IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAHAB JALALI,

OPINION AND ORDER

Plaintiff,

12-cv-563-bbc

v.

CAROLYN COLVIN,

Defendant.

- -

Plaintiff Shahab Jalali is seeking review of a decision denying his claim for disability benefits under the Social Security Act. 42 U.S.C. § 405(g). The administrative law judge concluded that plaintiff's depression was a severe impairment and that he could not perform his past work as an engineer but that he was not disabled because he could perform a significant number of jobs in the national economy as an assembler, office helper or packager.

In his opening brief plaintiff challenged the decision on a number of grounds, but he abandoned all but two of them in his reply brief: (1) in concluding that plaintiff's depression did not meet the criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, the administrative law judge misinterpreted the opinion of one of the medical experts; and (2) the administrative law judge refused to consider the opinion of one of plaintiff's treating physicians. By failing to respond in his reply brief to the commissioner's arguments on the

other issues, plaintiff waived any contrary argument. Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010). Because I disagree with plaintiff's arguments on the remaining two issues, I am affirming the decision of the administrative law judge.

OPINION

A. Medical Listings

If the administrative law judge determines that the claimant has a "severe" impairment within the meaning of 20 C.F.R. 404.1520, he must determine next whether the impairment "meets or equals a listed impairment" in 20 C.F.R. Part 404, Subpart P, Appendix 1. Plaintiff argues that the administrative law judge erred by concluding that plaintiff did not meet that "B" criteria for Medical Listing 12.03 (Schizophrenic, Paranoid and Other Psychotic Disorders) and 12.04 (Affective Disorders) before the last day he was insured under the Social Security Act, which was December 31, 2004. Under 12.03(B) and 12.04(B), a claimant must show that his impairment meets at least two of the following criteria:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Marked difficulties in maintaining concentration, persistence, or pace; or

4. Repeated episodes of decompensation, each of extended duration.

Plaintiff says that the opinion of medical expert, Allen Hauer, who testified at the hearing before the administrative law judge, supports a conclusion that plaintiff had marked

difficulties in maintaining social functioning and maintaining concentration, persistence or pace. However, the administrative law judge saw things differently. Although he gave "considerable weight" to Hauer's opinion, the administrative law judge summarized the relevant portion of the opinion as follows: "Prior to the date of last insured, [Hauer] testified that the claimant only had mild limitations in his activities of daily living and social functioning. He opined that the claimant had moderate difficulties with concentration, persistence and pace." AR 17.

The disagreement is caused by Hauer's word choice while testifying. With respect to social functioning, he stated, "[s]ince late '04 I would rate that at a marked level." AR 71. With respect to concentration, persistence and pace, he stated that "[t]here is this pattern of concentration difficulties and racing thoughts and some illogia [sic] or disorganized thinking and I think that predates '04. But since that time, I think that that would be marked." AR 71-72. Plaintiff argues that Hauer's testimony must be interpreted to mean that plaintiff suffered from marked limitations in both social functioning and concentration, persistence and pace since before December 31, 2004.

In isolation, Hauer's use of the phrase "since late '04" supports plaintiff's interpretation, but I agree with the commissioner that plaintiff's interpretation does not make any sense when Hauer's testimony is viewed in context. When the administrative law judge began his questioning of Hauer, the administrative law judge made it clear what the relevant time frames were: "By the way, I do have some time considerations here. There is a consideration as to where he may have been prior to—the date here—December 31,

2004 and where he may have been psychologically since that date up to the present." AR 69. In response to this, Hauer stated that he would "try to give two ratings, before '04 and since '04," supporting the view that Hauer's references to "'04" were shorthand for December 31, 2004. AR 71.

The full context of Hauer's opinion regarding plaintiff's social functioning provides further support for the commissioner's position:

> In terms of his social function, again, *before the '04 date*, I think it was probably mild. There's always been an odd nature of his manner of relating and heightened suspiciousness although he was capable of entering and maintaining reciprocal relationships. *Since late '04*, I would rate that at a marked level.

AR 71 (emphasis added). Although Hauer could have been clearer, this passage is best read as simply continuing the "before and after December 31, 2004" framework the administrative law judge asked Hauer to adopt.

Any doubt is resolved by the administrative law judge's later questioning, in which he tried to get more specific answers from Hauer: "[W]hat I'm wondering is, is there any way for you to pin down [when plaintiff's limitations became marked]? You seem to be saying after December 31, 2004. Is there anyway for you pin down the time frame of which he reaches those levels of marked?" AR 72. Again, the administrative law judge was making it clear that he understood Hauer to be saying that plaintiff's limitations became marked at some point *after* December 31, 2004. Hauer did not tell the administrative law judge that he was misinterpreting the testimony. Rather, in response to the administrative law judge's question, he stated that plaintiff "tipped over" sometime "between '04 and '09," but he

could not be more specific. AR 73. If Hauer had meant in his previous testimony that plaintiff's limitations became marked some time during 2004, he would not have provided such a vague answer.

Finally, even if I agreed with plaintiff that Hauer's use of the phrase "since late '04" needs clarification, that would not be enough to require a remand, because plaintiff must meet two of the "B" criteria. With respect to concentration, persistence and pace, Hauer testified that some of plaintiff's symptoms "predat[e] '04" and that "since that time," plaintiff's limitations would be "marked." Because Hauer was using "'04" as shorthand for December 31, 2004, his testimony that plaintiff's limitations were marked "since that time" does not support the conclusion that plaintiff met this requirement for the date he was last insured. Accordingly, I conclude that the administrative law judge did not err in concluding Hauer's testimony did not show that plaintiff had one of the impairments listed in 12.03 or 12.04.

B. Treating Physician

After several years of receiving no treatment, plaintiff began seeing David Dowell, a psychiatrist. In a letter dated April 13, 2010, Dowell wrote that plaintiff's "functioning has declined over the years" and that "[t]here is reasonable certainty that he was unable to be employed prior to 2004." AR 262. The administrative law judge did not discuss Dowell by name, but the parties seem to agree that the documents related to Dowell were part of the "additional medical records" that the administrative law judge disregarded because they did

not show what plaintiff's condition was before December 31, 2004, when plaintiff was no longer eligible for disability benefits.

In response, plaintiff cites Allord v. Barnhart, 455 F.3d 818 (7th Cir. 2006), and Estok v. Apfel, 152 F.3d 636 (7th Cir. 1998), for the proposition that the administrative law judge must consider a "retrospective medical opinion" when it is "corroborated by evidence contemporaneous with the eligible period." Plt.'s Br., dkt. #6, at 17. The commissioner argues that plaintiff is misstating the law, but even if I accept plaintiff's characterization as accurate, plaintiff has not shown that the administrative law judge erred by refusing to consider Dowell's opinion. The only evidence plaintiff cites to support Dowell's opinion are clinical findings that Dowell made regarding plaintiff's symptoms at the time Dowell evaluated plaintiff *in 2010*. AR 282-83. Although Dowell attached other records from 2003 and 2004 to his letter, neither Dowell nor plaintiff attempted to explain how any of those records show that plaintiff was disabled during the relevant time period. Particularly because such a long time had passed when Dowell evaluated plaintiff and depression does not have "a well-understood progression," Allord, 455 F.3d at 822, such that plaintiff's condition in 2004 could be inferred readily from his condition in 2010, the administrative law judge was entitled to reject Dowell's opinion.

ORDER

IT IS ORDERED that plaintiff Shahab Jalali's motion for summary judgment is DENIED and the decision of the commissioner is AFFIRMED. The clerk of court is directed

to enter judgment in favor of the commissioner and close this case.

Entered this 29th day of April, 2013.

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