

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

CHAD J. PAISER,

Plaintiff,

v.

Case No. 05-C-602

**JO ANNE B. BARNHART,
Commissioner of Social Security,**

Defendant.

**DECISION AND ORDER REVERSING DECISION OF COMMISSIONER
AND REMANDING CASE**

INTRODUCTION

Chad J. Paiser (“Paiser”) appeals the decision of the Commissioner of Social Security (“Commissioner”) denying Paiser Supplemental Security Income (“SSI”) and Disability Insurance Benefits (“DIB”). These claims were denied initially and upon reconsideration. (R. at 19.) On May 30, 2003, Paiser filed a request for a hearing and a hearing was conducted before an Administrative Law Judge (“ALJ”) on May 5, 2004. Paiser, who was represented by counsel, testified at the hearing along with a vocational expert and Paiser’s stepfather. On August 27, 2004 the ALJ issued a decision denying Paiser benefits. On April 8, 2005, the Appeals Council denied Paiser’s request for review. On June 3, 2005, Paiser filed this action. The case was reassigned to this court upon the consent of all parties to the full jurisdiction of a magistrate judge.

Paiser was born in 1977 and in November of 1998, he was involved in a motor vehicle accident. As a result of this accident, Paiser suffered a ruptured left diaphragm, splenic fracture, and

multiple contusions and abrasions. (R. at 118-21.) Since the accident, Paiser has complained of various ailments that can be generally summarized as neck, back, and shoulder pain. Also since the accident, Paiser has been diagnosed by a psychiatrist with adjustment disorder with mixed emotional features. (R. at 144.)

Despite his injuries, Paiser received his associate's degree in natural resources in January of 1999. (R. at 509.) He worked for the Department of Natural Resources in a limited-term position in which he would identify, weigh, and measure fish that he collected in nets that he had to pull up by hand. (R. at 509, 525-26.) This position also involved significant driving, which was hard on Paiser's neck. (R. at 510.) At the completion of the limited term for this job, Paiser was offered another limited-term position but he declined it because he did not want to move to a different area of the state. (R. at 510.)

Paiser then began working as a land-surveying assistant, and he did this job for approximately one year, until about January of 2001. (R. at 511.) Paiser then obtained a second land-surveying job and worked at that position for approximately eleven months, until July 11, 2002. (R. at 511.) Paiser has not worked since that time. Id. Paiser explained that he quit this job because on May 15 and 16 of 2002, his wrists became irritated after two long days of surveying work that involved pounding stakes with an eight-pound hammer. (R. at 512.) Paiser testified that ever since those two days, his wrists get irritated very easily by repetitive motion and are very painful. (R. at 512.)

Paiser testified that since the accident he has suffered from panic attacks on what seems like to him, a daily basis. (R. at 531.) He said these panic attacks come about from his inability to "shut [his] mind down from thinking about [his] problems." (R. at 531.) He further testified that he does not deal well with stress and that he has been irritable around his family. (R. at 532.) Although he used to have friends and a girlfriend, Paiser testified that he no longer has any acquaintances other

than his family. (R. at 532.) Paiser's stepfather's testimony corroborated the fact that there has been a significant change in Paiser's personality since the accident. (R. at 535-38.) Specifically, Paiser's stepfather testified that after the accident, Paiser changed from a "typical young person" who had friends, girlfriends, and would participate in outdoor activities, (R. at 535), to a "very different person" who is withdrawn and seldom smiles or laughs, (R. at 536). Paiser's stepfather also testified that Paiser now "talks in circles" and tends to become obsessed with new ideas. (R. at 537.)

MEDICAL EVIDENCE

On November 30, 1998, Paiser was an unrestrained driver of a vehicle that was struck on the driver's side by a pickup truck traveling at 45 to 55 miles per hour. (R. at 118, 170.) As a result of the accident, Paiser underwent surgery to remove his spleen and to repair his damaged diaphragm. (R. at 123.) On January 22, 1999, Paiser saw Dr. John Lindstrom regarding concerns over the lasting affects of his injuries. Dr. Lindstrom found that Paiser had full active mobility in his shoulder with no crepitus, excellent strength, and no observable swelling, bruising, deformity, or localized tenderness. (R. at 137.) However, Dr. Lindstrom did observe that Paiser did have glenohumeral instability. (R. at 137.) Dr. Lindstrom recommended physical therapy and gave Paiser a good prognosis. (R. at 137.)

On May 7, 1999, Paiser again saw Dr. Lindstrom. At this visit Paiser complained of grinding type symptoms in his wrists, crepitus in both shoulders, lower back pain that makes it difficult to sit in a car, cracking in his hips when he changes position, soreness in his right leg when he drives, and finally soreness in his chest that is sometimes aggravated with breathing but is not functionally limiting. (R. at 136.) Dr. Lindstrom's notes indicate that this pain has not caused Paiser to miss work. (R. at 136.)

On June 7, 1999, Paiser was evaluated by Dr. Steven Klein, a psychologist, who diagnosed Paiser with post-traumatic stress disorder and a mild level of depression. (R. at 173.) Dr. Klein

stated that it was too soon to tell whether the post-traumatic stress disorder would be permanent. (R. at 173.) Further, Dr. Klein speculated that Paiser's depression was likely the reaction to the pain and the impact that the accident has had on his lifestyle. (R. at 173.) Paiser continued treatment with Dr. Klein until February of 2000. (R. at 175-77.) Over the course of this treatment, Paiser informed Dr. Klein of a number of difficulties he was having. For example, Paiser described how, as a result of his injuries, he was unable to participate in many of the activities he used to enjoy. (R. at 174.) He stated that he was more irritable and short-tempered with his girlfriend. (R. at 174.) Driving causes him anxiety because he is hyper-vigilant regarding other drivers. (R. at 174-75.) Paiser repeatedly states that he is concerned about the lasting effects of his injuries. (R. at 174-77.)

On November 8, 1999, Dr. Michael Messer, a psychiatrist, evaluated Paiser and diagnosed him with adjustment disorder with mixed emotional features. (R. at 144.) Paiser complained of stress relating to the prospective settlement relating to the traffic accident and stated that he suffered from anxiety while driving. (R. at 143.) Further, Paiser stated that he felt that his memory was diminished and that he was sometimes forgetful. (R. at 143.)

Also on November 8, 1999, Paiser saw Dr. James Marotz. (R. at 152.) Dr. Marotz's notes from this visit record Paiser's complaints of a popping in his wrists, hands, elbows, and also throughout his spine, all of which are not painful. Dr. Marotz notes that Paiser's joint range seems normal but Dr. Marotz does note crepitus when evaluating the range of motion in his spine and Paiser complains of pain at certain points during the exam. Dr. Marotz also notes that Paiser appears to be in a depressed mood.

On December 2, 1999, Paiser saw Dr. Catherine Dremel with complaints of cracking joints, particularly in cold weather, middle back pain, and a sharp pain when taking a deep breath. (R. at 146.) Paiser described the pain as intermittent but constant and stated that the pain is causing him

to avoid certain activities. (R. at 146.) Dr. Dremel stated that she did not know what could be causing Paiser's joint problems. (R. at 147.)

On March 9, 2000, Paiser again saw Dr. Marotz. During this visit, Paiser notes that he is experiencing a non-painful cracking in his chest and mid-back. (R. at 156.) Paiser also stated that he was experiencing some discomfort when doing survey work, but he was not taking any medications for the pain. (R. at 156.) Dr. Marotz encouraged Paiser to live as normal of a life and possible and stated that Paiser has no occupational restrictions. (R. at 156.) However, Dr. Marotz did recommend neurological testing to determine if Paiser had suffered a brain injury. (R. at 156.)

Beginning on April 12, 2000, Paiser began seeing Dr. Rodney Lefler, a chiropractor, to address complaints of pain. (R. at 188.) Records indicate that Paiser continued to periodically see Dr. Lefler until July 19, 2001. (R. at 192.)

On June 19, 2001, Dr. Klein re-evaluated Paiser. At that time, Paiser complained of significant physical pain in his neck and shoulders and stated that it was present every day but aggravated by heavy lifting. (R. at 178.) Paiser expressed concern as to whether he would be able to work physically-oriented jobs in the future. (R. at 178.) However, Paiser continued to do all of the household chores, sports, physical activities, and hobbies that he pursued prior to the accident. (R. at 178.) Although these activities are sometimes painful, Paiser has made the effort to maintain the lifestyle he had before the accident. (R. at 178.) Although Paiser continues to be hyper-vigilant when he drives, other symptoms of post-traumatic stress disorder, such as nightmares, have improved. (R. at 178-79.) Paiser stated that he was able to do his surveying job although certain aspects of the job, such as carrying a thirty-pound backpack, tended to cause him pain. (R. at 179.) Dr. Klein concluded that Paiser no longer met the criteria for post-traumatic stress disorder but did meet the criteria for adjustment disorder with mixed emotional features. (R. at 180.) Further, Dr. Klein stated that Paiser had likely reached maximum medical improvement with regard to his

psychological injuries and therefore no further psychological or psychiatric treatment was recommended at that time. (R. at 180.)

On March 6, 2002, Paiser saw Dr. James Burwitz and complained of a grinding noise when he moved his neck. (R. at 183.) Paiser explained that it felt as if some vertebrae were shifting in his upper back. (R. at 183.) Paiser also complained of pain after having used his arms a lot. (R. at 183-84.)

On April 12, 2002, an MRI revealed a Chiari I malformation. (R. at 233.) However, on July 3, 2002, Paiser met with Dr. John Revord, and Dr. Revord stated that, despite the finding of the radiologist, he believed the MRI was normal. (R. at 235.) Dr. Revord's notes indicate that two other doctors reviewed the April 12, 2002 MRI and also felt it was normal. (R. at 235.) His notes further indicate that a June 19, 2002 MRI was normal and did not show any evidence of Chiari malformation. (R. at 235.) Dr. Revord concluded that the intermittent popping that Paiser is experiencing in his chest is probably a result of having broken his ribs and that his back pain is likely a result of poor posture. (R. at 237.) Dr. Revord encouraged Paiser to continue with his daily activities and notes that he was not prevented from working. (R. at 237.) Dr. Burwitz's notes from September 21, 2003 indicate that Paiser saw Dr. Kula at the Chiari Institute at the North Shore University Hospital in New York and it was determined that Paiser did not have evidence of Chiari I malformation. (R. at 431.)

On December 8, 2003, Dr. Burwitz's notes indicate that he believed that Paiser would be unable to work or return to normal functioning for at least twelve months, if ever. (R. at 433.)

Beginning on January 21, 2004, Paiser began to see Dr. Thomas Altepeter, a psychologist. (R. at 461.) Dr. Altepeter completed a Mental Impairment Questionnaire and indicated that Paiser was "[u]nable to meet competitive standards" for a number of abilities and skills necessary to unskilled work such as maintain regular attention and be punctual, complete a normal workday or

workweek without interruptions from psychologically based symptoms, or deal with ordinary stress. (R. at 463.) Dr. Altepeter considered Paiser either unlimited or limited but satisfactory in only three out of sixteen categories. (R. at 463.)

On May 5, 2004, Dr. Ronald Barnes completed a Chiari Malformation and Syringomyelia Residual Functional Capacity Questionnaire for Paiser. (R. at 451.) On this form, Dr. Barnes states that Paiser has certain spinal disorders which result in a number of conditions, including chronic fatigue syndrome, depression and anxiety or panic attacks. (R. at 452). He concludes that Paiser is able to sit for less than two hours and stand or walk for about two hours during a normal eight-hour workday. (R. at 453.) Further, Dr. Barnes states that Paiser could work only at a job that permitted him to stand and walk for fifteen-minutes an hour and would permit him to take unscheduled breaks and to shift from sitting, standing, or walking at will. (R. at 454.) Also, Dr. Barnes speculates that Paiser would likely be absent from work more than three times a month. (R. at 455.)

ALJ'S DECISION

The ALJ found that Paiser had not engaged in substantial gainful activity since the alleged onset of his disability and that his neck, arm, and hand pain were considered "severe" based upon the requirements set forth in 20 C.F.R. §§ 404.1520(c) and 416.920(b). (R. at 23-24.) The ALJ then determined that these impairments did not meet or equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4. (R. at 24.) However, the ALJ found that Paiser's allegations of his limitations were not totally credible and determined that Paiser could stand and walk for six to eight hours a day, lift up to fifty pounds occasionally, and perform semiskilled work. (R. at 24.) The ALJ further found that Paiser would be able to return to his past job with the Department of Natural Resources. Alternatively, the ALJ found that if Paiser was limited to light or sedentary work, there were a significant number of jobs that he could perform. (R. at 24.)

In reaching his decision, the ALJ rejected the conclusions of Dr. Barnes on the basis that he was a non-treating source and that his conclusions were inconsistent with the other medical evidence. (R. at 22). Also significant to the ALJ's decision were the facts that after the accident, Paiser was able to return to school and complete his degree and then was able to work at three different jobs over the next several years. (R. at 22.) The ALJ determined that there were no intervening injuries or illnesses. (R. at 22.) The ALJ also discussed the evidence that Paiser engaged in other life activities that were apparently inconsistent with his medical complaint. (R. at 22.) Additionally, at the hearing, the ALJ discussed how he was very reluctant to find a person of Paiser's age and education to be disabled. (R. at 548.) Thus, the ALJ decided that Paiser was not disabled.

PAISER'S POSITION

Paiser alleges that the ALJ erred when he failed to find at step two that Paiser did not have a severe psychological impairment. Paiser argues the ALJ improperly ended his analysis regarding this impairment at step two because at that step the disability analysis requires only a de minimis showing of impairment. Because the ALJ improperly stopped the analysis at step two, the ALJ did not determine Paiser's mental residual functional capacity. Paiser argues that as a result, the ALJ improperly discounted the opinions of Drs. Messer, Altepeter, and Klein, all of whom indicate that Paiser suffers psychological ailments that would satisfy the de minimis standard.

Second, Paiser argues that the ALJ impermissibly played the role of doctor and made an erroneous determination regarding Paiser's residual functional capacity. Paiser argues that the ALJ's finding that Paiser suffers from a severe neck, arm, and hand pain is contradictory to the ALJ's conclusion that Paiser could stand and walk for six to eight hours a day and lift up to fifty pounds. Additionally, Paiser argues that the ALJ failed to follow the function-by-function assessment as is required by SSR 96-8p for determining residual functional capacity. Although the

ALJ states that he carefully considered the evidence, he never stated specifically what evidence he was relying upon.

Third, Paiser argues that the ALJ failed to follow SSR 96-7p in making his credibility finding. Specifically, the ALJ failed to state his reasons for finding Paiser not totally credible.

Fourth, Paiser contends that the ALJ's finding under step four that Paiser has the residual functional capacity to perform past work is not supported by substantial evidence. Here again, Paiser argues that the ALJ failed to consider his mental impairments as they limited his ability to perform his past relevant work.

Finally, Paiser argues that the ALJ's step five determination was erroneous because the ALJ failed to prove the existence of jobs in the national economy that Paiser could perform. In particular, Paiser argues that the hypothetical posed to the vocational expert was inadequate.

COMMISSIONER'S POSITION

The Commissioner argues that Paiser's argument that the ALJ improperly stopped his analysis at step two is based upon a misreading of the ALJ's decision and a misunderstanding of the law. The Commissioner argues that there is no way for the ALJ to have found Paiser to have been disabled at step two; rather, the ALJ's options at step two are either finding that the claimant is not disabled or the ALJ shall proceed to the additional steps in the analysis. The ALJ then reasonably determined that Paiser could return to his past relevant work with the DNR and reasonably rejected the limitations set forth by Dr. Altepeter because they were based upon Paiser self-reporting and were inconsistent with objective testing.

Second, the ALJ's finding that Paiser could lift fifty pounds, stand or walk for six hours, and sit for two hours, was supported by substantial evidence because there was no objective medical evidence that supported Paiser's complaints and Paiser's history since the motor vehicle accident

indicated that he was capable of such work. The ALJ properly rejected Dr. Barnes' conclusion because it was inconsistent with the other evidence in the record.

Third, the ALJ reasonably found that Paiser's complaints of pain were inconsistent with the record as a whole. Specifically, Paiser's reported lifestyle was inconsistent with his reported pain as was Dr. Revord's clinical examination.

Fourth, Paiser's argument that the ALJ erred in determining he could perform medium work is simply a rehashing of his arguments that the ALJ improperly determined Paiser's residual functioning capacity.

Finally, the Commissioner argues that the ALJ appropriately determined that there are a significant number of sedentary jobs that Paiser can perform. The ALJ did not err in failing to include some of Paiser's complaints in the hypothetical he presented to the vocational expert because the ALJ reasonably rejected those complaints on the basis they were not supported by the medical or other evidence.

STANDARD OF REVIEW: SUBSTANTIAL EVIDENCE

In addressing the five issues raised by Paiser, the court is limited to determining whether the ALJ's factual findings are supported by "substantial evidence." Young v. Barnhart, 362 F.3d 995, 1001 (7th Cir. 2004). The court may not re-weigh evidence, resolve conflicts in the record, decide questions of credibility, or substitute its own judgment for that of the Commissioner of the Social Security Administration. Id.; Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993).

The substantial evidence burden is satisfied when the evidence is such that a reasonable mind might accept it as adequate to support a conclusion. Williams v. Apfel, 179 F.3d 1066, 1071 (7th Cir. 1999). Although a mere scintilla of proof will not suffice, Butera v. Apfel, 173 F.3d 1049, 1055 (7th Cir. 1999), substantial evidence may be something less than the greater weight or preponderance of the evidence. Young v. Sullivan, 957 F.2d 386, 388 (7th Cir. 1992). If the ALJ

rejects uncontradicted evidence, reasoning for that rejection must be clearly articulated. Id.; Walker v. Bowen, 834 F.2d 635, 640 (7th Cir. 1987). If the ALJ's decision rests on a credibility determination, this court will overturn that determination only if it is patently wrong. Powers v. Apfel, 207 F.3d 431, 435 (7th Cir. 2000). Special deference is appropriate because the ALJ is in the best position to see and hear the witness and to determine credibility. Id. at 435.

Finally, if the ALJ committed an error of law, this court may reverse the Commissioner's decision, regardless of whether it is supported by substantial evidence. Pugh v. Bowen, 870 F.2d 1271, 1274 (7th Cir. 1989).

DETERMINING DISABILITY: A FIVE-STEP ANALYSIS

A person is disabled if she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §423(d)(1)(A). In determining whether Paiser was disabled, the ALJ applied the following five-step inquiry: (1) whether Paiser is currently unemployed; (2) whether Paiser has a severe impairment; (3) whether Paiser's impairment equates to one of the impairments listed in 20 C.F.R. § 404, Subpart P, Appx. 1 ("Appendix"); (4) whether Paiser is unable to perform past relevant work; and (5) whether Paiser is incapable of performing work in the national economy. Dixon v. Massanari, 270 F.3d 1171, 1176 (7th Cir. 2001); 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. An affirmative answer leads either to the next step, or on steps 3 and 5, to a finding that the claimant is disabled. A negative answer at any point, other than step 3 ends the inquiry and leads to a determination that a claimant is not disabled. Zurowski v. Halter, 245 F.3d 881, 885-86 (7th Cir. 2001)(citing Zalewski v. Heckler, 760 F.2d 160, 162 n.2 (7th Cir. 1985)).

In regards to Paiser's alleged mental impairments, the ALJ determined that these impairments were not severe and therefore ended the analysis at step two. (R. at 22.) As for Paiser's

physical impairments, the ALJ determined that Paiser was able to perform his past relevant work (step four) or alternatively, at a less exertional level, could perform other work in the national economy (step five).

ANALYSIS

ALJ's Finding That Paiser Did Not Have a Severe Mental Impairment

The ALJ determined that the record did not support a finding that Paiser suffered from severe mental impairments. (R. at 22.) The ALJ supported his conclusion by stating that Paiser had never been in treatment and discounted Dr. Altepeter's conclusions because they were based upon Paiser's complaints rather than an objective diagnosis. (R. at 22.)

SSR 85-28 instructs that a claim should be denied at step two only if the medical evidence clearly establishes that the individual's impairments do not have more than a minimal effect on the person's physical or mental abilities to perform basic work activities. Medical evidence alone should be evaluated. SSR 85-28. Other factors such as age, education, and work experience are not considered. SSR 96-3p. If it is unclear what effect the impairment has, the process should not end at step two. SSR 85-28.

The ALJ's determination that Paiser did not suffer from a severe mental impairment is not supported by substantial evidence. The ALJ dismissed Dr. Altepeter's conclusions because they were based largely upon Paiser's self-reporting. However, Dr. Altepeter was not the only doctor who determined Paiser suffered a psychological impairment.

Dr. Klein diagnosed Paiser with post-traumatic stress disorder on June 7, 1999. (R. at 172-73.) Dr. Messer diagnosed Paiser with adjustment disorder with mixed emotional features on October 21, 1999. (R. at 144.) On June 19, 2001, Dr. Klein re-evaluated Paiser and stated that although he no longer met the diagnostic criteria for post-traumatic stress disorder, he did suffer from significant anxiety, which he believed would be permanent. (R. at 180.) Dr. Klein further

stated that he did not believe Paiser to be malingering or otherwise exaggerating his symptoms. (R. at 179.) On September 30, 2002, Dr. Steven Krawiec, diagnosed Paiser with adjustment disorder with mixed anxiety and depressed mood, and stated that his prognosis was “[g]uarded to fair.” (R. at 248-49.)

Finally, the medical records indicate that Paiser did receive treatment for his psychological impairments in that he saw Dr. Klein on at least seven occasions. (R. at 174-77.) Although these visits ended, there is nothing to indicate that there was any reason for them to continue. On June 20, 2001, Dr. Klein stated no further psychological or psychiatric treatment was needed at that time and that Paiser had reached maximum medical improvement with regard to his psychological injuries. (R. at 180.)

Therefore, the ALJ’s determination that Paiser does not suffer from a severe mental impairment is not supported by substantial evidence and this case must be remanded.

ALJ’s Residual Functional Capacity Determination

The ALJ determined Paiser had the residual functional capacity to stand and walk for six to eight hours a day and to lift twenty-five pounds. (R. at 23.) The ALJ found that Paiser did have some pain and limitations; however, the ALJ did not believe these were as severe as Paiser indicated. (R. at 22.) The ALJ’s determination was based upon the conclusion that Paiser carried out non-work activities that reflect an ability to perform medium semiskilled work. (R. at 23.) To support his conclusion, it appears that the ALJ specifically relies upon the facts that Paiser enjoys hunting, fishing, and being outdoors, that he graduated from college after the accident, and that he had three different jobs since the accident. (R. at 22.) Based upon this retained functional capacity, the ALJ determined that Paiser could perform his past job with the DNR or a many other jobs in the national economy. (R. at 24.)

Paiser argues that the ALJ's determination that Paiser's neck, arm, and hand pain were severe is contrary to the finding that Paiser had the retained functional capacity to work for the DNR or in many other positions in the national economy.

The ALJ's determination required that he disregard the opinion of Dr. Barnes, who had stated that Paiser would be limited to standing or walking and sitting for no more than four hours of an eight-hour workday. The ALJ dismissed Dr. Barnes' opinion on the basis that he was not a treating source and because his opinion contradicts with many of the objective findings and Paiser's reported activity. (R. at 22.)

The ALJ was entitled to discount the opinion of Dr. Barnes. The non-treating source opinion of Dr. Barnes appears inconsistent with much of the other medical evidence. For example, Dr. Marotz stated on March 9, 2000 that Paiser has no specific occupational restrictions. (R. at 156.) Similarly, on July 3, 2002, Dr. Revord encouraged Paiser to continue his daily activities and stated that it would not be dangerous for him to continue his present work. (R. at 237.)

However, Dr. Barnes was not the only medical professional who determined that Paiser was disabled. On December 8, 2003, Dr. Burwitz stated that Paiser was disabled and unable to work for at least twelve-months given his present condition. (R. at 433.) Dr. Burwitz, a member of the Affinity Medical Group, can be considered a treating source. The ALJ refers to Dr. Burwitz in regard to whether Paiser suffers from a cervical instability, (R. at 21), but the ALJ did not attempt to distinguish Dr. Burwitz's opinion when he determined that Paiser was able to stand and walk for six to eight hours a day and to lift twenty-five pounds. The ALJ thus failed to comply with the requirement that he fully evaluate all medical evidence in the record. See 20 C.F.R. § 416.927.

ALJ's Credibility Finding

The ALJ rejected Dr. Barnes' opinion largely because it was based upon Paiser's self-reporting, which the ALJ found to be "not fully credible." (R. at 22.) This credibility finding was

based upon the discrepancy between Paiser's reported impairments and those that were objectively verified and the fact that Paiser declined a position with the DNR, not because he could not do the work, but because he did not want to move. (R. at 22.)

"The ALJ's credibility determinations generally will not be overturned unless they were 'patently wrong.'" Zurawski v. Halter 245 F.3d 881, 887 (7th Cir. 2001) (quoting Powers v. Apfel, 207 F.3d 431, 435 (7th Cir.2000)).

[T]he ALJ's determination or decision regarding claimant credibility 'must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.'

Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001) (quoting SSR 96-7p).

In the present case, the ALJ recognized that the objective medical evidence indicated that Paiser suffered some degree of pain and limitations but rejected Paiser's complaints regarding severity. (R. at 22.) The ALJ rejected Paiser's complaints on the basis that "the record is also filled with instances of the claimant discussing his activities including packing to move, enjoying hunting and fishing, and enjoying being outside." (R. at 22.)

In light of the record, which contained only a very minimal inquiry regarding daily activities during the hearing, (R. at 517-518), this general description of Paiser's life activities is insufficient to support the ALJ's determination that his complaints of pain are not credible. In Zurawski, the Seventh Circuit held that a general description of a claimant's activities, which included washing dishes, helping his children prepare for school, doing laundry, and preparing dinner, were "not of a sort that necessarily undermines or contradicts a claim of disabling pain." Zurawski, 245 F.3d at 887 (citing Clifford v. Apfel, 227 F.3d 863, 872 (7th Cir. 2001)).

It is certainly not at all inconsistent that a person who experiences debilitating pain would enjoy being outside. Without a more substantial description of the specific actions involved and the

duration of the activity, the fact that Paiser packed to move is not necessarily inconsistent with an inability to work on a sustained basis. Similarly, a person may be able to hunt or fish without necessarily being able to work on sustained basis. Therefore, this court lacks a sufficient basis to sustain the ALJ's credibility determination.

ALJ'S Step Four Determination

The ALJ determined that Paiser would be able to return to his previous position at the DNR. (R. at 23.) The ALJ based this determination upon the fact that Paiser stated that he could return to the position but chose not to because he did not want to move. (R. at 23.)

The ALJ presented a hypothetical to the vocational expert in which the vocational expert was asked whether a person with the same work and educational background of Paiser was employable if he could not engage in overhead reaching with his non-dominant arm and he had some memory impairment so that he would do best in a position that was routine and repetitive. (R. at 540.) The vocational expert determined that, given these limitations, Paiser's past jobs would be excluded. (R. at 541.) The vocational expert excluded Paiser's previous jobs on the basis that the presented mental impairments would interfere with a person's ability to do those jobs. (R. at 541.)

It appears that the ALJ's determination that Paiser could return to his position with the DNR is a product of his finding that Paiser's mental impairments were not severe, that Paiser had the retained functional capacity to stand or walk for six to eight hours a day, and that Paiser's allegations regarding his physical impairments were not credible. For the reasons previously explained, these conclusions are not appropriately supported in the ALJ's decision and therefore this court lacks sufficient basis to sustain the ALJ's determination that Paiser could return to his former job with the DNR.

ALJ's Step Five Determination

Although the vocational expert concluded that Paiser's past jobs would be excluded if Paiser was unable to engage in overhead reaching with his non-dominant arm and he had some memory impairment so that he would do best in a position that was routine and repetitive, the ALJ determined that there were jobs in the national economy that a person with Paiser's limitations could perform. (R. at 540.) These jobs included packing machine operator, a general office clerk, or a production inspector. (R. at 542.)

The ALJ then added factors to the hypothetical and asked if there were any jobs that a hypothetical person could do if he could not sit for two hours and could not stand and walk for more than two hours in an eight-hour workday. (R. at 543.) The vocational expert determined that there would be no jobs that a person with such limitations could perform. (R. at 543.) However, when this hypothetical was again modified to assume that the person could work eight-hours a day but needed to move his head or wrists every thirty-minutes, the vocational expert concluded that such a person could work as an office clerk, an interviewer, or an information clerk. (R. at 544.)

When Paiser's attorney presented to the vocational expert a hypothetical based upon the limitations set forth in Dr. Barnes' report, the vocational expert determined that there were no jobs that such a person could maintain. (R. at 545-46.)

As an alternative reason as to why Paiser was not disabled, the ALJ determined that Paiser could perform many other positions in the national economy including working as a packing machine operator, general office clerk, or production inspector. (R. at 23.) The ALJ also determined that Paiser could work as an officer clerk, interviewer, or information clerk if he was limited to sedentary work. (R. at 23.) The ALJ rejected the opinion of John Birder because that vocational expert had based his opinion upon medical records that the ALJ had determined did not reflect Paiser's true abilities. (R. at 23.)

Paiser argues that the ALJ's determination was erroneous because the ALJ failed to include certain variables in the hypothetical he presented to the vocational expert. Specifically, Paiser argues that the ALJ erroneously excluded Paiser's limitations in engaging in repetitive grasping or turning, his chronic fatigue, or his limited ability to deal with stress. When Paiser's attorney questioned the vocational expert and included these variables, the vocational expert stated that all previously included jobs would be excluded.

As was true with the ALJ's step four determination, it appears that the ALJ's determination that Paiser could return to his position with the DNR is a product of his finding that Paiser's mental impairments were not severe, that Paiser had the residual functional capacity to stand or walk for six to eight hours a day, and that Paiser's allegations regarding his physical impairments were not credible. For the reasons previously explained, these conclusions are not appropriately supported in the ALJ's decision and therefore this court lacks sufficient basis to sustain the ALJ's determination that Paiser could perform work in the national economy.

CONCLUSION

The ALJ's determination that Paiser did not suffer from a severe mental impairment is not supported by substantial evidence. This step two determination may have affected the analysis at the subsequent steps. Additionally, this court lacks a sufficient basis to sustain the ALJ's findings that Paiser's testimony was not credible, that Paiser could return to his job with the DNR, or that Paiser could perform other work in the national economy.

IT IS THEREFORE ORDERED that the decision of the Commissioner is **reversed** and this case is hereby **remanded** for further review in accordance with this decision.

Dated at Milwaukee, Wisconsin, this 8th day of September, 2006.

s/AARON E. GOODSTEIN
United States Magistrate Judge