

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

JODI KUCHENBECKER,

Plaintiff,

v.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

17-cv-134-wmc

Pursuant to 42 U.S.C. § 405(g), plaintiff Jodi Kuchenbecker seeks judicial review of a final decision of defendant Nancy A. Berryhill, the Acting Commissioner of Social Security, denying her application for Title II Child Disability Benefits. For the reasons provided below, the court will affirm the Commissioner's determination and enter judgment in defendant's favor.

BACKGROUND

A. Procedural History of Claim

The procedural history in this case has been long and torturous. Through her mother, Kuchenbecker first filed an application for disabled child's insurance benefits, which was denied on June 15, 1988. This decision was never appealed. After more than a decade, Kuchenbecker again filed for disabled child's insurance benefits on May 27, 2010, though this time through her father. That application was also denied initially and again upon reconsideration. After another administrative hearing and an Appeals Council ruling, however, Kuchenbecker's case was remanded to Administrative Law Judge Debra Meachum for further review.

In a September 12, 2013, decision, ALJ Meachum then found that Kuchenbecker had been disabled as of January 26, 1979. That finding also required a reopening of the 1988 application based on new and material evidence. On review, however, the Appeals Council found that the ALJ's decision had invaded the period adjudicated by the 1988 decision, prompting yet another remand to determine if there was a proper basis to reopen the 1988 decision and also to include Kuchenbecker's mother and sister as parties who could be adversely affected. Accordingly, ALJ Meachum held yet another hearing on January 28, 2015, and issued an opinion dated March 3, 2015, finding no proper basis to reopen the 1988 case. Consequently, the ALJ vacated her September 12, 2013, opinion that had provided benefits to Kuchenbecker.

OPINION

When this court reviews a final decision under 42 U.S.C. § 405(g), the “findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.” Substantial evidence requires more than a “mere scintilla” of evidence and instead is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In seeking review by this court, Kuchenbecker argues the 1988 adverse decision should have been reopened, because: (1) she did not possess the mental capacity to understand her appellate rights; and (2) she did not receive adequate notice of her right to appeal.

I. Mental Capacity

Plaintiff first argues that she did not appeal the 1988 decision because she lacked the mental capacity to understand her right to do so. *See* SSR 91-5p (providing relief to claimants for failing to exercise their appellate rights “when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review”). In assessing whether a claimant’s mental capacity justifies relief from a failure to appeal timely, a court is to consider factors such as a claimant’s inability to read or write, limited facility with the English language, educational attainment, and mental or physical conditions. *Id.* Here, plaintiff argues that her diagnosed struggles with depression, anxiety and agoraphobia constitute “mental incapacity” under SSR 91-5p, pointing to her testimony about difficulties leaving the house, panic attacks and a reliance upon her mother to accompany her to college classes and other settings.

While the court is sympathetic to plaintiff’s limitations, it is unclear why any of them would render plaintiff unable to understand her appellate rights. Moreover, the ALJ acknowledged the severity of plaintiff’s conditions when applying SSR 91-5p, but concluded that “the record as a whole . . . does not establish that the claimant was ever mentally incapacitated or had mental impairments causing her to be unable to understand her claims for disability benefits.” (AR 25.) In particular, the ALJ noted that plaintiff had completed her high school education, taken college classes, cared for her disabled sister who received Social Security benefits, and performed a variety of tasks for her family. (*Id.*) On that record, the court has no basis to invade the ALJ’s discretion in finding that an individual capable of these tasks would also be capable of understanding her appellate rights after the 1988 decision.

Moreover, the ALJ found inconsistencies in plaintiff's testimony that she did not seek an appeal because she did not understand her right to do so. Plaintiff first testified that she believed she had "won" benefits, but then "decided in 1988 that she did not want disability benefits because she was embarrassed"; so instead, she "asked an agency employee in 1988 to destroy her application and medical records." (AR 25.) The ALJ reasonably understood this to mean that plaintiff *voluntarily* discontinued her effort to obtain Title II Benefits because she did not want them, rather than because she lacked the mental capacity to understand her appellate rights. The ALJ also found plaintiff's testimony concerning her mental incapacity to be credible, particularly following her failure to disclose relevant evidence during earlier proceedings, including her guardianship of her sister. (AR 26.) Because the ALJ possessed more than adequate grounds to make these credibility assessments and reach these factual findings, this court will not disturb the ALJ's judgment.

II. Inadequate Notice

Plaintiff separately argues that she did not receive adequate notice of her right to appeal the 1988 decision, constituting a violation of procedural due process. While plaintiff fails to clarify just how notice was inadequate here, but more importantly, it is also unclear that this issue was never properly raised before the ALJ. Accordingly, SSR 95-1p affords plaintiff no provide relief on these facts. Regardless, the allegedly defective notice was dated and issued between August 31, 1977, and March 1, 1990, which the court will assume also failed to inform plaintiff that filing a new application after her denial,

rather than requesting administrative review, could result in the loss of benefits. *See* SSR-95-1p, 1995 WL 259487 at *3.

Even with this assumption, however, plaintiff has still not met her burden to prove that “[s]he failed to file a timely request for review *because of the defective notice.*” *Id.* at *2 (emphasis added). This requires “an acceptable explanation [by a claimant] linking his or her failure to file a timely request for administrative review to the absence in the notice of a statement that filing a new application instead of a request for administrative review could result in the loss of benefits.” *Id.* at *3. In assessing such an explanation, an ALJ may consider such factors as the claimant’s mental condition, educational level, ability to speak and understand the English language, the amount of time elapsed before the claimant filed a subsequent claim or sought administrative review of the prior determination, and whether the claimant was represented by an attorney. *Id.* at *3-4.

Here, plaintiff makes *no* effort to link any arguable failure to provide adequate notice with plaintiff’s failure to seek administrative review after the 1988 decision. Moreover, while not explicitly addressing the inadequate notice argument, the ALJ found that plaintiff possessed the mental capacity to understand her appellate rights within the meaning of SSR 95-5p. Plaintiff was also a high school graduate with some college education, and she was at least conversant in the English language during the relevant time period. Finally, plaintiff waited some *twelve years* from expiration of her original right to appeal and filing a subsequent claim, strongly cautioning against relief on these facts -- 1988 to 2010. The length of this gap supports the ALJ’s view that plaintiff more likely than not chose to abandon her claim out of embarrassment, and certainly does *not* give rise to an inference

that she did not appeal due to inadequate notice. Consequently, this court cannot provide relief based on that dubious assertion on judicial review.

ORDER

IT IS ORDERED that the decision of defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying plaintiff Jodi Ann Kuchenbecker's application for Title II Child Disability Benefits is AFFIRMED. Consequently, plaintiff's motion for summary judgment (Dkt. #8) is DENIED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 1st day of April, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge