

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF INDIANA
 SOUTH BEND DIVISION

RUBY EVANS,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. 3:06-CV-315 CAN
)	
SOCIAL SECURITY)	
ADMINISTRATION,)	
)	
Defendant.)	

OPINION AND ORDER

On May 15, 2006, Plaintiff Ruby Evans (Evans) filed her complaint in this Court. On October 12, 2006, Evans filed an opening brief and she asks this Court to enter judgment in her favor or to remand this matter to the Commissioner. On January 22, 2006, Defendant Social Security Administration (SSA) filed its response brief. On February 6, 2007, Evans filed her reply brief. This Court now enters its ruling based upon the record of this case that includes the pleadings, the motions, the administrative record, briefs of the parties, and the arguments of counsel.

I. PROCEDURE

On November 13, 2001, Evans filed her application for Disability Insurance Benefits (Tr 37). Evans is insured for Disability Insurance Benefits through June 1, 2001 (Tr. 71). Evans claims she is entitled to benefits pursuant to Title II of the Social Security Act. See 42 U.S.C. §§ 416(i), 423, 1381a.

On September 4, 2003, Evans appeared at a hearing before an Administrative Law Judge (ALJ), who issued a denial of Evan’s claim (Tr. 34-43). Evans, at this point, was proceeding *pro se* (Tr. 208-10). The ALJ found that Evans was able to perform light exertion, and as a result,

she was able to perform her past work as a seat belt assembler (Tr. 41-42). Therefore, the ALJ found that Evans was not disabled (Tr.42).

Evans appealed the ALJ's decision to the Appeals Council. (Tr. 29) The Appeals Council denied review, and as a result, the ALJ's decision became the Commissioner's final decision (Id.). 20 C.F.R. § 404.981; Fast v. Barnhart, 397 F.3d 468, 470 (7th Cir. 2005). Consequently, on May 15, 2006, Evans filed a complaint in this Court seeking a review of the ALJ's decision. This Court may enter a ruling in this matter based on the parties' consent, 28 U.S.C. § 636(c), and 42 U.S.C. § 405(g).

II. ANALYSIS

A. Facts

Evans was 59 years old at the time of the hearing (Tr. 212). She has a high school-equivalent education, and she has prior work experience as a seat belt assembler and child care assistant (Id.).

Evans alleges that she has been disabled since June 1, 2001, because of the effects of Lupus¹ and Raynaud's Syndrome² (Tr. 38, 71, 215). Specifically, Evans claims that these conditions cause pain in her joints and muscles and make her fatigued (Tr. 92-94). Because of her pain and fatigue, Evans alleges she has trouble doing light house work and working with her hands (Tr. 92, 214).³

¹Lupus is a term originally used to depict erosion of the skin, but is now used with modifying terms designating various diseases. Stedman's Medical Dictionary 1124 (28th ed. 2006).

²Raynaud's syndrome is the idiopathic paroxysmal bilateral cyanosis of the digits due to arterial and arteriolar contraction; caused by cold or emotion. Stedman's Medical Dictionary 1911.

³Evans saw a number of doctors for her conditions. However, this Court will not detail all of Evan's doctor visits because the focus of this Court's inquiry is whether the ALJ properly developed the record.

The issues this Court must resolve is whether the ALJ received an adequate waiver of counsel from Evans, and whether the ALJ fully and fairly developed the record.

B. Standard of Review

The standard of review for an ALJ's decision is whether it is supported by substantial evidence and free of legal error. See 42 U.S.C § 405(g); Briscoe v. Barnhart, 425 F.3d 345, 351 (7th Cir. 2005); Haynes v. Barnhart, 416 F.3d 621, 626 (7th Cir. 2005); Golembiewski v. Barnhardt, 322 F.3d 912, 915 (7th Cir. 2003). Substantial evidence means such relevant evidence as a reasonable mind might accept to support such a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1972). A reviewing court is not to substitute its own opinion for that of the ALJ's or to re-weigh the evidence, but the ALJ must build a logical bridge from the evidence to his conclusion. Haynes, 416 F.3d at 626. An ALJ's decision cannot stand if it lacks evidentiary support or an adequate discussion of the issues. Lopez v. Barnhart, 336 F.3d 535, 539 (7th Cir. 2003). However, an ALJ's legal conclusions are reviewed *de novo*. Haynes, 416 F.3d at 626.

C. Evan's Motion for Summary Judgment or Remand

To be entitled to benefits under 42 U.S.C. §§ 423, 1321a, Evans must establish that she was "disabled." See 42 U.S.C. § 423(a)(1)(D). The Social Security Act defines "disability" as:

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 423(d)(1)(A). The Social Security regulations prescribe a sequential five-part test for determining whether a claimant is disabled. The ALJ must consider whether: 1) the claimant is presently employed; 2) the claimant has a severe impairment or combination of impairments, 3) the claimant's impairment meets or equals any impairment listed in the regulations as being so

severe as to preclude substantial gainful activity, 4) the claimant's residual functional capacity leaves him unable to perform his past relevant work, and 5) the claimant is unable to perform any other work existing in significant numbers in the national economy. 20 C.F.R. §§ 404.1520(a)(4)(i)-(v), 416.920; Briscoe, 425 F.3d at 352. If the ALJ finds that the claimant is disabled or not disabled at any step, he may make his determination without evaluating the remaining steps. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If there is an affirmative answer at either step three or step five, then there is a finding of disability. Briscoe, 425 F.3d at 352. At step three, if the impairment meets any of the severe impairments listed in the regulations, the impairment is acknowledged by the Commissioner. See 20 C.F.R. § 404.1520(a)(4)(iii); 20 C.F.R. app. 1, subpart P, § 404. However, if the impairment is not so listed, the ALJ assesses the claimant's residual functional capacity, which in turn is used to determine whether the claimant can perform her past work under step four and whether the claimant can perform other work in society under step five. 20 C.F.R. § 404.1520(e). The claimant bears the burden of proof on steps one through four, but the burden shifts to the Commissioner at step five. Id.

However, if claimant does not receive adequate notice of his right to representation, the burden shifts. See Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994); Hodes v. Apfel, 61 F.Supp. 2d 798, 811 (N.D. Ill. 1999). Claimants have a statutory right to counsel at disability hearings. See 42 U.S.C. § 406. A claimant may waive this right if the ALJ explains to the *pro se* claimant: 1) the manner in which an attorney can aid in the proceedings, 2) the possibility of free counsel or a contingency arrangement, and 3) the limitation of attorney fees to 25 percent of past due benefits and required court approval of the fees. Binion, 13 F.3d at 245; Thompson v. Sullivan, 933 F.2d 581, 585 (7th Cir. 1991). If the ALJ fails to explain all three elements, the

waiver is invalid, and the burden shifts to the SSA to prove that the ALJ adequately developed the record. Id.

In the present case, the ALJ failed to obtain a valid waiver. At the hearing, the ALJ asked Evans whether she was certain she did not wish to have an attorney. The discussion, though, was completely void of the topic regarding the possibility of free counsel, a contingency arrangement, or the limitations to 25 percent and court approval for fees (Tr. 208-10). Also, the ALJ did not explain the manner in which an attorney can aid in the proceedings (Id.). Even though Evans received a written notice before her hearing regarding her right to counsel, that notice contained no discussion of the 25 percent cap on fees (Tr. 47). As a result, the ALJ's failure to discuss all three of the Binion requirements renders Evan's waiver of counsel invalid. See Binion, 13 F.3d at 245 (“[B]ecause the ALJ did not comply with the clear dictates of Thompson, . . . waiver was invalid.”); Hodes, 61 F. Supp. 2d at 810-11; Young v. Apfel, 1999 WL 325026 at 8 (N.D. Ind. 1999) (indicating that a written notice that does not discuss 25 percent cap still fails to satisfy Binion standards).

When, as here, the claimant's waiver of representation is invalid, the ALJ has a heightened duty to develop the record. Skinner v. Astrue, 478 F.3d 836, 841 (7th Cir. 2007); Young v. Apfel, 1999 WL 325026 at 8 (N.D. Ind. 1999). “The ALJ's duty to develop the record fully and fairly where the claimant proceeds without counsel is met if the ALJ probes the claimant for possible disabilities and uncovers all of the relevant evidence.” Binion, 13 F.3d at 245. A significant omission is usually required before this Court will find that the ALJ failed to assist the *pro se* claimant in developing the record fully and fairly. Luna v. Shalala, 22 F.3d 687, 692 (7th Cir. 1994). If the SSA establishes that the ALJ fully and fairly developed the record,

the claimant can rebut the showing by demonstrating prejudice or an evidentiary gap. Binion, 13 F.3d at 245; Hodes, 61 F. Supp. 2d at 811.

In the present case, the SSA has essentially shirked its burden (Def.'s Brief 17). Rather than establishing how the ALJ fully and fairly developed the record, the SSA argues that Evans must establish harm or prejudice to the claimant for an invalid waiver to warrant a remand. The SSA simply misunderstands the law. Evans must establish harm or prejudice, but only after the SSA has met its burden by establishing the record was fully and fairly developed. Binion, 13 F.3d at 245 (“Once the Secretary establishes that the record was developed fully and fairly, the plaintiff has the opportunity to rebut . . . by demonstrating prejudice.”); Henderson v. Barnhart, 205 F. Supp. 2d 999, 1010 (E.D. Wis. 2002); Seamon v. Barnhart 2005 WL 1801406 at 10 (W.D. Wis. 2005). The SSA does not offer any analysis or explanation of how the ALJ fully and fairly developed the record. In fact, the SSA’s only explanation regarding its burden is that the ALJ did not need to consider Evan’s claims of blurry vision, fatigue, or nervousness because failing to discuss them was not a significant omission (Def.’s Brief 17).⁴ Because the SSA has failed to establish that the ALJ fully and fairly developed the record, this Court can only assume that the record was not fully and fairly developed, and that a remand is warranted.

Even assuming the record was fully and fairly developed, this Court also finds that Evans has established prejudice. The ALJ, in his opinion, indicates that Evans claims she is disabled because of Lupus (Tr. 38). However, it appears that Evans is actually claiming that she is disabled because of the effects of Lupus and Raynaud’s Syndrome because they caused her pain

⁴The SSA also argues that the record reveals that Evan’s doctors found she was doing well. Whether or not Evans was actually disabled is not the issue. Instead, the issue is whether the ALJ properly developed the record. Thus, this argument is simply not on point for the SSA to establish its burden.

and fatigue (Tr. 71, 92-93). Symptoms based on subjective complaints, such as pain and fatigue, can be disabling. See Carradine v. Barnhart 360 F.3d 751, 752 (7th Cir. 2004). The ALJ addressed Evan's claims of pain both in his opinion and at the hearing, but he did not discuss Evan's claims of fatigue.

The SSA argues that Evan's claims of fatigue was not a significant problem because there was no evidence in the record to support them. This Court does not agree. Evans claimed on both her disability report and her daily activities questionnaire that she could do very little because she would become tired and fatigued (Tr. 71, 92-93). Dr. Patel's notes, who was Evan's general practitioner, contain references that Evans claimed she was short of breath and feeling fatigued (Tr. 143, 150). Dr. Khan, a state medical examiner, indicated that Evans suffered from fatigue and shortness of breath (Tr. 122). Therefore, there are several references in the record that indicate Evans claimed fatigue was a contributor to her disability.

Despite a number of references regarding Evan's claims of fatigue in the record, the ALJ failed to question Evans about her fatigue, how it affected her daily activities, or how it affected her ability to work.⁵ Regardless of whether the ALJ obtained a valid waiver, he has a duty to develop the record. Binion 13 F.3d at 245. Additionally, because the ALJ failed to obtain a valid waiver, he had a heightened duty to scrupulously and conscientiously probe, inquire, explore, and develop all relevant evidence. See Skinner, 478 F.3d at 841; Henderson v. Barnhart, 205 F. Supp. 2d 999, 1010 (E.D. Wis. 2002); Young, 1999 WL 325026 at 8. Because there were several references in the record, Evan's fatigue was not only a relevant issue but a

⁵Other than failing to address all relevant areas, the ALJ also did not question Evans about her medications. The ALJ presented and heard no testimony from any other witnesses. And, the ALJ did not significantly question Evans about medical evidence in her file. Thompson and Binion suggest the ALJ should have developed these areas as well.

significant issue. Even though Evans did not indicate that fatigue was one of her problems in response to open ended questions by the ALJ, the ALJ had the heightened duty and the responsibility to develop the record. The ALJ should have recognized that part of Evan's claim that she was disabled was that she was fatigued, and the ALJ should have asked specific questions and elicited specific testimony regarding Evan's fatigue and its effects.⁶ But, the ALJ did not inquire into or otherwise develop this relevant evidence.

Furthermore, the ALJ must consider all of a claimant's disabilities. Gentle v. Barnhart, 430 F.3d 865, 868 (7th Cir. 2005). The ALJ's opinion is devoid of an discussion of Evan's subjective claims of fatigue (Tr. 40-41). An ALJ decision cannot stand if it lacks an adequate discussion of the issues. Lopez, 336 F.3d at 539. The ALJ recognizes, in his opinion, that Evans had claims of fatigue, but then he does not engage in any discussion as to whether Evan's claims of fatigue are credible or whether her fatigue affects her ability to work or function.⁷

In summary, because the ALJ failed to obtain a valid waiver of Evan's right to counsel, the SSA has failed to meet its heightened burden to establish that the ALJ fully and fairly developed the record. Furthermore, even if the SSA had properly met its burden, this Court finds

⁶Evans also argues that the ALJ failed to inquire into her claims of blurry vision and nervousness. Evan's claims of blurry vision and nervousness are far less prevalent in the record as her claims of fatigue. As such, this Court is less persuaded that Evan's blurry vision or nervousness were significant problems, but the ALJ should have developed or inquired into all of Evan's alleged side effects caused by her Lupus.

There are several different specific diseases that are lumped under the general disease Lupus, each with its own effects on a person. Stedman's Medical Dictionary 1124. Part of the problem is that this Court cannot tell from the record and the ALJ's opinion what type of Lupus Evans suffers from and the full extent of its effects. Upon remand, the ALJ should fully inquire into all of the disabling effects Evan's suffers from because of her Lupus. At the very least, this Court is certain that Evan's claims of fatigue were prevalent enough in the record to demand questioning of whether her fatigue contributed or created her alleged disability.

⁷This Court notes that Evans also argues that the ALJ improperly determined her credibility. However, the ALJ's failure to fully and fairly develop the record inherently flaws his credibility determination. While this Court offers no opinion regarding the ALJ's credibility determination regarding Evan's subjective claims of pain, the ALJ should have considered Evan's credibility regarding her claims of fatigue, which he did not do. Thus, the ALJ's failure to develop the record about Evan's fatigue makes his credibility finding insufficient as well.

that Evans has established prejudice in the ALJ's development of the record that also warrants a remand.

III. CONCLUSION

This Court **GRANTS** Evan's request and this case is **REVERSED** and **REMANDED** to the Commissioner for proceedings consistent with this opinion pursuant to sentence four (4) of 42 U.S.C. § 405(g). The clerk is instructed to term the case.

SO ORDERED.

Dated this 13th Day of April, 2007.

S/Christopher A. Nuechterlein
Christopher A. Nuechterlein
United States Magistrate Judge