

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

MARK W. MACHTAN,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

12-cv-575-bbc

Plaintiff Mark W. Machtan has filed this motion for judicial review of an adverse final administrative decision of defendant Commissioner of Social Security. He contends that the decision is not supported by substantial evidence and that the administrative law judge erred in two ways: (1) he created his own mental limitations for plaintiff without explaining the bases for his assessment and (2) he failed to develop the record after he found that plaintiff had mental limitations. Defendant argues that these errors require remand.

The case is an unusual one. The administrative law judge gave plaintiff mental limitations beyond those that any doctor had identified. However, he then found that even with these limitations, plaintiff could perform some jobs that exist in the state and national economy. The administrative law judge's altruistic impulse to give plaintiff the benefit of the doubt may have been misguided, but it does not warrant remand, either to allow him to explain his reasons for finding mental limitations or to develop the record. Development of

the record is warranted when there is evidence of mental limitations in the record that could be explained and evaluated by trained professionals. In this instance, however, the record contains no evidence to suggest that expansion of the record would make a difference to the outcome.

RECORD EVIDENCE

A. Plaintiff

Plaintiff Mark W. Machtan worked for more than 20 years for WIC Building Systems as a builder of modular homes. His work came to an end on July 14, 2008, perhaps because he had been out of work with a non-work-related injury. (The record is unclear on this point.) He filed a claim for social security benefits that was denied initially and on reconsideration. He was granted a hearing before an administrative law judge at which he described his pain as diffuse, random and wide-ranging. He said he had been seen by physicians specializing in rheumatoid arthritis and pain management, but had been unable to find relief from the pain.

It is not necessary to go into any more detail about plaintiff's medical problems because plaintiff is not contesting the administrative law judge's finding that plaintiff had the severe impairments of degenerative disc disease, fibromyalgia, bone/joint disease, rheumatoid arthritis, recurrent tendonitis in his left Achilles tendon and gout. AR 17. Moreover, plaintiff accepts the administrative law judge's determination that these impairments did not meet or medically equal any listing, AR 18, and that from a physical

standpoint plaintiff had the residual functional capacity to perform sedentary work with additional limitations, as set out in the administrative law judge's decision. AR 19.

B. Medical Evidence

The record shows that plaintiff saw Dr. James Lampman in the Department of Rheumatology at the Marshfield Clinic on many occasions in 2008 and 2009. E.g., AR 273 (Aug. 19, 2008); AR 279 (Sept. 19, 2008); AR 288 (Oct. 22, 2008); AR 290 (Nov. 18, 2008). When he saw Lampman in October 21, 2009, he told Lampman for the first time that he had "quite a bit of stress and strain" and was interested in psychological counseling, which Lampman arranged for him. AR 352. Plaintiff met with social worker Kenneth Berg, MSW, at the clinic on December 1, 2009. Plaintiff told Berg that he had begun to have symptoms of depression six months earlier in the form of depressed mood, lack of energy, lack of interest, no motivation, not wanting to be around people and a general inactivity. AR 396. He said he had problems sleeping and a poor appetite that had caused him to lose 15 pounds in the previous few months. He denied having suicidal thoughts but said that he cried at times from his pain. He said that he generally wanted to be alone most of the time. AR 397.

Berg found that plaintiff was alert and oriented with no thought disorder and that he had fair insight and judgment. ARE 397-98. Berg's diagnosis was depressive disorder, not otherwise specified, and moderate to severe stress. AR 398.

On December 2, 2009, plaintiff was seen by Dr. Guy Van Oudenhoven for

hypertension. AR 359. Van Oudenhoven found plaintiff under “significant psychological stress” because of his unemployment, id., but alert and oriented, with appropriate mood. AR 360. He noted that plaintiff maintained good eye contact and answered questions readily and appropriately. Id.

At a medication evaluation on December 4, 2009, plaintiff told Dr. Michael Wood that his appetite, enjoyment in life and self esteem were all decreased, that he had difficulty with memory, poor concentration, poor energy, problems getting to sleep and staying asleep and social withdrawal. AR 400. He also noted symptoms of anxiety, such as headaches, irritability and excessive worrying about his finances and his health and he said that when he was experiencing a lot of stress it caused flareups of headaches and blurred vision. Id. He denied feeling suicidal. Id. Wood’s diagnosis was major depression, single episode; generalized anxiety; and pain disorder with mixed psychological and medical features. Id. He assessed a global assessment functioning of 50, AR 406, and prescribed Sertraline. AR 407. At the time plaintiff was taking hydrocodone-acetaminophen for pain. Id. 399.

At a medication followup visit the next month, on January 6, 2010, plaintiff received a renewed and modified prescription for Sertraline. AR 369. Plaintiff was still taking hydrocodone-acetaminophen for pain. Id. At that time, he told nurse practitioner Celeste Jackson that his mood was a little better, his concentration was improving, his memory was fair, his energy was good, his sleep and appetite were improving and his anxiety remained high. AR 409. Her assessment was major depression, single episode, partial remission; generalized anxiety; and pain disorder with mixed psychological and medical features. AR

411. The note was cosigned by a medical doctor. AR 412.

Plaintiff canceled his next appointment for medication followup, AR 413. When he had not returned for any medication by March 25, 2010, Jackson sent him a letter of inquiry about his interest in returning. AR 414. On May 4, 2010, she wrote a discharge summary, noting that plaintiff had had two counseling sessions and had responded positively to Sertraline but had not returned for further visits. AR 415.

Plaintiff continued to see other doctors at the Marshfield Clinic to obtain medication refills for his physical problems, e.g., AR 417-20, and for examinations and care, e.g., 2010 visit to Lampman); AR 32 (Jan. 20, 2001 visit to Abraham for annual physical); AR 437-38 Jan. 26, 2011 visit to Lampman).

C. Agency Reviewers

No agency reviewers assessed plaintiff's mental limitations.

D. Hearings

Plaintiff testified at his first hearing before the administrative law judge on January 4, 2011 that he was very depressed because he had loved the outdoors and enjoyed his job and he could no longer go for walks with his daughter or work at his former occupation. AR 45. He said he had had thoughts of suicide, thinking that his family might be better off without him, and that at times he had crying spells and periods when he did not want to be around family members or friends because he could see that they felt sorry for him. Id.

Plaintiff testified that he was not taking any pills for depression because they would not work unless he got off his pain pills. AR 46.

Vocational expert Mark Kellman testified that plaintiff's past relevant work was classified as medium exertion, semi-skilled work. AR 58-59. The administrative law judge asked Kellman a hypothetical question about plaintiff's physical ability to perform his past relevant work; Kellman said plaintiff could not perform it but that he could work as a telemarketing representative, as a receptionist or as an office helper, AR 59-60, all of which were light unskilled jobs available in the state and national economies. AR 61. In response to a hypothetical question from plaintiff's attorney, Kellman said that if plaintiff's contact with supervisors, coworkers and the public were limited to less than 50% of the time, he would not be able to perform the jobs he had identified. AR 63.

At a supplemental hearing held on March 14, 2011, a medical expert testified about plaintiff's physical limitations and Kellman testified again as a vocational expert. This time, the administrative law judge added to the hypothetical question to Kellman a limitation of work to "simple, routine and repetitive tasks in a work environment free of fast-paced production requirements involving only simple work-related decisions with few, if any, workplace change[s]." AR 74. In response, Kellman testified that he knew from the Dictionary of Occupational Titles and his own training, education and experience in the field that the jobs of telemarketer, production worker and inspectors/testers would be available. AR 75. If, however, plaintiff were restricted to only occasional handling of gross manipulation of the right hand and fingering and fine manipulation, the jobs would be

limited to telemarketing and office helper, AR 76, and if plaintiff were limited to less than occasional contact (one-third of a day) with supervisors, co-workers and the public, he could not do either of those jobs. AR 76-77.

E. Administrative Law Judge's Decision

The administrative law judge found that plaintiff had not engaged in substantial gainful activity since July 14, 2008, that he had severe impairments of depression, anxiety, degenerative disc disease, fibromyalgia, bone/joint disease, rheumatoid arthritis, recurrent tendonitis in his left Achilles tendon and gout, AR 17, and that none of these impairments by themselves or in combination met or equaled a listed impairment. He found specifically that plaintiff's mental impairments did not equal a listed impairment. The paragraph "B" criteria were not met because plaintiff did not have two areas of marked restriction (activities of daily living, maintaining social functioning, maintaining concentration, persistence and pace or repeated episodes of decompensation).

The administrative law judge found that plaintiff had mild restrictions on activities of daily living because of his physical impairments. AR 18. He gave plaintiff the benefit of the doubt when it came to social functioning and assessed him as having moderate difficulties, even though he acknowledged that plaintiff had no problem getting along with friends, family, neighbors and others; he had never been fired or laid off because of difficulty getting along with people; and he handled authority "fine." Id.

When it came to concentration, persistence and pace, again the administrative law

judge gave plaintiff the benefit of the doubt and found that he had moderate difficulties, despite plaintiff's own statement that he handled stress and changes in routine with "fair" ability, could pay attention for an unlimited time and finished what he started. AR 18-19 (citing Exhs. ##3E/7 & 3E/6). Only his physical impairments affected his ability to complete tasks and required reminders. AR 19.

The administrative law judge concluded that plaintiff had the residual functional capacity to perform sedentary work with limitations, including only occasional handling and fingering with his right hand, so long as the work was limited to simple, routine and repetitive tasks involving only simple, work-related decisions, in an environment free of fast-paced production requirements and few if any workplace changes. *Id.* He admitted that the record contained no evaluations of plaintiff's mental limitations but despite this, he was including mental limitations in the residual functional capacity assessment he was adopting. AR 24. At the same time, he discussed the inconsistencies between the treatment record and plaintiff's testimony and written reports and observed that these tended "to damage claimant's credibility and considerably diminish the force of his disability claim." AR 25. He concluded that jobs existed in the national economy that plaintiff could perform, AR 26, specifically telemarketing representative and office helper, both of which are unskilled jobs. AR 27.

OPINION

Plaintiff challenges defendant's rejection of his claim, arguing first that the

administrative law judge's findings that plaintiff has mental limitations have no basis in the record and that therefore they cannot be sustained. I agree that they should be ignored; in fact, I find the administrative law judge's inclusion of mental limitations inexplicable. Plaintiff's own reports showed that he had a history of getting along with coworkers and supervisors, that he handled stress and changes in routine with "fair" ability and that he could pay attention for an unlimited time and he finished what he started. Plaintiff's argument gets him nowhere, however, because ignoring the mental limitations that the administrative law judge included means only that he is not disabled.

Plaintiff has a second argument, however, which is essentially that if an administrative law judge thinks there is a basis for a finding of mental limitations, he has an obligation to develop the record on that issue. In theory, this is a better argument, but it is inapplicable in this case.

Plaintiff notes correctly that the state agency never had a chance to consider his mental limitations because they were not part of the record until after the agency had finished its consideration of the case. This might be a reason to remand the case if the record evidence suggested the possibility of serious "mental limitations," but it does not. Plaintiff saw Lampman for months for his various physical ailments before mentioning any stress. In itself, this omission might not be particularly noteworthy because it may have taken plaintiff some time to work himself up to admitting his emotional state. What is noteworthy, however, is that after Lampman arranged for him to have counseling and medication treatment, plaintiff attended only two counseling sessions and had only two

rounds of medication before stopping all mental health treatment.

At his hearing, plaintiff did not admit to the administrative law judge that he was the one who stopped treatment but said instead that he could not take medication for those problems while he was on pain medication for his physical ailments. This statement is contradicted by the record, which shows that he was prescribed Sertraline for his mental problems while he was taking hydrocodone-acetaminophen. AR 363, 369, 399. In addition, plaintiff told the administrative law judge that he had suicidal thoughts, but he consistently denied any such thoughts when talking with his doctors and counselor. AR 393, 398, 400.

Contrary to plaintiff's argument, the administrative law judge has a duty to develop the record only when there is evidence suggesting that a real issue exists. It would be a misuse of the limited resources of the agency to require "development of the record" any time a possible problem is mentioned. Plaintiff points to Dr. Wood's assessment of a GAF score of 50, AR 406, and argues that such a score means that Wood thought plaintiff would have serious impairments in occupational functioning, but this score must be taken in conjunction with Berg's assessment of 55 three days earlier, on December 1, 2009. AR 398. The score of 50 hardly jibes with plaintiff's improvement at his next visit or his putting an end to treatment immediately thereafter.

It is hard to understand why the administrative law judge's gave the "generous" reading to the record that he did in the absence of any support for the reading, but it does not require a remand. The record does not contain any credible evidence that would require

development. It is apparent from the record that plaintiff had no mental limitations that would prevent him from making a successful adjustment to other work that exists in significant numbers in the national economy, as the administrative law judge found.

ORDER

IT IS ORDERED that plaintiff Mark W. Machtan's motion for summary judgment, dkt. #11, is DENIED. The decision of defendant Carolyn W. Colvin, Acting Commissioner of Social Security, denying plaintiff's application for disability insurance benefits, is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 18th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge