

NA 07-0163-C H/H Barger v Astrue
Magistrate William G. Hussmann, Jr.

Signed on 03/25/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

JULIE D. BARGER,)	
)	
Plaintiff,)	
vs.)	NO. 4:07-cv-00163-WGH-DFH
)	
MICHAEL J. ASTRUE,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

JULIE D. BARGER,)	
(Social Security No. XXX-XX-3730),)	
)	
Plaintiff,)	
)	
v.)	4:07-cv-163-WGH-DFH
)	
MICHAEL J. ASTRUE, COMMISSIONER)	
OF SOCIAL SECURITY,)	
)	
Defendant.)	

**MAGISTRATE JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION**

This matter is before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, upon the consents of the parties (Docket Nos. 7, 12) and an Order of Reference dated March 4, 2009 (Docket No. 15). The parties filed their briefs at Docket Nos. 19, 22, and 23, and the Magistrate Judge heard oral argument on March 13, 2000, at which the plaintiff was represented by counsel, Steven K. Robison, in person, and the defendant was represented by counsel, Ed Studzinski, by telephone.

Findings of Fact

The Magistrate finds facts as detailed in "Exhibit A" attached hereto.

Conclusions of Law

1. The 12.00 introduction paragraph states, in part, as follows:

The structure of the listing for mental retardation (12.05) is different from that of the other mental disorders listings. Listing 12.05 contains an introductory paragraph with the diagnostic description for mental retardation. It also contains four sets of criteria (paragraphs A through D). If your impairment satisfies the diagnostic description in the introductory paragraph and any one of the four sets of criteria, we will find that your impairment meets the listing For paragraph C, we will assess the degree of functional limitation the additional impairment(s) imposes to determine if it significantly limits your physical or mental ability to do basic work activities, *i.e.*, is a “severe” impairment(s), as defined in §§ 404.1520(c) and 416.920(c). If the additional impairment(s) does not cause limitations that are “severe” as defined in §§ 404.1520(c) and 416.920(c), we will not find that the additional impairment(s) imposes “an additional and significant work-related limitation of function,” even if you are unable to do your past work because of the unique features of that work.

20 C.F.R. Part 404, Subpart P, App. 1, § 12.00)

2. In this case, the evidence supports that the plaintiff “satisfies the diagnostic description in the introductory paragraph” of 12.05C. Specifically, that the plaintiff suffered from significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the development period; *i.e.*, the evidence demonstrates or supports onset of the impairment before age 22, as follows:

- (a) R. 281-284 (Exhibit 10F), the October 2003 consultative mental status evaluation by Dr. Catt.
- (b) R. 285, 289, 301 (Exhibit 11), the state agency doctor’s psychiatric review technique form showing related limitations due to mental retardation and that plaintiff’s symptoms are “fully credible.”
- (c) R. 342 (Exhibit 19F), the August 2005 state agency doctor’s psychiatric review technique form showing limitations

associated with mental retardation, which were “partially documented during the developmental period.”

- (d) R. 324-327 (Exhibit 16F), the later examination of Dr. Catt which does not suggest that Plaintiff’s condition is a recent development and found that “[t]he claimant’s cognitive limitations and academic skills deficits, however, will likely continue.”

3. The only valid verbal performance and full scale IQ found in the record establishes the plaintiff’s IQ between 60 and 70. (R. 281, Exhibit 10F). There are no other IQ tests of record.

4. The ALJ found that the plaintiff has physical or other mental impairments imposing additional and significant work-related impairment of function in that she is unable to perform all jobs except a limited range of sedentary employment. (R. 18, 20). These impairments were found to be “severe” as defined at 20 C.F.R. §§ 404.1520(c) and 416.920(c).

5. This court cannot trace the path of the ALJ’s determination that the claimant’s impairment is that of “low borderline intellectual functioning” (R. 16), because it is based upon three expressed reasons which are not in evidence, or for which the ALJ cannot take judicial notice, specifically,

- (a) that “[i]t is the standard practice in understanding test scores that a person could fake a lower score on intelligence testing, but could not fake a higher score”;
- (b) that her activities of daily living are well beyond those of a person who has an IQ of 61; and
- (c) that the ALJ can judge intelligence because she “presented as a more intelligent person” at the hearing.

While these propositions may be true, and giving due respect to the ALJ's experience, this court believes that these factors are not evidence properly considered by the ALJ under the Commissioner's regulations.

Decision

For the reasons expressed by the Magistrate Judge in the factual findings attached hereto as "Exhibit A," the decision of the Commissioner is **REMANDED** for a determination of whether Plaintiff meets Listing 12.05C.

SO ORDERED.

Dated: March 25, 2009

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THE COURT: The Court is going to make the following findings with respect to this matter, and they are as follows:

1. The issue before the Court is whether the plaintiff meets Listing 12.05C and, secondarily, whether the Administrative Law Judge in this case wrote an opinion that the Court can trace the path of reasoning that he, in fact, considered the listing, 12.05C, in reaching his decision.

2. The Court has considered the language found in the introductory paragraph of Listing 12.00, and I believe it is in the fourth paragraph that says with respect to Listing 12.05C there are two requirements: One is that the plaintiff meet the diagnostic criteria in the opening paragraph of 12.05 and that the plaintiff meet one of Subsections A, B, C, or D and that both are required.

3. Listing 12.05, the introductory paragraph which defines mental retardation, states as follows: "Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22." The evidence concerning whether the plaintiff had significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period has been established by the plaintiff in this case. The evidence that supports that is found in the

record at Exhibit 10F, the diagnosis of Dr. Catt in October of 2003 where there was a diagnosis of mild mental retardation.

In contrast to those pieces of evidence that support that she had significantly subaverage general intellectual functioning before age 22, the ALJ refers to the examination of Dr. Catt at Exhibit 16 in June of 2005. Dr. Catt's examination at that time was not based on additional IQ testing directly.

The next thing recited to by the ALJ as a reason for his determination that the plaintiff did not meet the first paragraph of 12.05 as found at page 16 on the record is what appears to me to be the taking of judicial notice of some sort of, quote, the standard practice in understanding test scores that a person could fake a lower score on intelligence testing but could not fake a higher score. I do not find this reason to be supported by evidence from any mental health professional in the record. I do not find that that could be substantial evidence to support a finding that the plaintiff did not have a disability before age 22.

The next piece of evidence recited to by the ALJ is found at B, paragraph B: A review of her activities of daily living shows activities which are well beyond those of a person who has an IQ of 61. For example, she reads and claims to understand The Hardy Boys books. She also works many simple word-finding puzzles. This is established by her statements to Dr. Catt in her own reports of daily activities. This piece of

evidence that her activities of daily living show activities well beyond those of a person who has an IQ of 61 is not substantial evidence because . . .

{NOTE: Portion of record has been deleted by Magistrate Judge as a part of final opinion}

. . . the ALJ appears to take judicial notice of facts which are not otherwise in the record and are not supported by the testimony of any mental health professional which shows that the activities that she is able to do are inconsistent with those of a person of her IQ.

The third piece of evidence that the ALJ recites to is found at paragraph C on page 16, and the ALJ says, quote, at the hearing she presented as a more-intelligent person. She was at her best when I caught her in a discrepancy between what she told the consultant examining psychologist and what she told me about why she quit work. She explained away the discrepancy in clear and almost-believable terms. A review of the report from Dr. Catt shows agreement with the higher level of presentation and functioning. He noted the claimant's attention and concentration were normal, with normal speech flow, appropriate thought content, and fair judgment. I find that overall paragraph C appears to be the ALJ determining her mental status as a result of her testimony at the hearing. It is my understanding that under Seventh Circuit law, an ALJ is not allowed to, quote, play doctor, closed quote, and base his

findings with respect to at least the issue of mental competency on her presentation at the hearing without more. I therefore conclude I am not able to trace the path of the ALJ's reasoning as to why the plaintiff does not meet the first paragraph of 12.05, which is the first portion of the listing that she must meet.

If the plaintiff should be found to have met the first paragraph, I must consider whether she has satisfied the criteria for 12.05C. 12.05C is satisfied if there is a valid verbal performance or full-scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related impairment of function. In this case the only valid IQ test of record that I can find shows a 60-through-70 IQ score. Dr. Catt's second evaluation, which was relied on by the ALJ, did not include additional testing or a second battery of tests. Therefore, I do not believe you can rely on Dr. Catt's second evaluation to establish that she does not have the IQ score required. I am unable to trace the path of the ALJ's reasoning as to why there has not been a finding of a valid verbal performance or full-scale IQ of 60 through 70 in this case.

The final requirement of C is that the plaintiff have an additional and significant work-related impairment of function. In that regard the ALJ did find that the plaintiff was limited to, and I quote, a limited range of sedentary work at the

transcript at 19 and 20. The finding that there is a physical limitation that restricts her to not even a full range of sedentary work is, I believe, a finding that she has other physical impairments imposing additional and significant work-related impairment of function. If the ALJ did not believe that to be the case, I am unable to trace the path of the ALJ's reasoning in that regard.

The Court would find that plaintiff's counsel specifically asked the ALJ to address listing 12.05 at the hearing (see transcript 463 and 464), and that in the posttrial brief the plaintiff's counsel argued the listing applied in the posttrial brief (see the transcript at pages 21 through 27).

Next number, the Court will conclude that when an ALJ is specifically asked to consider a listing by number both in the oral argument portion of the hearing and in the posttrial brief, the failure to specifically address that listing does require remand where the Court cannot trace the path of reasoning as to why the first paragraph or the second paragraph of listing 12.050 is met; that is, the first paragraph defining the beginning function. In this case while I understand the arguments of the United States that a diagnosis of mental retardation is not required -- and I agree it appears from the listing that the ALJs are required to look at the function of a person and not the precise label placed on the person by the mental health professionals, but in this case I do not believe

there has to be articulated by a mental health professional that a person is mentally retarded before an ALJ must consider listing 12.05. Therefore, the Court is going to issue an order that this matter be remanded to the Secretary for an articulation as to whether the plaintiff meets Listing of Impairment 12.05C.