosed gout in plaintiff's right foot. AR 250-51. On March 26, 2007, plaintiff saw Dr. Keith Kleiss. At that appointment, plaintiff was weighed at 360 pounds. Kleiss told plaintiff his cholesterol was quite high and prescribed Zocor. AR 253-54.

On April 11, 2007, Drs. Tom Gregory Shahwan and Rafael J. Sierra examined plaintiff at the Mayo Clinic in Rochester, Minnesota. On examination, plaintiff weighed 360 pounds and stood 6' 2" tall. Dr. Sierra diagnosed mild to moderate degenerative joint disease of plaintiff's right hip and recommended surgery to preserve plaintiff's hip joint after plaintiff lost 100 pounds. He referred plaintiff to the Endocrinology Clinic to determine whether he would be a good candidate for gastric bypass surgery. AR 264-67.

On May 10, 2007, plaintiff was seen in the Endocrinology Clinic, which

recommended bariatric surgery. At that time plaintiff weighed 359 pounds and had a body mass index of 49.1. AR 272-74. On June 1, 2007, plaintiff was seen at the Sports Medicine Center at the Mayo Clinic, which suggested that he try using a cane so that he could walk longer distances. AR 303.

On July 30, 2007, plaintiff had a psychology consultation at Mayo Clinic for weight management and possible bariatric surgery. He reported an eleven pound weight loss since June and he weighed 355 pounds. AR 300. The psychologist concluded that there were no psychological issues that would contraindicate bariatric surgery. AR 302.

On January 23, 2008, plaintiff went to an urgent care center complaining of back pain after he had been carrying his wife's wheelchair. AR 330. On January 29, he saw Dr. Kleiss, who thought the lumbar strain was musculoskeletal and referred plaintiff to physical therapy. AR 333. After physical therapy, plaintiff reported that his low back pain had improved significantly. AR 355. On February 14, 2008, plaintiff was discharged from physical therapy to a home exercise program after regaining full functional activities of daily living and leisure activities. AR 352. In August 2008, plaintiff returned to see Dr. Kleiss. He reported losing 40 pounds but having to cancel the bariatric surgery because his insurance would not cover it. AR 344-45.

On September 11, 2008, plaintiff returned to see Dr. Sierra at the Mayo Clinic. Dr. Sierra found that the arthritis had progressed in plaintiff's right hip. He suggested that a

total hip replacement would be reasonable. AR 370. On August 7, 2009, plaintiff had an x-ray of his knee, which showed a fracture. AR 374.

B. Consulting Physicians

On June 7, 2007, state agency physician Dan Larson completed a physical residual functional capacity assessment for plaintiff, listing the diagnoses of obesity and right hip degenerative arthritis. AR 283. He found that plaintiff could occasionally and frequently lift 10 pounds, stand at least two hours in an eight-hour work day and sit about six hours in an eight-hour work day. Larson noted that plaintiff could perform sedentary work. AR 284-85. On September 9, 2007, Dr. Gregory Salmi considered the medical evidence and affirmed Dr. Larson's assessment. AR 309-11.

C. Hearing Testimony

At the hearing before the administrative law judge, plaintiff testified that he could not work because of pain in his hip and lack of range of motion in his right leg. He testified that he had pain in his right knee and foot caused by pseudogout, AR 37, that he had no side effects from his medications, AR 34, and that when his hip hurts, he takes ibuprofen and sits in a soft chair. AR 39. He takes medications for high blood pressure and high cholesterol, AR 46, and he can walk with his prescribed cane for two blocks. AR 38.

Plaintiff testified that he washed dishes and clothes, cooked and shopped. AR 32. He never had a driver's license. AR33. Plaintiff testified that on four occasions in 2009, he had fished at an area near his house while sitting in a comfortable camping chair. AR 50. He mowed his lawn on a riding mower. AR 52. Plaintiff testified that he made pizzas at a packing plant until he was fired because of a past felony conviction. AR 34. At that job he had to stand 10 hours a day. AR 35-36.

At the time of the hearing, plaintiff testified that he weighed 352 pounds and stood 6' 2" tall, AR 39, that his doctors had recommended a hip replacement but wanted him to lose 100 pounds first and that he had been considering gastric bypass surgery, but his insurance would not cover the whole cost. AR 39-40.

The administrative law judge called vocational expert Richard Norman to testify. AR 54. The administrative law judge asked the expert whether a hypothetical individual with plaintiff's characteristics, including the residual functional capacity to perform sedentary work, could perform plaintiff's past work. Norman testified that such an individual could not. AR 55. In response to a question from the administrative law judge, Norman testified that the individual could perform other jobs available in the economy, specifically, 5,400 order clerk jobs (DOT # 209.567-014) and 2,900 printed circuit board assembler jobs (DOT # 725.684-110). He said that his testimony was consistent with The Dictionary of Occupational Titles. AR 56.

Norman testified that standard breaks in a work day were 10-15 minutes every few hours. He said that if an individual missed more than two days a month on a regular basis he would not be employable. AR 57.

Finally, the administrative law judge called Nadine Kellogg, plaintiff's wife, as a witness. AR 60. She testified that she helped plaintiff with his socks and shoes every day and picked up things he dropped. She testified that plaintiff limped but could walk a block or two, except when he had an outbreak of gout, AR 61, that he took Indocin for his gout, AR 62, that he had trouble getting in and out of a car, could lift five gallons and did not write well. AR 63. When she had foot surgery, plaintiff was able to push her wheelchair but doing so aggravated his back condition. AR 64.

D. 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. 20 C.F.R. § 404.1520. At step one, he found that plaintiff had not engaged in substantial gainful activity since May 1, 2007, the application date. At step two, he found that plaintiff had the severe impairments of a history of hypertension obesity, degenerative joint disease of the right hip and right knee and foot pain due to pseudogout. At step three, he found that plaintiff's impairment did not meet or medically equal any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 16.

Once the administrative law judge concluded that plaintiff's impairments were not severe enough to establish that he was presumptively disabled under the regulations, he proceeded to assess plaintiff's work-related limitations to determine whether there was work in the economy that plaintiff could perform in spite of his impairments. He found that plaintiff retained the residual functional capacity to perform a full range of sedentary work with no lifting or carrying weight of more than 10 pounds occasionally or frequently, standing or walking up to two hours in an eight-hour day and sitting up to six hours in an eight-hour day. AR 17.

In determining plaintiff's residual functional capacity, the administrative law judge assessed the credibility of plaintiff's testimony in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p and set forth the factors to be considered pursuant to the regulations and summarized plaintiff's testimony. AR 17-18. He concluded that the plaintiff's statements concerning the intensity, persistence and limiting effects of his symptoms "were not entirely credible." AR 18.

In support of this conclusion regarding plaintiff's credibility, the administrative law judge noted that plaintiff's allegations of disabling symptoms and incapacitating limitations were not consistent with the objective medical evidence. AR 18. He found the absence of significant cord compression, ongoing neurological abnormalities or sustained difficulty with gait and balance inconsistent with plaintiff's allegations of disabling pain, AR 20, as were his

use of medications and course of treatment. Next, the administrative law judge considered plaintiff's failure to look for work or to seek assistance in looking for work and judged it a lack of motivation to work. AR 21. He also considered the facts that plaintiff had a history of a criminal conviction, no driver's licence and lived in a remote area as contributors to his unemployment. Finally, the administrative law judge concluded that plaintiff's daily activities were inconsistent with his allegations of incapacitating pain and limitations. AR 22.

In determining plaintiff's residual functional capacity, the administrative law judge gave significant weight to the opinions of the state agency physicians who found plaintiff capable of a range of sedentary exertional work because their opinions were supported by the medical evidence. He noted that none of plaintiff's treating sources had restricted him from all work-related activities. AR 20.

At step four, the administrative law judge found that plaintiff's restrictions would keep him from performing his past work (carpenter and assembly worker). AR 22. At step five, he relied on the testimony of a vocational expert to determine the extent to which plaintiff's non-exertional limitations would erode the occupational base of unskilled work at all exertional levels. The expert testified that a hypothetical individual with plaintiff's characteristics would be able to perform jobs as order clerk (DOT 920.567-014), with 5,400 jobs in Wisconsin and printed circuit board assembler (DOT 726.684-110), with 2,900 jobs

in Wisconsin. The administrative law judge found the vocational expert's testimony to be consistent with the information contained in The Dictionary of Occupational Titles. The administrative law judge concluded that plaintiff was not disabled because there were a significant number of jobs available in the national economy that he could perform. AR 23-24.

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, he 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. Listed Impairment

When considering whether an individual has an impairment that meets or equals a listed impairment, an administrative law judge should mention the specific listing he is considering. In combination with a “perfunctory analysis,” his failure to identify the specific listing may require a remand. Ribaudo v. Barnhart, 458 F.3d 580, 583 (7th Cir. 2006); Brindisi ex rel. Brindisi v. Barnhart, 315 F.3d 783, 786 (7th Cir. 2003). However, in Brindisi, the court recognized that “even a ‘sketchy opinion’ is sufficient if it assures us that an ALJ considered the important evidence and enables us to trace its reasoning.” Id. at 787 (citation omitted).

In this case, the administrative law judge merely concluded that plaintiff did not have an impairment or combination of impairments that met or equaled the requirements of the Listing of Impairments of Appendix 1, Subpart P, Regulations No. 4. Nowhere in his decision did he discuss any specific listing or point to any medical evidence in the record that would help him decide whether plaintiff met a listed impairment. He did not call a medical expert to determine whether plaintiff’s impairments met or equaled a listed impairment. The only medical opinions concerning plaintiff’s medical restrictions in the record are those prepared in 2007 by state agency physicians who did not review the 2008 and 2009 evidence that plaintiff’s degenerative arthritis of his hip had worsened.

The commissioner argues that the administrative law judge’s evaluation addresses all

the criteria for Listings 1.02 and 14.09. Listing 1.02, Major Dysfunction of a Joint, requires involvement of weight-bearing joint such as a hip, knee or ankle resulting in the inability to ambulate effectively. Effective ambulation is defined as independent ambulation without the use of hand-held assistive devices that limit the functioning of both upper extremities. Listing 1.00, B, 2b(1). Listing 14.09, Inflammatory Arthritis, requires persistent inflammation or deformity of a weight bearing joint and the inability to ambulate effectively.

Although the administrative law judge did not address these listings or their requirements in his decision, the record does suggest that plaintiff can ambulate with one cane. However, in Moss v. Astrue, 555F. 3d 556, 562-63 (7th Cir. 2009), the court found that an individual who did not use two canes or a walker could still meet the requirements of a listing that requires the inability to ambulate effectively. It is possible that plaintiff's hip condition and pseudogout do not meet or equal these listed impairments, but the question remains whether plaintiff's impairments in combination equal the severity of a listed impairment. Medical equivalence may be found when a specific element of a listing is missing but the combined severity of impairments is equal to the severity of listed impairments. 20 C.F.R. 416.926(a)-(b).

Moreover, the regulation requires the administrative law judge to consider any additional and cumulative effects of obesity when determining whether an individual has a listing level impairment or combination of impairments. Listing 1.00, Q, Effects of Obesity;

Social Security Ruling 02-1p: Policy Interpretation Ruling Titles II and XVI: Evaluation of Obesity, 67 Fed. Reg. 57859 (2002). In addition to plaintiff's other impairments, he has a body mass index of 49.1. The commissioner points out that a failure to consider obesity may be harmless if the administrative law judge relied on the opinions of doctors who were aware of the obesity. Prochaska v. Barnhart, 454 F. 3d 731, 736-37 (7th Cir. 2006), but in this case there are no opinions of doctors concerning medical equivalency or the effect of plaintiff's obesity on his other impairments. Evidence in the record indicates that it did have an effect. Dr. Sierra told plaintiff he could not have surgery to repair his hip until he lost 100 pounds. Further, the medical evidence suggests that plaintiff's obesity caused the worsening of the degenerative arthritis.

In Martinez v. Astrue, 630 F.3d 693, 698-699 (7th Cir. 2011), the Court of Appeals for the Seventh Circuit found that it was error to find that the administrative law judge had properly considered the obesity of the plaintiff in combination with her other impairments. The court stated:

It is one thing to have a bad knee; it is another thing to have a bad knee supporting a body mass index in excess of 40. We repeat our earlier reminder that an applicant's disabilities must be considered in the aggregate.

Id. at 699. In this case, I cannot find that the administrative law judge considered plaintiff's obesity and its affect on his hip condition when making the determination that plaintiff's combined impairments did not equal the severity of a listed impairment. Therefore, the case

must be remanded to the commissioner for a new step three finding.

C. Credibility

Under Social Security Ruling 96-7p, an administrative law judge must follow a two-step process in evaluating an individual's own description of his or her impairments: (1) determine whether an "underlying medically determinable physical or mental impairment" could reasonably be expected to produce the individual's pain or other symptoms; and (2) if such a determination is made, evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Social Security Ruling 96-7p, 1996 WL 374186, *1 (1996). See also Scheck v. Barnhart, 357 F.3d 697, 702 (7th Cir. 2004). When conducting this evaluation, the administrative law judge may not reject the claimant's statements regarding his symptoms on the sole ground that the statements are not substantiated by objective medical evidence. Instead, the administrative law judge must consider the entire case record to determine whether the individual's statements are credible.

Relevant factors the administrative law judge must evaluate are the individual's daily activities; the location, duration, frequency and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness and side effects of any medication the individual takes or has taken to alleviate

pain or other symptoms; other treatment or measures taken for relief of pain; the individual's prior work record and efforts to work; and any other factors concerning the individual's functional limitations and restrictions. SSR 96-7p; 20 C.F.R. §§ 404.1529©, 416.929©. See also Scheck, 357 F.3d at 703; Zurawski, 245 F.3d at 887.

An administrative law judge's credibility determination is given special deference because that judge is in the best position to see and hear the witness and to determine credibility. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). In general, an administrative law judge's credibility determination will be upheld unless it is "patently wrong." Prochaska, 454 F.3d at 738; Sims v. Barnhart, 442 F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying."). However, the administrative law judge still must build an accurate and logical bridge between the evidence and the result. Shramek, 226 F.3d at 811. The court will affirm a credibility determination as long as the administrative law judge gives specific reasons that are supported by the record. Skarbeck v. Barnhart, 390 F.3d 500, 505 (7th Cir. 2004).

In recent opinions, the Court of Appeals for the Seventh Circuit has expressed criticism of the Social Security Administration's credibility assessments. The court has said that it is not enough for the administrative law judge to say only that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are

not entirely credible.” As the court has noted, assessments like these fail to identify which statements are not credible and what exactly “not entirely” is meant to signify. Martinez, 630 F.3d at 694.

In this case the administrative law judge used the phrase “not entirely credible” in making his credibility assessment. He then set forth the reasons for his conclusion, but it is difficult to determine what allegations the administrative law judge found not credible. He states that the allegations of disabling pain and limitations are inconsistent with the medical evidence. However, plaintiff’s testimony that he was prescribed a cane, could walk two blocks with the cane and needed to lose 100 pounds before he could have hip replacement surgery is supported by the notes of his treating physicians. Further, the administrative law judge failed to assess the credibility of plaintiff’s wife, who corroborated plaintiff’s testimony that he could walk only a block or two. Although the administrative law judge addressed the factors required by the regulations in assessing plaintiff’s credibility, I cannot determine what he meant when he said plaintiff was not “entirely credible” when it is apparent that some of plaintiff’s testimony is supported by medical evidence in the record. Therefore, I cannot affirm the administrative law judge’s credibility finding.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of

Social Security, denying plaintiff Walton Kellogg'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 29th day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge