

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KATHLEEN IRWIN, o/b/o)
JACK IRWIN,)
Plaintiff,)
)
v.) Civil Action No. 89-1421
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
Defendant.)

R E P O R T

GARY L. LANCASTER,
United States Magistrate

Plaintiff brought this action on behalf of her minor son, Jack Irwin, pursuant to the Social Security Act ("Act"), 42 U.S.C. §§ 405(g) and 1383(c). Plaintiff seeks a judicial review of the final decision of the Secretary of Health and Human Services denying her application for child's Supplemental Security Income benefits under Title XVI of the Act. Before the court are the parties' cross motions for summary judgment. Because substantial evidence does not exist to support the final decision of the Secretary, the decision should be reversed and summary judgment entered in favor of plaintiff.

I. PROCEDURAL HISTORY

On October 8, 1987, plaintiff filed an application with the Social Security Administration for child's Supplemental Security Income benefits, alleging Jack has been disabled since 1982 due to mental impairment. The Secretary denied the application both initially and on reconsideration.

Plaintiff then requested and received a hearing before an Administrative Law Judge ("ALJ") on July 13, 1988. Upon hearing, the ALJ determined that the child does not meet or equal the statutory requirements for disability. The Appeals Council denied plaintiff's request for review; accordingly, the ALJ's decision became the final decision of the Secretary.

Plaintiff filed the present action on June 29, 1989. Plaintiff contends that the Secretary's decision is not supported by substantial evidence and seeks an order reversing the Secretary's decision or, alternatively, vacating the decision and remanding the case to the Secretary for a new hearing. Defendant seeks an order affirming the Secretary's decision.

II. BACKGROUND

At the ALJ hearing in July, 1988, plaintiff's testimony provided an historical overview of Jack's problems.

Jack also testified briefly. The relevant testimony is summarized as follows.

Jack was born November 2, 1975. He has two older and two younger siblings; his mother, plaintiff herein, raises the children alone. By all reports, plaintiff is very unstable, and has been hospitalized several times and has a problem with alcohol abuse. The family is supported by welfare. Jack does not know his father nor does he have a father figure.

Jack's problem acutely manifested in 1982 when he was six to seven years old and in the first grade. He acted violently against others by pulling knives on people and destroying property or stealing things. He acted violently against himself by throwing himself down the stairs. There was concern about suicide attempts. He also exhibited psychotic behavior such as talking to imaginary rabbits and rats. Jack was committed to Bradley Center, a residential treatment program. In October 1983, Jack was admitted to Western Psychiatric Institute and Clinic ("WPIC"), for ninety days, for evaluation. He returned to the Bradley Center where he stayed until August 1984 when he allegedly threatened to kill a staff person. In August, 1984, Jack was placed with his mother. A month later, he was readmitted to WPIC for four weeks. Jack was then placed in Holy Family Institute in

October 1984 because of aggressive and destructive behavior. Thereafter, plaintiff returned home and attended a special program in the public school system until he verbally abused the teacher and threw a desk at her. He was returned to WPIC in June 1987 when he was diagnosed manic-depressive and placed on Lithium by Dr. Vallano, his treating physician. Plaintiff and his mother see Doctor Vallano at WPIC weekly.

Plaintiff testified that when Jack takes the Lithium, his behavior was much better controlled, but he refuses to take the Lithium as prescribed because it irritates his stomach. Plaintiff reported that the doctor offered no solution to the problem of the upset stomach and told plaintiff that Jack was a typical, normal 12 year old boy. However, this testimony is inconsistent with Dr. Vallano's report in which he stated Jack's Lithium level would be modified to alleviate the gastrointestinal upset. In the same report dated July 22, 1988, Dr. Vallano diagnosed Jack as meeting the criteria for "oppositional disruptive behavior¹ on

+ ¹The American Psychiatric Association describes oppositional disruptive behavior as:

The essential feature of this disorder is a pattern of negativistic, hostile, and defiant behavior without the more serious violations of the basic rights of others that are seen in Conduct Disorder. The diagnosis is made only if the oppositional and defiant behavior is much more common than that seen in other people of the same mental age.

Axis I of the DSM-III-R as well as a history of dysthemic disorder² and specified family circumstances. On Axis II the patient has a developmental reading disorder."³ (T. 152). Dr.

Children with this disorder commonly are argumentative with adults, frequently lose their temper, swear, and are often angry, resentful, and easily annoyed by others. They frequently actively defy adult requests or rules and deliberately annoy other people. They tend to blame others for their own mistakes or difficulties.

Diagnostic and Statistical Manual of Mental Disorders 56 (3d ed. 1987) ("DSM-III-R").

²Dysthemic disorder is defined as:

The essential feature of this disorder is a chronic disturbance of mood involving depressed mood (or possibly an irritable mood in children or adolescents), for most of the day more days than not, for at least two years (one year for children and adolescents). In addition, during these periods of depressed mood there are some of the following associated symptoms: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness.

Id. at 230.

³Developmental Reading Disorder is defined as:

The essential feature of this disorder is marked impairment in the development of word recognition skills and reading comprehension that is not explainable by Mental Retardation or inadequate schooling and that is not due to a visual or hearing defect or a neurologic disorder. The diagnosis is made only if this impairment significantly interferes with academic achievement or with activities of daily living that require reading skills.

Id. at 43.

Vallano concluded, "Overall, in comparison to the patient's status from ages 8-11 where he was requiring constant hospitalization or partial hospitalization, an overall improvement in his status has been seen, but this is mild at best." (T.152).

Plaintiff's behavioral problems continue. The hearing was conducted in July and his mother indicated that he had already been kicked out of the local swimming pool for the summer. About six weeks before the hearing, plaintiff pulled a knife on a little boy and verbally threatened the boy's mother when she intervened. The police were called in to mediate the dispute. He has been refused entrance to a local grocery store for retail theft. Plaintiff and his mother testified that he does not get along with any of his siblings. In response to a question about plaintiff's violent behavior toward the family, his mother testified that the week before plaintiff had verbally abused his oldest sister and threatened to harm her child when it was born. He is also so rough with his five year old brother that his mother has to intercede. He has no friends in school or in the neighborhood. He also tied a lighted firecracker to a neighbor's door.

Finally, plaintiff is patently unable to function in

the school setting. Plaintiff consistently tests within the average intelligence range but is incapable of achieving due to emotional disturbance. During the school year before the hearing, plaintiff attended public school. He was mainstreamed with selected learning disabled classes but his teachers could not handle him so he was placed in what his mother referred to as a special school within the public school system. He flunked his last year of school because he missed too many days due to suspensions and possibly truancy.

When asked if plaintiff had any recent altercations at school, fighting with other children, his mother replied, "He's not a fighter, he, he mouths off to people but he's scared, you know, he is, he's not a fighter." He has mood swings from angry and mad to sad and quiet. He gets mad and has temper tantrums during which he becomes foul-mouthed and verbally abusive.

Plaintiff's pastime includes collecting comic books and watching television several hours a day. There is no indication that he engages in constructive or self-directed activity during his free time or that he plays with other children in the neighborhood. Plaintiff has problems sleeping in his own bedroom because he is afraid to be alone. He frequently stays up until 3:30 a.m. Plaintiff's most

constructive time is when he helps a woman who owns a bookstore. He does odd jobs for her in exchange for pocket change and comic books.

Plaintiff presently has no problem taking care of his normal personal hygiene. He occasionally helps with household chores if his mother pays him.

III. Standard of Review

A district court's review of the Secretary's findings is limited to a determination of whether the findings are supported by "substantial evidence." Richardson v. Perales, 402 U.S. 389 (1971). Substantial evidence is more than a mere scintilla of evidence but less than a preponderance; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981) (quoting Richardson v. Perales at 401). The court may neither reweigh the evidence, nor may we reverse the Secretary merely because we would have decided the claim differently. Cotter v. Harris, 642 F.2d at 705. Our reviewing authority is confined to an examination of the entire record to determine whether there is a rational basis for the Secretary's conclusions. Miller v. Harris, 490 F. Supp. 1184 (W.D. Pa. 1980). When inconsistencies appear in

the evidentiary record, the Secretary may resolve issues of credibility, but in doing so, it must provide some rationale for the manner in which the inconsistencies are ultimately resolved. Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). With these concepts in mind, we turn to the merits of the claim.

IV. DISCUSSION

The standard for evaluating claims for disabled children's benefits under Title XVI of the Social Security Act is whether the child has an impairment which is "of comparable severity" to an impairment which would render an adult disabled. 42 U.S.C. § 1382c(a)(3)(A). Under section 416.924, the Secretary will find that a child under age 18 is disabled if he or she:

(a) Is not doing any substantial gainful activity; and

(b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)--

(1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or

(3) Is determined by [the Secretary] to be medically equal to an impairment listed in

Appendix 1 of Subpart P of Part 404 of this chapter.

20 C.F.R. § 416.924. See Wier v. Heckler, 734 F.2d 955, 959 (3d Cir. 1984). The Listing of Impairments consists of two parts: Part A contains medical criteria that apply to adult persons age 18 and over; Part B contains additional medical criteria that apply only to the evaluation of impairments of persons under age 18. In evaluating disability for a person under age 18, Part B is to be considered first. If the medical criteria in Part B do not apply, then the medical criteria in Part A will be considered. 20 C.F.R. § 416.925(b).

In the case at bar, the Administrative Law Judge first determined that section 112.04 of Part B most directly applied to Jack's condition but found that his condition did not meet or equal the requirements of that section. Listing 112.04 states,

112.04 Functional nonpsychotic disorders.
Documented by psychiatric evaluation and supported, if necessary, by the results of appropriate, standardized psychological tests and manifested by marked restriction in the performance of daily age-appropriate activities; constriction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others; together with persistence of one (or more) of the following:

A. Psychophysiological disorder (e.g. diarrhea,

- asthma); or
- B. Anxiety; or
- C. Depression; or
- D. Phobic, obsessive, or compulsive behavior; or
- E. Hypochondriasis; or
- F. Hysteria; or
- G. Asocial or antisocial behavior.

20 C.F.R., Part 404, Subpart P, Appendix 1, § 112.04.

The ALJ concluded that, by diagnosis, Jack fit within this category but that he did not manifest the requisite restrictions in daily activity. In analyzing the record, the ALJ reported:

The medical evidence in the instant case reveals that the claimant does suffer from severe emotional problems, including diagnoses of conduct disorder and dysthymic disorder. Claimant has a long history of treatment for these conditions, and he has required in-patient hospitalization on several occasions. The claimant's impairments are most appropriately evaluated under section 112.04 (functional nonpsychotic disorders) of Part B of Appendix 1, Subpart P, Regulations No. 4. It is noted that the claimant's impairment does have elements of anxiety, depression and asocial or antisocial behavior. However, there is no indication that the claimant suffers from a marked restriction in the performance of daily age-appropriate activities, constriction of age-appropriate interests, deficiency of age-appropriate self-care skills, or a markedly impaired ability to relate to others.

Plaintiff contends that the ALJ's conclusion that her son is not restricted in engaging in age-appropriate activities is not supported by substantial evidence. We agree that the facts of record do not justify this conclusion.

Between the ages of 8 and 11, Jack spent almost the entire time either in WPIC, Holy Family Institute or the Bradley Center because of his behavioral and conduct difficulties. Prior to the hearing, he had spent approximately one and a half years with his mother, with a six week hospitalization at WPIC for aggressive and destructive behavior. He flunked that year of schooling not because of intellectual inferiority but because of his inability to control his behavior and his refusal to participate in class activities or to do the work assigned, either in class or as homework.⁴ As his mother testified, within the two to three months prior to the hearing, Jack had displayed aggressive behavior toward his siblings, at the pool, and at neighborhood children and adults.

In determining that Jack could engage in age-appropriate activities, the ALJ focused on the fact that he helped out in the book store, maintained his own personal hygiene and interacted appropriately with his peers

⁴Notes from Jack's teachers during that year include: "Jack easily distracted"; "does not complete most assignments"; "not good in group instruction"; "bothers the other children"; "incomplete assignments"; "passive in class"; "afraid to try"; "won't do assigned work"; "discourteous"; "didn't follow instructions." Each teacher had similar comments about him.

"intermittently."⁵ These few straws of appropriate behavior clearly are outweighed by the preponderance of evidence which shows Jack as a maladapted boy who consistently engaged in inappropriate, antisocial behavior. The regulation requires only a restriction in the performance of daily age-appropriate activities, not a complete cessation. See generally Williams on behalf of Williams v. Bowen, 859 F.2d 255 (2d Cir. 1988) (a claimant need not be an invalid to be disabled). See also Aviles v. Bowen, 715 F. Supp. 509 (S.D. N.Y. 1989); Wills v. Secretary of Health & Human Resources, 686 F. Supp. 171 (W.D. Mich. 1987).

While it is possible, and certainly hopeful, that Jack is on the upswing, and sometime will be functioning in normal society, the record clearly established that since 1982, he has not done so. Accordingly, the Secretary's decision should be reversed.

⁵The only evidence showing that Jack plays with other children in the neighborhood comes from his own testimony that he "occasionally" plays with two boys in his neighborhood that are three to four years younger than him. This testimony is hardly "substantial" in light of the overwhelming evidence that Jack does not make friends or interact appropriately as a twelve year old boy.

United States Magistrate

Dated: November 29, 1989

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