

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

Michael A. Wilson,

Plaintiff,

v.

Carolyn W. Colvin, Acting Commissioner
of Social Security Administration,

Defendant.

Case No.3:13-CV-802 JVB

OPINION AND ORDER

Plaintiff Michael A. Wilson seeks judicial review of the final decision of Defendant Acting Commissioner of Social Security, who denied his applications for Disability Insurance Benefits under the Social Security Act.¹ Because Plaintiff has failed to identify any error in the ALJ's decision, the Court's affirms that decision.

A. Procedural Background

On May 8, 2013, Administrative Law Judge ("ALJ") Jennifer Fisher issued a decision finding Plaintiff not disabled because he was still able to work in his previous profession as a welder; in addition, he could do a significant number of light-level jobs in the national economy. The Appeals Council denied Plaintiff's request for a review, thus making the ALJ's decision final. Plaintiff appeals to this Court.

¹ Plaintiff was not represented by counsel during the administrative proceedings nor is he represented before this Court.

After the Commissioner's response to Plaintiff's opening brief, Plaintiff filed three motions: a motion for discovery (DE 21); a motion for court subpoena (DE 22); and a motion for summary judgment (DE 23). These motions relate to the Commissioner's argument that Chiropractor Joshua Martens's treatment notes regarding Plaintiff show only mild impairments. Plaintiff submits that he does not know who Joshua Martens is and that he has never been treated by him. He wants to review Dr. Marten's records for his alleged treatment. However, the documents he is seeking are already in the record and, during his administrative hearing in February 2013, Plaintiff attested that the record was accurate. Therefore, Plaintiff's request for a subpoena to produce Dr. Martens's documents is moot. Moreover, Plaintiff points to no statute, regulation, rule, or case allowing plaintiffs to conduct discovery on appeal from the Commissioner's decisions. However, since Dr. Marten's records aren't necessary for this Court to decide Plaintiff's appeal, the Court will not consider them.²

B. Parties' Contentions

Plaintiff's opening brief gets to the point: he suffered a back injury at work in 1999 and settled with his employer for a payment of \$5,500, accounting for a 5% permanent partial impairment. According to Plaintiff, "they wouldn't have paid [him] unless there was hurt." (Pl.'s Opening Brief, DE 11-1, at 2). The doctor who evaluated him told him that his "condition would only get worse over time if [he] didn't have surgery for repairing degenerating disks." (*Id.*) Since then, he has applied three times for disability insurance benefits with the Social Security Administration, but without success.

He is appealing his third determination because the last physician to evaluate him, Dr.

² Dr. Martens's records would suggest that Plaintiff suffered no disability as he experienced only minor, intermittent back pain.

Thomas Barbour, found his condition to be severe: “widespread back, hip and foot issues along with severe hypertension and depression.” (*Id.* at 2—3.) Dr. Barbour’s finding also included a recommendation for a walking cane. Additionally, Dr. Barbour prohibited Plaintiff from driving and noted that he had significant limitations in sitting and walking. (*Id.* at 3.) Plaintiff wonders why he was sent to this doctor unless the doctor’s findings are honored, and that, in essence, is Plaintiff’s main contention in his four-page opening brief.

In his Reply brief he submits that he has been suffering from these ailments for some time but has been unable to get medical care because he is uninsured and poor. He also complains that the ALJ did not have a medical expert at the administrative hearing. Apparently, he had some questions prepared but did not get a chance to ask them.

As for the Acting Commissioner, she points to multiple inconsistencies in the record between Plaintiff’s subjective complaints and clinical records as well as contradictions in what Plaintiff said over the years. The Acting Commissioner’s main argument amounts to this: it is not so much Dr. Barbour whom the ALJ disbelieved, but Plaintiff, upon whose subjective complaints Dr. Barbour made his diagnoses.

B. Summary of Medical Evidence Considered by the ALJ

Plaintiff argued before the ALJ that his disability began on August 15, 2010, but it all started in 2000 when he suffered a work-related back injury that rendered him 5% permanently impaired.

His next visit to a doctor is in March 2009 (remember, Plaintiff disputes that he was ever treated by the chiropractor), when Plaintiff was examined at the request of the state agency by

Dr. Strong.³ Dr. Strong found no limitations except for mild pain when Plaintiff was bending and flexing. Although Plaintiff came with a cane to the exam, Dr. Strong could not find a medical need for the cane. Moreover, Dr. Strong concluded that Plaintiff had no limitations in his ability to sit, stand, walk, carry, or lift.

A year and a half later, in November 2011, Plaintiff saw Dorwyn C. Colier, M.D., at the request of the state agency. Plaintiff told Dr. Collier that he took over-the-counter aspirin for his back pain. Dr. Collier found that Plaintiff had normal posture and gait and had no issues moving around. The x-rays showed disc generation between L5-S1 and degenerative osteoarthritis.

A week later A. Dobson, M.D., reviewed Dr. Collier's findings and concluded that Plaintiff's condition was not severe. Several months later, another state reviewing physician affirmed Dr. Dobson's conclusions.

Plaintiff sought no medical treatment for the next year. As such, at the February 19, 2013, hearing, the ALJ asked Plaintiff to undergo a consultative examination with Thomas Barbour, M.D., and ordered that x-rays be done. When Dr. Barbour examined Plaintiff, the x-rays and the radiology report were still pending. Hence, his examination and ultimate conclusions rested primarily on Plaintiff's subjective complaints.

Plaintiff reported pain in his neck, low back, right ankle, feet, and left hip (Tr. 449). He reported having this pain every day, and at times he needed help with his activities of daily living, including getting in and out of the bathtub. (*Id.*) He said he couldn't stand longer than 10 minutes at a time and could walk only 60 feet. (*Id.*) Despite this pain, Plaintiff admitted that he had no ongoing treatment for his reported problems. (*Id.*) Upon exam, Dr. Barbour observed Plaintiff to have a stooped forward station, and wide-based gait. (*Id.*) He demonstrated a severe limp favoring the right side, but was not ataxic or lurching. (*Id.*) He had mild difficulty getting

³ The examination was related to Plaintiff's previous application for disability benefits.

on and off the examination table, complaining of back pain. (*Id.*) Plaintiff had a poor ability to walk on his heels, toes, and tandem walk. (*Id.*) He was unable to hop or squat. (*Id.*) His active range of motion was unremarkable except for some pain related limitation in his cervical spine and forward flexion/extension/lateral flexion of his lumbar spine. (*Id.*) Plaintiff demonstrated normal muscle strength throughout except in his thighs (Tr. 449.) His deep tendon reflexes were normal as was his sensation, grip strength, and fine finger movements. (*Id.* at 449--50.) Straight leg raising was negative. (*Id.* at 450.) Dr. Barbour's impression was that Plaintiff had widespread musculoskeletal problems and severe hypertension which continued to interfere with all daily activities. (*Id.*) Dr. Barbour ordered several x-rays studies.

Dr. Barbour completed a medical source statement regarding Plaintiff's physical ability to perform work-related activities. (Tr. 459--64). Dr. Barbour found Plaintiff could lift and carry up to 100 pounds frequently, and up to 10 pounds occasionally.⁴ (Tr. 459.) When asked what clinical findings support this assessment, Dr. Barbour noted "pain-back." (*Id.*) Next, Dr. Barbour opined that Plaintiff could sit 10 minutes total in an eight hour day, stand 10 minutes total in an eight-hour day, and walk 10 minutes total in an eight-hour day. (Tr. 460.) He again noted that these limitations were on account of "pain." (*Id.*) Dr. Barbour also indicated that Plaintiff occasionally required the use of a cane to ambulate (if he was leaving his house). (*Id.*) Dr. Barbour noted that Plaintiff could only walk 60 feet without a cane. (*Id.*) Dr. Barbour indicated that this limitation was on account of "pain." (*Id.*) Dr. Barbour noted that Plaintiff could only use his hands occasionally for handling, fingering, feeling, and pushing/pulling, and could never use his hands to reach overhead or in other directions. (Tr. 461.) Dr. Barbour also noted that Plaintiff could never use his feet for the operation of foot controls. (*Id.*) He cited "pain" in support of this limitation. (*Id.*) Next, Dr. Barbour noted that Plaintiff could not engage

⁴ This seems counterintuitive, but that is exactly what Dr. Barbour's notes reflect.

in any postural activities (no climbing of stairs, ramps, ladders, or scaffolds; no balancing; no stooping; no kneeling; no crouching, and no crawling) on account of “pain.” (Tr. 462.) Dr. Barbour also restricted Plaintiff from all environmental exposure (no unprotected heights; moving mechanical parts; operating a motor vehicle; humidity and wetness; dust, odors, fumes, and pulmonary irritants; extreme cold; extreme heat; and vibrations) due to “pain” (Tr. 463.) Finally, Dr. Barbour opined that Plaintiff could not engage in activities like shopping or walking a block at a reasonable pace on rough or uneven surfaces due to “pain” (Tr. 464.)

The lumbar x-rays that became available after Dr. Barbour’s examination showed degenerative disc disease at L5-S1 with mild associated facet arthritis in his lower lumbar and lumbosacral facets and bilateral sacroiliitis (Tr. 451.) The x-rays of Plaintiff’s bilateral feet were normal, and his left hip x-ray showed minimal left hip osteoarthritis (Tr. 453--54.)

C. The ALJ’s Findings

The ALJ found that Plaintiff suffered three medically determinable severe impairments: lumbar degenerative disc disease, osteoarthritis, and hypertension. None of these impairments, by themselves or in combination with each other, meet or medically equal the severity of the listed impairments in 20 C.F.R. 404, Subpart P, Appendix 1. On the basis of these limitations, the ALJ found that Plaintiff could continue working in his previous profession as a welder as well as work other jobs in national economy classified as light work.

D. Standard of Review

This Court has the authority to review Social Security Act claim decisions under 42 U.S.C. § 405(g). The Court will uphold an ALJ's decision if it is reached under the correct legal standard and supported by substantial evidence. *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005). This Court will not reconsider facts, re-weigh the evidence, resolve conflicts in the evidence, decide questions of credibility, or substitute its judgment for that of the ALJ. *Boiles v. Barnhart*, 395 F.3d 421, 425 (7th Cir. 2005). This Court will, however, ensure that the ALJ built an "accurate and logical bridge from the evidence to his conclusion so that, as a reviewing court, we may assess the validity of the agency's ultimate findings and afford a claimant meaningful judicial review." *Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002).

E. Disability Standard

To qualify for disability insurance benefits, the claimant must establish that he is unable "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)..

A successful claimant must show:

(1) he is not presently employed; (2) his impairment is severe; (3) his impairment is listed or equal to a listing in 20 C.F.R. § 404, Subpart P, Appendix 1; (4) he is not able to perform her past relevant work; and (5) he is unable to perform any other work within the national and local economy.

Scheck v. Barnhart, 357 F.3d 697, 699–700 (7th Cir. 2004).

An affirmative answer leads either to the next step or, on steps three and five, to a finding that the claimant is disabled. *Zurawski v. Halter*, 245 F.3d 881, 886 (7th Cir. 2001). A negative answer at any point other than step three stops the inquiry and leads to a finding that the claimant is not disabled. *Id.* The burden of proof lies with the claimant at every step except the fifth,

where it shifts to the Commissioner. *Clifford v. Apfel*, 227 F.3d 863, 868 (7th Cir. 2000).

F. Analysis

As noted above, Plaintiff's main contention on appeal is that the ALJ largely disregarded Dr. Barbour's opinion about his health: "Is the credibility of the doctors being put into question, [sic] these are Indiana State Board of Medical Doctors. They have passed all requirements and taken oaths to serve the public in their best ability." (Pl.'s Opening Br., DE 11-1, at 3.) Yet, Plaintiff fails to understand that it was his credibility that the ALJ had problems with when she discounted his subjective complaints and rejected Dr. Barbour's conclusions that were largely based on Plaintiff's subjective complaints of pain.

The ALJ noted various inconsistencies in Plaintiff's medical record. For example, when Plaintiff filed his application for disability, he reported that he stopped working in August 2010. (Tr. 24.) At the hearing, he initially testified that he stopped working in November 2011, but later in his testimony, "to be totally honest," he confirmed that he last worked in September 2012 (Tr. 24, 44, 48, 51, 202-06.) Not only was Plaintiff still working in 2012, two years after his alleged disability onset date, but he was working at the level of substantial gainful activity (Tr. 19, 207—08.)

The ALJ also highlighted other inconsistencies in Plaintiff's reports, including that Plaintiff had initially testified that he quit his job in 2001 because of a back injury and increased back pain, but later stated he was fired from his job after agreeing to a worker's compensation settlement (Tr. 24, 46, 48.) Moreover, earlier in the record, he inconsistently reported that he stopped working in October 2008 "[b]ecause of my condition and other reasons company cut back." (Tr. 236.)

The ALJ also questioned Plaintiff's credibility by pointing out that, in July 2001, when Plaintiff underwent a functional capacity evaluation as part of his worker's compensation claim (Tr. 24, 382), he was uncooperative and limited himself unnecessarily. (Tr. 24, 382.) He also refused to perform at maximum capacity, demonstrated inconsistent performances on multiple tasks, and demonstrated inappropriate pain behavior during testing procedures. (Tr. 382.) In spite of limiting his abilities, he showed "excellent tolerance" for sitting, standing, walking, climbing stairs, ladders, and balancing, and even had the ability to push 36 pounds, pull 39 pounds, carry 50 pounds in one hand, 65 pounds while carrying in front of his person, and lift 40 pounds from his waist to overhead (Tr. 382). In light of the findings, Dr. Desmarais opined that Plaintiff did not need permanent work restrictions, and should be able to perform his job duties as a welder. (Tr. 382.) This inconsistency, like the others, casts doubt on Plaintiff's claims of total disability.

Plaintiff seems to suggest that there is a cutoff time for credibility assessment, but common sense must prevail: if a person has been shown to lack credibility, one is not required to suddenly believe him just because many moons have changed.

Moreover, Plaintiff's minimal treatment undermines his claims of disability. Beyond the over-the-counter aspirin, there's no suggestion of any serious treatment for the alleged conditions. And while Plaintiff claimed that he had no medical insurance or financial ability to seek treatment, there's nothing in the record to suggest that he sought treatment or medication from free or low cost clinics. *See* Social Security Ruling (SSR) 82-59 (in cases where an individual is unable to afford prescribed treatment and free community resources are unavailable, all possible resources (e.g., clinics, charitable and public assistance agencies, etc.), must be explored and contacts with such resources and the claimant's financial circumstances must be documented).

As for Dr. Barbour's opinion, it was based in large part on Plaintiff's self-reports of pain. Moreover, Plaintiff contradicted some of Dr. Barbour's findings just days later when relating his medical history to other healthcare providers. For example, Dr. Barbour found that Plaintiff needs assistance with getting in and out of the shower, yet Plaintiff lived alone and said during a mental status consultative examination that he was able to care for his personal needs and hygiene. Also, while Dr. Barbour noted that Plaintiff could not shop on account of pain, two days later, Plaintiff reported that he was able to shop independently. (Tr. 466--67.) Moreover, the x-rays done shortly after Dr. Barbour's evaluation did not reveal any debilitating conditions. For all these reasons, the ALJ did not err in discounting Dr. Barbour's opinion and siding with evidence that did not support a disability finding. Plaintiff failed his burden of proof before the ALJ and he cannot remedy this deficiency here.

F. Conclusion

As explained above, the Court denies Plaintiff's motion for discovery (DE 21), motion for court subpoena (DE 22), and motion for summary judgment (DE 23). And because Plaintiff has not shown error in the ALJ's decision, the Court affirms.

SO ORDERED on September 30, 2014.

S/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE