

IP 05-0666-C H/S Harcourt v Barnhart
Judge David F. Hamilton

Signed on 01/05/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRENDA G. HARCOURT,)	
)	
Plaintiff,)	
vs.)	NO. 1:05-cv-00666-DFH-VSS
)	
JO ANNE B. BARNHART,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRENDA G. HARCOURT,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:05-cv-0666-DFH-VSS
)	
JO ANNE B. BARNHART,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	

ENTRY ON JUDICIAL REVIEW

Plaintiff Brenda G. Harcourt seeks judicial review of a final decision by the Commissioner of Social Security denying her application for disability insurance benefits. Acting for the Commissioner, an Administrative Law Judge (“ALJ”) determined that Ms. Harcourt was not disabled under the Social Security Act because she retained the ability to perform a significant range of light work. Ms. Harcourt claims that substantial evidence does not support the ALJ’s decision. For the reasons explained below, the ALJ’s decision is affirmed.

Background

Ms. Harcourt was 44 years old in 2002 when the ALJ found her to be ineligible for disability benefits under the Social Security Act. Ms. Harcourt has

graduated from high school and attended technical school to become a nurse's aide. She worked last as a certified nursing assistant in nursing homes. R. 29, 32-33.

Ms. Harcourt applied for disability benefits on May 25, 2000. R. 28. She alleges disability due to nerve problems, carpal tunnel syndrome, and back disorders. R. 19. Ms. Harcourt claims that these impairments disabled her within the meaning of the Social Security Act on or after March 24, 2000.

Ms. Harcourt had an x-ray exam in 1999 which was normal. R. 140. Ms. Harcourt had a consultative examination on June 3, 1999 which noted that x-rays of her back performed in March 1999 had revealed arthritis of the neck, lumbar spine, and shoulders. The examination further revealed numbness in her hands and feet, and that Ms. Harcourt had no problems squatting. Ms. Harcourt had problems walking while squatting and complained of back pain while tandem walking or walking on her heels or toes. The examiner found that Ms. Harcourt could walk on her heels and toes normally. The examiner rated Ms. Harcourt's hand grip and leg strength as 5/5. R. 109-11.

In another consultative examination on August 19, 2000, Ms. Harcourt complained of neck pain and numbness and weakness in her left arm. An EMG performed earlier had shown nerve entrapment, and Ms. Harcourt had undergone a carpal tunnel release (CTS) earlier that same month. Ms. Harcourt's right arm

and hand were still in post-operative dressing. The examination found that Ms. Harcourt had normal movement, except for her neck, where she had a decreased range of motion. Musculoskeletal and neurological examinations were normal, except that Ms. Harcourt had a decrease in light touch and vibratory sense in her left hand. Left grip strength was 4/5. No examination of the right arm was possible because of the post-operative dressing. The examiner concluded that Ms. Harcourt had nerve entrapment syndrome in her right arm, chronic neck pain, and intermittent weakness and numbness in her left arm. R. 98-100.

A report from Ms. Harcourt's treating physician from June 29, 2000 stated that she suffered from right arm/neck/shoulder pain (secondary to the nerve entrapment syndrome); hypertension; elevated cholesterol; irritable bowel disorder; and bleeding in the gastrointestinal tract. The treating physician also concluded that Ms. Harcourt was largely unable to use her arms/hands. The report went on to say that she might be able to work after surgery. R. 95.

On November 9, 2000, Ms. Harcourt underwent motor nerve conduction and sensory nerve conduction because of median nerve compression and the chance of radiculopathy. The impression was normal nerve-conduction studies and needle EMG of the right arm. R. 72-73.

X-rays of the cervical spine on January 22, 2001 revealed no significant change from July 2, 1998 and no evidence of fractures or dislocations. The joint

spaces were preserved and there was minimal spurring, as on the previous exam. No cervical rib was identified. R. 69.

An MRI of the lumbar spine on April 9, 2001, indicated mild disc bulges, but no evidence of neural foraminal narrowing causing impingement on the existing nerve roots in the lumbar spine. R. 64-65.

Ms. Harcourt's treating physician, Dr. Mark Tiritelli, completed a physical capacities evaluation on October 8, 2001, opining that she was not capable of even sedentary work. R. 89-91.

The state agency examiners found Ms. Harcourt could do medium level work, with postural activities limited to occasionally lifting up to 50 pounds, frequently lifting 25 pounds, and the ability to stand or sit at least six hours in an eight-hour work day. R. 101-108.

Testimony at the Hearing

At the administrative hearing, Ms. Harcourt testified that she last worked in March 2000 and that she had pain in her neck, shoulders, arms, hands, lower back, and legs. R. 33. Ms. Harcourt said that she had the pain for several years and felt it constantly, and that she took pain medication but felt worse after it wore off. R. 38.

Ms. Harcourt described her days as doing a “little bit of stuff around the house,” reading, or watching television, and that she lay down and took a lot of breaks. R. 39. She testified that she could not raise her arms very far and needed help brushing her hair. R. 34. Ms. Harcourt testified that her hands were weak, that she dropped things, and that her hands would feel numb. She testified that she could open and prepare a can of soup. R. 44.

Procedural History

The ALJ issued his ruling on January 22, 2002. R. 25. Ms. Harcourt asked the Appeals Council to consider her case, and the record indicates that there was a problem that caused a significant delay in the Appeals Council’s consideration of the case. See R. 13 (message from Ms. Harcourt’s attorney to Appeals Council dated November 5, 2004 attaching copy of request for review dated February 15, 2002). After the Appeals Council denied Ms. Harcourt’s request for review, she filed her complaint on May 5, 2005. On the parties’ joint motion, the case was remanded to the Social Security Administration on June 8, 2005 to correct defects in and/or to supplement the administrative record pursuant to sentence six of 42 U.S.C. § 405(g). Because the Appeals Council denied Ms. Harcourt’s request for review, the ALJ’s decision is treated as the final decision of the Commissioner. See *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). The court has jurisdiction under 42 U.S.C. § 405(g).

The Statutory Framework for Determining Disability

To be eligible for disability insurance benefits, a claimant must establish that she suffers from a disability within the meaning of the Social Security Act. To prove disability under the Act, the claimant must show that she was unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that could be expected to result in death or that has lasted or could be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d). Ms. Harcourt was disabled only if her impairments were of such severity that she was unable to perform work that she had previously done and if, based on her age, education, and work experience, she also could not engage in any other kind of substantial work existing in the national economy, regardless of whether such work was actually available to her. *Id.*

This standard is a stringent one, and it has decisive force for Ms. Harcourt, who has serious impairments and cannot do her prior work. The Act does not contemplate degrees of disability or allow for an award based on partial disability. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir. 1985). Even claimants with substantial impairments are not necessarily entitled to benefits, which are paid for by taxes, including taxes paid by those who work despite serious physical or mental impairments and for whom working is difficult and painful.

The implementing regulations for the Act provide the familiar five-step process to evaluate disability. The steps are:

- (1) Has the claimant engaged in substantial gainful activity? If so, she was not disabled.
- (2) If not, did the claimant have an impairment or combination of impairments that are severe? If not, she was not disabled.
- (3) If so, did the impairment(s) meet or equal a listed impairment in the appendix to the regulations? If so, the claimant was disabled.
- (4) If not, could the claimant do her past relevant work? If so, she was not disabled.
- (5) If not, could the claimant perform other work given her residual functional capacity, age, education, and experience? If so, then she was not disabled. If not, she was disabled.

See generally 20 C.F.R. § 404.1520. When applying this test, the burden of proof is on the claimant for the first four steps and on the Commissioner for the fifth step. *Young v. Barnhart*, 362 F.3d 995, 1000 (7th Cir. 2004).

Applying the five-step process, the ALJ found that Ms. Harcourt satisfied step one because she had not engaged in substantial gainful activity since her alleged onset of disability. At step two, the ALJ found that Ms. Harcourt suffered severe impairments of degenerative disc disease in the cervical spine, asthma, and post-carpal tunnel syndrome that limited her ability to work. At step three, the ALJ found that Ms. Harcourt failed to demonstrate that any of her severe impairments met or equaled any listed impairment. At step four, the ALJ found that Ms. Harcourt was not able to perform any of her past relevant work. At step

five, the ALJ found that Ms. Harcourt was not disabled because she retained the residual functional capacity to perform a significant range of light work with some restrictions. R. 24.

Standard of Review

“The standard of review in disability cases limits . . . the district court to determining whether the final decision of the [Commissioner] is both supported by substantial evidence and based on the proper legal criteria.” *Briscoe v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005), quoting *Scheck v. Barnhart*, 357 F.3d 697, 699 (7th Cir. 2004). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Diaz v. Chater*, 55 F.3d 300, 305 (7th Cir. 1995), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To determine whether substantial evidence exists, the court must “conduct a critical review of the evidence,’ considering both the evidence that supports, as well as the evidence that detracts from, the Commissioner’s decision” *Briscoe*, 425 F.3d at 351, quoting *Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003); see also *Zurawski v. Halter*, 245 F.3d 881, 888 (7th Cir. 2001). The court must not attempt to substitute its judgment for the ALJ’s judgment by reweighing the evidence, resolving material conflicts, or reconsidering facts or the credibility of witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). Where conflicting evidence allows reasonable minds to differ as to whether a claimant is entitled to

benefits, the court must defer to the Commissioner's resolution of that conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

A reversal and remand may be required, however, if the ALJ committed an error of law, *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997), or based the decision on serious factual mistakes or omissions. *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). This determination by the court requires that the ALJ's decision adequately discuss the relevant issues: "In addition to relying on substantial evidence, the ALJ must also explain his analysis of the evidence with enough detail and clarity to permit meaningful appellate review." *Briscoe*, 425 F.3d at 351, citing *Herron v. Shalala*, 19 F.3d 329, 333-34 (7th Cir. 1994). Although the ALJ need not provide a complete written evaluation of every piece of testimony and evidence, *Schmidt v. Barnhart*, 395 F.3d 737, 744 (7th Cir. 2005), a remand may be required if the ALJ has failed to "build an accurate and logical bridge from the evidence to her conclusion." *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002), quoting *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001).

Discussion

The ALJ found that Ms. Harcourt was able to work at the light exertional level. According to 20 C.F.R. § 404.1567(b), light work includes "a good deal of walking or standing." The ALJ found that Ms. Harcourt was able to lift up to 50 pounds infrequently and 25 pounds frequently and was able to walk or stand for substantial periods of time. The ALJ also found that Ms. Harcourt was not able

to climb ladders, ropes or scaffolds and found that she would need to avoid concentrated exposure to heat, cold, hazardous machinery, and heights.

Ms. Harcourt claims that she cannot work due to nerve problems, carpal tunnel syndrome, back disorders, and a general inability to engage in a range of motions. Ms. Harcourt claims that the ALJ erred by rejecting the opinion of her long-time treating physician, by relying on work with a sit/stand option to deny benefits, and by failing to analyze properly her subjective complaints.

I. *Opinion of Treating Physician*

Ms. Harcourt's treating physician, Dr. Tiritelli, expressed the opinion that she could not do even sedentary work. R. 89-91. She argues that the ALJ erred by failing to give controlling weight to Dr. Tiritelli's opinion.

ALJs are required to give controlling weight to the opinion of a treating source if the opinion is supported by medically acceptable clinical and laboratory diagnostic techniques and is not contradicted by other substantial medical evidence in the record. 20 C.F.R. § 404.1527(d)(2); see also *Gudgel v. Barnhart*, 347 F.3d 467, 470 (7th Cir. 2003) ("ALJ can reject an examining physician's opinion only for reasons supported by substantial evidence in the record"). An ALJ may discount a treating physician's medical opinion when it is inconsistent with the opinion of a consulting physician or when the treating physician's opinion is internally inconsistent. *Skarbek v. Barnhart*, 390 F.3d 500, 503 (7th

Cir. 2004). The ALJ has the discretion – even the obligation – to weigh conflicting medical opinions. *Caviness v. Apfel*, 4 F. Supp. 2d 813, 824 (S.D. Ind. 1998).

The ALJ explained clearly why he did not give controlling weight to Dr. Tiritelli's conclusions. Dr. Tiritelli's opinion was "contrary to all objective testing, clinical studies and [the] determination of the State Agency," and he was not an orthopedic or neurological specialist. Dr. Tiritelli's conclusions are contradicted by the findings of the state agency examiner, Dr. Frank J. Lavallo, who concluded that Ms. Harcourt could frequently lift up to 25 pounds and occasionally lift up to 50 pounds. R. 101-08.

Ms. Harcourt argues that the ALJ erred by failing to specify the evidence that supported his assertion that Dr. Tiritelli's conclusions were not supported by evidence in the objective record. She argues that the examinations by Dr. Ablog in June 1999 and Dr. Towriss in August 2000, support Dr. Tiritelli's conclusions.

Dr. Towriss found that the plaintiff had decreased range of motion in her spine but that otherwise her range of motion was normal. R. 100. Dr. Towriss was unable to examine Ms. Harcourt's right arm because she had recently undergone surgery. Dr. Ablog also found a decreased range of motion for Ms. Harcourt's back and found some decrease of motion for the plaintiff's hips. R. 112. Both doctors found that the claimant suffered from back and neck pain. R. 99, 110. These examinations found that Ms. Harcourt did have severe

impairments, as did the ALJ, but they do not support Dr. Tiritelli's opinion that Ms. Harcourt was completely unable to work. The ALJ discussed the examinations by Dr. Towriss and Dr. Ablog, as well as the opinion of Dr. Tiritelli. He addressed the relevant lines of evidence, and he sufficiently articulated his reasons for why he did not give controlling weight to Dr. Tiritelli's opinion. Cf. *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (7th Cir. 2003) (remanding for ALJ's failure to address three lines of evidence).

II. *Use of the Sit/Stand Option*

Ms. Harcourt argues that the ALJ impermissibly used a "sit/stand" option in denying her claim. Pl. Br. at 8-9. She bases her argument on Social Security Ruling (SSR) 83-12 and *Johnson v. Barnhart*, No. 04-3438-CV-W-HFS, 2006 WL 373896, at *8 (W.D. Mo. 2006), which relied on SSR 83-12 to hold that a claimant limited to unskilled work with a sit/stand option was disabled.

SSR 83-12 explains: "In cases of unusual limitation of ability to sit or stand, a VS [vocational specialist] should be consulted to clarify the implications for the occupational base," which is what the ALJ did in this case. This court does not read *Johnson* as adopting a blanket finding that no unskilled jobs allow a sit/stand option. The vocational expert in *Johnson* initially had testified that the claimant could have worked some light and sedentary unskilled jobs, but when confronted with SSR 83-12, apparently conceded that his testimony was inconsistent with it. 2006 WL 373896 at *8. Whatever the testimony was in that

particular case, it is clear that SSR 83-12 itself does not adopt a view that *no* unskilled jobs allow a sit/stand option:

Unskilled types of jobs are particularly structured so that a person cannot *ordinarily* sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS [vocational specialist] should be consulted to clarify the implications for the occupational base.

SSR 83-12,1983 WL 31253, *4 (emphasis added). The ALJ in this case followed the instruction of the second quoted sentence and relied on the vocational expert's testimony to find that Ms. Harcourt would be able to do some unskilled jobs that have sit/stand options.

In *Powers v. Apfel*, 207 F.3d 431 (7th Cir. 2000), the Seventh Circuit explicitly rejected the argument that the plaintiff advances here. The vocational expert in *Powers* testified that a number of unskilled jobs had a sit/stand option. The Seventh Circuit reasoned that the description in SSR 83-12 of what is the case "ordinarily" does not refute the specific testimony of a vocational expert testifying at the hearing in response to a specific question. 207 F.3d at 436. That reasoning applies directly to this case.

III. *Credibility Determination*

The ALJ found that Ms. Harcourt's testimony about her limitations and ability to work was not fully credible. Ordinarily a reviewing court defers to an ALJ's credibility determination. *Indoranto v. Barnhart*, 374 F.3d 470, 474 (7th Cir.

2004). Absent legal error, an ALJ's credibility finding will not be disturbed unless "patently wrong." *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000); *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995). Nevertheless, the ALJ must explain adequately the reasons behind a credibility finding and must provide more than a conclusory statement that a claimant's allegations are not credible. *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003). The ALJ may not disregard a claimant's subjective complaints merely because they are not fully supported by objective medical evidence, *Knight v. Chater*, 55 F.3d 309, 314 (7th Cir. 1995), but the ALJ may discount subjective complaints that are inconsistent with the evidence as a whole. *Id.*; 20 C.F.R. § 404.1529.

In this case, the ALJ offered an explanation for his credibility finding. He noted that although Ms. Harcourt claimed to be unable to use her arms or hands, that testimony was inconsistent with later medical examinations by Dr. Towriss and Dr. Ablog. R. 23. As a result, the ALJ found the plaintiff's subjective complaints difficult to accept as wholly credible. This reasoned explanation was sufficient to find the plaintiff's subjective complaints not wholly credible.

Conclusion

For the above reasons, the Commissioner's decision must be affirmed. The court will enter final judgment accordingly.

So ordered.

Date: January 5, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Charles D. Hankey
charleshankey@hankeylawoffice.com

Thomas E. Kieper
UNITED STATES ATTORNEY'S OFFICE
tom.kieper@usdoj.gov