

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

OUSLEY, EDDY G,)
)
) Plaintiff,)
) vs.)
))
) BARNHART, JO ANNE B,) CAUSE NO. IP01-0359-C-T/F
) COMMISSIONER OF SOCIAL SECURITY,)
))
) Defendant.)

π G Robert Wright
Attorney at Law
232 North College
Indianapolis, IN 46202

Thomas E Kieper
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EDDY G. OUSLEY,)
)
 Plaintiff,)
)
 vs.) IP 01-C-359-T/F
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant.)
)

ENTRY REVIEWING COMMISSIONER’S DECISION¹

Plaintiff requests judicial review of the final decision of the Commissioner of Social Security² (“Commissioner”) denying his applications for Disability Insurance Benefits (“DIB”). Having reviewed the record, considered the submissions of the parties, and being duly advised, the court hereby **REVERSES** the Commissioner’s decision.

I. Factual and Procedural Background

¹ This Entry is a matter of public record and is being made available to the public on the court’s web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion to be sufficiently novel or instructive to justify commercial publication of the Entry or the subsequent citation of it in other proceedings.

² Jo Anne B. Barnhart became the Commissioner of Social Security on November 9, 2001, and, therefore, is substituted as the Defendant in this action. See Fed. R. Civ. P. 25(d)(1).

Eddy G. Ousley was born on May 25, 1963. He graduated from high school and served in the United States Army for two years before taking a variety of jobs including as a welder, painter, sandblaster, security guard, and laboratory tester. Mr. Ousley alleges that he became disabled on November 7, 1997, and except for a brief time in February 1998, has not worked since. The following is a recitation of Mr. Ousley's medical history.

In April 1997, Mr. Ousley had x-rays and a CT scan to investigate his headaches, double vision, nausea, and vomiting. They showed mild mucosal swelling and sinusitis, which appeared to be clearing in x-rays taken in May and August. However, an examination in September by neurologist Dr. Karen Rodman showed a possible combination of headaches, sinusitis, migraine headaches, and muscle tension headaches. Rodman prescribed medication and later ordered an occipital nerve injection for the recurrent sinusitis. The injection was not helpful, and Rodman prescribed medication in response to Mr. Ousley's continued complaints of pain. In December, Rodman mentioned a trampoline accident that occurred in November, adjusted Mr. Ousley's medications, and prescribed physical therapy. Also in December, a CT scan showed sinusitis. However, spinal x-rays were normal. In January 1998, Rodman prescribed Prozac and Fioricet, a pain medication, for Mr. Ousley's fibromyalgia and headaches.

Also in January, Mr. Ousley visited Dr. Robert Silbert, a physical medicine and rehabilitation specialist. Silbert diagnosed fibromyalgia, cervical facet syndrome, lower back pain, and myofascial pain syndrome. In February, Rodman observed fibromyalgia

trigger points. Mr. Ousley also underwent a septoplasty. Also in February, Mr. Ousley reported a decrease in headaches, some success with physical therapy, and feeling better. He returned to work for six days, but then had to stop working because of pain. In March when Mr. Ousley returned to Rodman, he informed her that working had reaggravated his condition. He received a steroid injection, more physical therapy, and a transcutaneous electrical nerve stimulation unit. In March, Mr. Ousley also saw his primary care physician, Dr. Christensen. In April, Mr. Ousley saw Dr. Staley, a rheumatologist. Staley diagnosed fibromyalgia, found tender points, and prescribed an anti-inflammatory medication. Mr. Ousley continued to see his doctors throughout 1998, with complaints of headaches and chronic pain. In addition, he saw psychologist Dr. Matthew La Grange, who performed a consultative examination and diagnosed Mr. Ousley with an adjustment disorder.

In September 1998, Rodman wrote a letter indicating that Mr. Ousley should be limited to lifting, bending, pushing, or pulling items of four pounds or less. That same month Mr. Ousley's physical capabilities were evaluated by an occupational therapist, who determined that Mr. Ousley could lift between twenty-five and forty-one pounds. Two state agency psychologists examined Mr. Ousley in fall of 1998 and determined that although he had an adjustment disorder, he did not have a "severe" mental impairment as that term is used in Social Security regulations.

In November 1998, a non-examining state agency physician, Dr. S. Davis, determined that Mr. Ousley could perform "light work." In January 1999, Mr. Ousley

obtained approval to see Silbert again. Mr. Ousley was prescribed methadone for his pain. Mr. Ousley also began seeing Dr. Elizabeth Van Tassel, a psychologist, who diagnosed Mr. Ousley with moderately severe depression. Mr. Ousley continued to see Silbert, Van Tassel, and Rodman, and take a variety of pain medications and anti-depressants.

On May 1, 1998, Mr. Ousley applied for DIB. His application was denied initially and on reconsideration. On June 16, 1999, a hearing was held before an administrative law judge (“ALJ”). Mr. Ousley, his wife, a medical expert, Dr. Emily Giesel, and a vocational expert (“VE”) all testified at the hearing. Giesel testified that Mr. Ousley had severe impairments of fibromyalgia, headaches, depression, and peptic ulcer disease, but that these impairments did not meet or equal a listed impairment. She further testified that Mr. Ousley could perform light work as long as he was not in contact with dust and gases. On August 3, a consultative psychological examination was performed on Mr. Ousley at Giesel’s recommendation. Later in August, the ALJ asked the VE questions through interrogatories, which were answered that same month. The VE testified that there were jobs satisfying Mr. Ousley’s residual functional capacity (“RFC”) as cashiers, bookkeepers, and general office clerks. On October 6, the ALJ decided that Mr. Ousley was not disabled at steps four and five of the five-step procedure. Mr. Ousley then initiated this action for judicial review of the Commissioner’s final decision.

II. Standard of Review

In reviewing the final decision of the Commissioner under 42 U.S.C. § 405(g), the court must accept as conclusive the findings of fact made by the Commissioner if such findings are supported by substantial evidence. *Perkins v. Chater*, 107 F.3d 1290, 1296 (7th Cir. 1997). 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)). If the record contains such support, the Court must affirm the decision of the Commissioner unless he has made an error of law. *Wolf v. Shalala*, 997 F.2d 321, 322 (7th Cir. 1993); *Veal v. Bowen*, 833 F.2d 693, 696 (7th Cir. 1987). Although the task before the Court is not to substitute its judgment for that of the Commissioner by reconsidering facts, reweighing or resolving conflicts in evidence, or deciding questions of credibility, *Cannon v. Apfel*, 213 F.3d 970, 977 (7th Cir. 2000), the Court will not simply rubber stamp the decision without critically reviewing the evidence as a whole. *Arbogast v. Bowen*, 860 F.2d 1400, 1403 (7th Cir. 1988); see also *Ehrhart v. Sec’y of Health & Human Servs.*, 969 F.2d 534 (7th Cir. 1992).

In considering the record as a whole, the Court must look at all of the relevant evidence, not just the evidence that supports the ALJ’s conclusion. *Herron v. Shalala*, 19 F.3d 329, 333 (7th Cir. 1994). The Court must also consider “whatever in the record fairly detracts from [the] weight” of the ALJ’s determination. *Telespectrum, Inc. v. Pub. Serv. Comm’n*, 227 F.3d 414, 423 (6th Cir. 2000); *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986). Of course, where conflicting evidence allows reasonable minds to differ, the

responsibility for the decision of whether a claimant is entitled to benefits falls to the Commissioner. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

III. Discussion

To be eligible for disability benefits, the claimant must establish that he suffers from a disability within the meaning of the Social Security Act. "Disability" is defined as the "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). In determining whether a claimant is disabled under the Act, the fact-finder is required to make the following five-step inquiry:

- (1) Is the claimant presently unemployed?
- (2) Is the claimant's impairment severe?
- (3) Does the impairment meet or exceed one of a list of specific impairments?
- (4) Is the claimant unable to perform his or her former occupation?
- (5) Is the claimant unable to perform any other work within the economy?

Rucker v. Chater, 92 F.3d 492, 494 (7th Cir. 1996) (summarizing the agency regulations set forth in 20 C.F.R. §§ 404.1520). "If a claimant satisfies steps one, two, and three, she will automatically be found disabled. If a claimant satisfies steps one and two, but not three, then she must satisfy step four." *Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995). The burden of proof is on the claimant at steps one through four. *Young v. Sec'y of Health & Human Servs.*, 957 F.2d 386, 389 (7th Cir. 1992). If the claimant meets this burden, the Commissioner must prove that the claimant is capable of performing work which exists in

the national economy, in light of the claimant's age, education, and past work experience.

Luna v. Shalala, 22 F.3d 687, 689 (7th Cir. 1994).

The ALJ found here that Mr. Ousley satisfied step one in that he had not engaged in substantial gainful activity since November 7, 1997, the alleged disability onset date. Further, Mr. Ousley satisfied step two because the impairment was severe. Step three was not satisfied because the impairment or combination of impairments did not qualify under the Listing of Impairments. Step four was also not satisfied in that Mr. Ousley was found able to perform his past relevant work. Specifically, the ALJ determined that Mr. Ousley's RFC met the definition for light work and would allow him to return to his previous job as a security guard, as the job is generally performed in the economy. In the alternative, the ALJ found that step five was not satisfied because Mr. Ousley was found able to perform a significant number of jobs in the economy.

Mr. Ousley challenges these findings on eight bases: (1) the ALJ's decision is based on a material misstatement of Dr. Giesel's testimony; (2) the ALJ failed to evaluate important aspects of Dr. Giesel's testimony; (3) the ALJ failed to evaluate Dr. Rodman's June 1999 opinions; (4) the ALJ failed to evaluate core evidence related to Mr. Ousley's RFC and credibility; (5) the ALJ's finding that Mr. Ousley's wife was credible was inconsistent with his RFC finding; (6) the ALJ violated *Sarchet*; (7) the ALJ's step four finding was defective; and (8) the VE's step five data was inconsistent with the Dictionary of Occupational Titles.

Mr. Ousley first claims that the ALJ misstated Giesel's testimony. In the opinion, the ALJ stated that: "Dr. Giesel testified that the claimant's alleged symptoms far exceeded what reasonably could be expected" and "In comparing the claimant's allegations to the objective medical evidence the most salient points are that Dr. Giesel stated the claimant's subjective complaints far exceed what could reasonable be expected given his physical impairments" (Tr. at 18, 22.) Mr. Ousley contends that Giesel did not make such a statement and that this misstatement requires remand for a rehearing.

Although this court must uphold the ALJ's decision if it is supported by "substantial evidence," it cannot uphold the decision if the ALJ does "not build an accurate and logical bridge between the evidence and the result." *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996). This means that the ALJ's decision cannot be based on "illogical or erroneous statements that bear materially on [the ALJ's] conclusion." *Id.*

In this case, Giesel testified on pages 437 to 461 of the transcript. A careful review of that testimony and the record as a whole does not support the ALJ's statement that Giesel stated that Mr. Ousley's subjective complaints far exceed what could reasonably be expected. The closest thing in the record is Giesel's agreement with Exhibit 12F, which was a functional capacity evaluation in which the doctor claimed that Mr. Ousley's symptoms were "not entirely credible." However, the thrust of Giesel's testimony appears to be on what Mr. Ousley's work limitations were and the statement in the evaluation is a far cry from "subjective complaints far exceed what could reasonably be expected given his physical impairments."

The next issue is whether this erroneous conclusion materially affected the ALJ's determination. Although a reviewing court can hardly be sure of the weight according by the ALJ to each piece of evidence, in this case, the ALJ describes the misstatement of Giesel's testimony, along with information about Mr. Ousley's mental problems, as the most salient points in comparing claimant's allegations to the objective medical evidence. Furthermore, Mr. Ousley's primary physical condition is fibromyalgia, a disease whose symptoms are entirely subjective. *Sarchet*, 78 F.3d at 306. Because the ALJ considered a misstatement of Giesel's testimony as one of the most salient points in disregarding Mr. Ousley's complaints of fibromyalgia pain, a remand is required.

Although the court does not need to reach the other issues, it also expresses concern over the ALJ's "misstatements" made in connection with his step four decision and apparent inconsistencies between the VE's testimony and the Dictionary of Occupational Titles. On remand, the ALJ should carefully consider these issues.

IV. Conclusion

For the foregoing reasons, the Commissioner's decision is **REVERSED** and this case is remanded for consideration of the issues discussed above.

ALL OF WHICH IS ORDERED this 27th day of March 2002.

John Daniel Tinder, Judge
United States District Court

Copies to:

G. Robert Wright
Attorney at Law
232 North College
Indianapolis, IN 46202

Thomas E. Kieper
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048