Ostrander v. Social Security, Commissioner of Doc. 17

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MYRA OSTRANDER,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 14-13151
Honorable Laurie J. Michelson
Magistrate Judge Mona K. Majzoub

OPINION AND ORDER
AFFIRMING DECISION OF THE COMMISSIONER OF SOCIAL SECURITY

In 2012, Plaintiff Myra Ostrander applied for period of disability benefits, disability insurance benefits, and social security income. In her applications, she alleged that she had become disabled from full-time work in August 2008. An administrative law judge acting on behalf of the Commissioner of Social Security thought otherwise, and concluded that Ostrander could perform light, unskilled work despite her health conditions. After the Social Security Administration's Appeals Council declined to review Ostrander's case, Ostrander appealed here.

Ostrander's appeal was referred to Magistrate Judge Mona K. Majzoub for all pretrial matters. (Dkt. 2) Following that referral, Ostrander's counsel was terminated from the case and the motion he filed was stricken from the docket. (*See* Dkt. 15.) Ostrander was given time to retain new counsel but did not. (*See* Dkts. 15, 16.) The Magistrate Judge then gave Ostrander a deadline to file her own *pro se* motion for summary judgment (and warned that the failure to do so might result in dismissal), but Ostrander did not comply. (*See* Dkts. 15, 16.) As such, the Magistrate Judge recommends dismissing Ostrander's case for failure to prosecute. (*See generally* Dkt. 16, R. & R.)

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Courts in this District are split regarding the propriety of dismissing a social security case for failure to prosecute when the plaintiff is proceeding *pro se*. *See Crist v. Comm'r of Soc. Sec.*, No. 13-CV-14008, 2014 WL 2931412, at *2 (E.D. Mich. June 27, 2014). Some reason that social security claimants often suffer from medical conditions that make it difficult for them to pursue their cases by way of a summary-judgment motion. It has been this Court's practice in these situations to "(1) review the administrative record and the ALJ's narrative and then (2) determine whether the ALJ's findings are supported by substantial evidence or whether the ALJ made an obvious legal error." *Brown v. Comm'r of Soc. Sec.*, No. 12-14057, 2014 WL 222760, at *12 (E.D. Mich. Jan. 21, 2014) (Michelson, M.J.). The Court continues to adhere to that practice, but clarifies its statement in *Brown* as follows: the Court reviews the ALJ's findings, including whether they are supported by substantial evidence, for obvious error. *See Mosely v. Astrue*, No. 2:12-CV-836, 2013 WL 1316013, at *1 (S.D. Ohio Mar. 28, 2013) ("In the past, especially when dealing with a pro se litigant (that is, someone who is not represented by an attorney), the Court has done a general review of the Commissioner's decision to make sure there are no obvious errors even when the plaintiff has not filed anything in this Court but the complaint.").

Upon reviewing the ALJ's narrative and the administrative record, the Court finds no apparent error warranting reversal or remand.

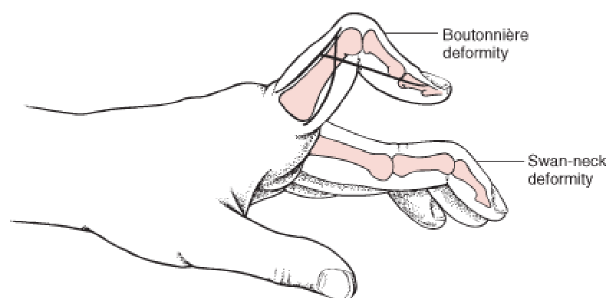
The Administrative Record

In 2005, years before her disability onset date, Ostrander went to see Dr. Charles Ellsworth for numbness in her left arm and fingers. (Tr. 205.) Dr. Ellsworth ordered an MRI of Ostrander's cervical spine. (Tr. 205.) It revealed "minor disc bulging at C6–C7" and bony elements at C7 "impinging mildly upon the spinal cord." (Tr. 205.)

In 2008, just after her disability onset date, Ostrander heard a pop in her wrist when she was pushing herself up from bed. (Tr. 237.) She was diagnosed with a "[w]rist sprain" and prescribed ice, rest, and Motrin. (Tr. 236.) A few days later, a CT scan of Ostrander's cervical spine revealed degenerative changes and a 2 mm listhesis (slippage). (Tr. 235.)

In 2010, an x-ray was taken of Ostrander's cervical spine; it showed "[d]generative arthritis." (Tr. 204.)

In 2011, Ostrander was seen for fatigue, depression, and neck pain. (Tr. 212.) The physician assessed hypothyroidism and depression. (Tr. 216–17.) The physician also noted boutonniere and swan-neck deformities. (Tr. 216.) A picture helps:



David R. Steinberg, MD, *Swan-Neck Deformity*, Merck Manual (Mar. 2013) http://goo.gl/OA6cWU.

In 2012, Ostrander reestablished treatment with Dr. Ellsworth. (Tr. 247.) She reported "back pain and RA [rheumatoid arthritis] and COPD[.]" (*Id.*) She stated that scrolling on a computer gave her headaches and that her hands would go numb. (*Id.*) On assessment, Ostrander had a positive leg-raise test. (Tr. 248.) Dr. Ellsworth made no diagnoses regarding Ostrander's hands but, as relevant here, assessed lower back pain and COPD. (*Id.*) In September 2012, a number of imaging studies were performed. One showed a heel spur, another "minimal degenerative changes" in the lower thoracic spine, a third, "minimal degenerative changes" at

C6–C7, and a fourth, "[m]inimal degenerative changes of some of the interphalangeal joints on both sides." (Tr. 276, 278, 282.)

Ostrander also received treatment for depression. In April 2012, she had a psychological evaluation. (Tr. 260.) She reported depression since childhood, past suicide attempts, hearing a voice, and dealing with family problems. (Tr. 260, 273.) Ostrander's memory was assessed as "normal," her intelligence "average," her judgment "good," and her insight "good/fair." (Tr. 260.) She was diagnosed with major depressive disorder. (Tr. 261.) In July 2011, Ostrander reported feeling anxious, but at her next appointment she stated that she felt better. (Tr. 272.) Ostrander withdrew from treatment in July 2011, with the discharge note indicating improvement. (Tr. 273.) In March 2013, about a month before her social security hearing, Ostrander restarted mental-health treatment. (Tr. 290.)

In April 2013, Ostrander appeared before an administrative law judge to testify about the conditions that she believed prevented her from working. (Tr. 28–44.) Regarding her hands, she testified that her rheumatoid arthritis caused her hands to "fold[] up" and that she had to "pry them open" in the morning to make them work. (Tr. 33.) She said that was constantly dropping items and that she could pick up a gallon of milk (which weighs about eight-and-a-half pounds) only if she used both hands. (Tr. 36, 40.) Ostrander testified that if she worked, she would have to miss two days a week when her hands would not open. (Tr. 41.) Regarding her back, she stated, "[w]hen I move I can hear my spinal cord grind" and that she was in "constant pain" "every[ ]day." (Tr. 36.) She also stated that she would "fall all the time" because her right leg went "out from under [her]." (Tr. 38.) Ostrander told the ALJ that she could not walk even half a block and that she used a cane. (Tr. 40.) When asked if she could walk a quarter-block, Ostrander stated, "I'm doing good to walk around the van, but I lean on it." (*Id.*) As for her

mental health, she testified that if she was told to go to the grocery store and get three items (butter, eggs, and milk), she would forget what she was supposed to get by the time she arrived at the store. (Tr. 37.)

Obvious-Error Review

Having considered all the foregoing, the ALJ thought that Ostrander could perform "light" "unskilled" work. The former, as defined by the social security regulations, generally involves walking or standing for up to six hours in an eight-hour workday, SSR 83-10, 1983 WL 31251, at *5–6, and "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds," 20 C.F.R. §§ 404.1567(b), 416.967(b).

Based on the record, the Court has some doubts about Ostrander's ability to lift twenty pounds on occasion and ten pounds for up to two-thirds of a workday. *See* SSR 83-10, 1983 WL 31251, at *5–6. It is plain that Ostrander has finger deformities consistent with rheumatoid arthritis. And it is not a stretch to say that Ostrander's hand problems limit her ability to grip and lift. Somewhat troublingly, the ALJ did not include any limitations specific to Ostrander's fingers or ability to manipulate objects.

On the other hand, the record does not reveal how much Ostrander's ability to grip, handle, and lift was limited. And it does reveal that Ostrander's treatment for her hands was very limited—indeed it does not appear that any physician has actually diagnosed rheumatoid arthritis or prescribed any medication because of that condition. Further, the ALJ acknowledged Ostrander's testimony about her hands in his narrative and noted that her hand x-rays showed minimal degenerative changes. (Tr. 21.) The ALJ also likely observed Ostrander's hands during the hearing. As such, the Court does not believe that the ALJ's lifting limitation, or failure to include a manipulation limitation, plainly lacks substantial evidentiary support. *See Mullen v.*

Bowen, 800 F.2d 535, 545 (6th Cir.1986) (en banc) (noting that the substantial evidence standard "presupposes . . . a zone of choice within which the decisionmakers can go either way, without interference by the courts" (internal quotation marks omitted)).

The Court struggles less with the ALJ's standing and walking limitations. The objective findings, summarized above, do not suggest disabling low-back or leg pain. Indeed, the imaging studies of record indicate "mild" spinal cord impingement and "minimal" degenerative changes.

The Court also finds no obvious error with the ALJ's "unskilled" limitation. Unskilled work is "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time." SSR 83-10, 1983 WL 31251, at *7. A review of Ostrander's mental-health treatment records reveals that such work is well within her abilities.

As such, the Court finds that the ALJ's conclusion that Ostrander could perform light, unskilled work to be supported by substantial evidence.

But should the ALJ have even reached that step of the disability analysis? The answer is not entirely straightforward. In another case where a *pro se* claimant filed no motion for summary judgment, this Court concluded, "a review of the administrative record reveals readily discernible legal error. In particular, the administrative record lacks an expert opinion on whether Brown's physical impairments (alone or combined with her mental impairments) medically equal any listed impairment found in 20 C.F.R. Part 404, Subpart P, Appendix 1." *Brown v. Comm'r of Soc. Sec.*, No. 12-14057, 2014 WL 222760, at *13 (E.D. Mich. Jan. 21, 2014) (Michelson, M.J.); *see also* SSR 96-6p, 1996 WL 374180, at *3 (1996) ("[L]ongstanding policy requires that the judgment of a physician (or psychologist) designated by the Commissioner on the issue of equivalence on the evidence before the administrative law judge or the Appeals

Council must be received into the record as expert opinion evidence and given appropriate weight.”).

In this case, there is potentially the issue uncovered in *Brown*. At the initial-review level (where disability benefits applications are first reviewed), two state-agency physicians opined on Ostrander’s condition: Dr. Ashok Kaul and Dr. U. Gupta. The problem, however, is that the “Disability Determination Explanation” indicates that Dr. Kaul only considered Listing 12.06 (a mental-health listing) and that Dr. Gupta only assessed Ostrander’s residual functional capacity. (Tr. 86, 88.) That is, the Disability Determination Explanation indicates that no physician opined on whether Ostrander’s conditions were the medical equivalent of other potentially-relevant listings, such as those relating to musculoskeletal conditions. And, as this Court explained in *Brown*, ALJs (and courts) generally lack the expertise to make the medical equivalence call. 2014 WL 222760, at *14; *see also Stratton v. Astrue*, No. 11-CV-256-PB, 2012 WL 1852084, at *12 (D.N.H. May 11, 2012) (“The basic principle behind SSR 96-6p is that while an ALJ is capable of reviewing records to determine whether a claimant’s ailments meet the Listings, expert assistance is crucial to an ALJ’s determination of whether a claimant’s ailments are equivalent to the Listings.” (internal quotation marks omitted)).

The “Disability Determination and Transmittal” form, however, creates enough ambiguity to remove the medical-equivalence issue from the realm of “readily discernible legal error.” *Cf. Brown*, 2014 WL 222760, at *13. That form is signed by Dr. Gupta and identifies as primary diagnoses “Disorders of Back[;] Discogenic & Degenerative.” (Tr. 92, 93.) And Social Security Ruling 96-6p provides: “The signature of a State agency medical or psychological consultant on an SSA–831–U5 (Disability Determination and Transmittal Form) . . . ensures that consideration by a physician (or psychologist) designated by the Commissioner has been given

to the question of medical equivalence at the initial and reconsideration levels of administrative review." SSR 96–6p, 1996 WL 374180, at *3 (1996). Thus, according to SSR 96-6p, it should be the case that Dr. Gupta made a finding on medical equivalence even though, as stated, the Disability Determination Explanation indicates that he only performed a residual functional capacity assessment. At a minimum, the record presents no clear answer to this question, so the Court cannot say that there is an obvious legal error.

Thus, upon conducting a review of the ALJ's findings for obvious error and finding none, the Court will AFFIRM the decision of the Commissioner.

SO ORDERED

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

Dated: March 18, 2016

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the attorneys and/or parties of record by electronic means or U.S. Mail on March 18, 2016.

s/Jane Johnson
Case Manager to
Honorable Laurie J. Michelson