

STEP TWO, NONEXAMINERS

IN THE UNITED STATES DISTRICT COURT
FOR THE XXXXX DISTRICT OF XXXXX

Firstname Lastname,)	No. XXXXX
)	
Plaintiff,)	Hon. XXXXX,
)	United States District Judge
v.)	
)	Hon. XXXXX,
JO ANNE B. BARNHART,)	United States Magistrate Judge
Commissioner of Social Security,)	
)	MEMORANDUM IN SUPPORT
Defendant.)	OF PLAINTIFF'S MOTION
)	FOR SUMMARY JUDGMENT

I. Statement of the Issue

Whether substantial evidence supports the final decision of the Defendant, the Commissioner of Social Security, that found Plaintiff, Firstname Lastname, not disabled and thus not entitled to Disability Insurance Benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 416(i), 423(d), and Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1382, 1382c. See 42 U.S.C. § 405(g); see also 42 U.S.C. § 1383(c)(3) (incorporating for SSI claims 42 U.S.C. § 405(g)).

II. Statement of the Case

In June 1999, Lastname applied for DIB and SSI, stating that he had been disabled since April 15, 1999. (Tr. at 151, 431.) After his applications were denied initially and on reconsideration, Lastname requested a de novo hearing before an administrative law judge (ALJ). (Tr. at 104, 109, 112, 436, 442.) On August 21, 2000, Lastname appeared with counsel and testified at an administrative hearing before ALJ Firstname NumberOne. (Tr. at 23.) In addition, internist and cardiologist Firstname MEOne, M.D., testified as a medical expert (Tr. at 23, 49, 117-18), and Firstname Lastname testified as a vocational expert (Tr. at 23, 62, 113). On February 23, 2001, ALJ NumberOne decided that Lastname had been disabled since April 28, 1998 at step five of the well-known five-step sequential evaluation. (Tr. at 135-36.) 20 C.F.R. § 404.1520(f) (2003) (step five).

On April 24, 2001, the Appeals Council announced that it was reviewing on its own motion ALJ Ploss's favorable decision. (Tr. at 19.) See 20 C.F.R. § 404.969 (2003) (regulatory authority for own-motion review by the Appeals Council). On October 18, 2001, the Appeals Council remanded Lastname's claims to an ALJ for further administrative proceedings. (Tr. at 137-39.) On June 14, 2002, Lastname appeared with counsel at a supplemental administrative hearing before ALJ Firstname NumberTwo. (Tr. at 68.) On July 25, 2002, ALJ NumberTwo decided that Lastname was not disabled at step two. (Tr. at 17-18.) 20 C.F.R. § 404.1520(c) (2003) (step two). On DATE, ALJ NumberTwo's July 25, 2002, decision became the “final decision” of the Commissioner when the Appeals Council denied Lastname's request for review. (Tr. at 6.) 20 C.F.R. § 422.210(a) (2003). Pursuant to 42 U.S.C. § 405(g), Lastname then initiated this civil action for judicial review of the Commissioner's final decision.

III. Statement of the Facts

A. Age

Lastname was born on DATE. (Tr. at 151.) Therefore, he was fifty-four years old on DATE (the date of ALJ NumberTwo's decision). (Tr. at 18.)

B. Insured Status

Lastname was insured through the date of ALJ NumberTwo's decision. (Tr. at 17.) Therefore, his insured status is not at issue.

C. Education and Military Service

Lastname completed high school and has an associates degree in business administration. (Tr. at 36, 170.) In the late 1960s, Lastname served in the U.S. Army as a tank driver and heavy equipment operator. (Tr. at 32, 36-37, 382.)

D. Work Experience

A vocational expert testified at the August 21, 2000, hearing that Lastname had two past jobs: pipe fitter and machine operator. (Tr. at 63; see also id. at 177-79, 198.) According to the vocational expert, Lastname's past work was at least “medium” in exertion. (Tr. at 63; see also id. at 178.) See 20 C.F.R. § 404.1567(c) (2003) (defining “medium” work).

E. Medical Evidence: Conditions

1. Tuberculosis

Lastname was treated for tuberculosis in 1995. (Tr. at 207.) In April 1999, he still had active tuberculosis. (Tr. at 400.) Lastname was also treated for tuberculosis in the fall of 1999. (Tr. at 291, 301, 417.)

2. Musculoskeletal Condition

In June 2000, x-rays showed a spur at L3 of the lumbosacral spine. (Tr. at 285.)

In May 2002, Veterans Administration physician Firstname ExaminerOne, M.D., noted that an August 25, 2000, MRI of Lastname's lower back showed “disc bulges . . . with early degenerative changes throughout the lower lumbar spine, worse at L3-L4, L4-L5, and L5-S1, with moderate central stenosis at L4-L5 and L5-S1, with bilateral foraminal stenosis at these levels and the level of L3-L4.” (Tr. at 382.) Dr. ExaminerOne diagnosed mild lumbar spine strain. (Tr. at 384.) In addition, Dr. ExaminerOne diagnosed mild left ankle strain. (Tr. at 383-84.)

F. Medical Evidence: Sources

On October 28, 1999, Edith Panopio, M.D., performed a consultative examination for the state agency. (Tr. at 260-64.) She diagnosed a history of tuberculosis and probable neuropathy. (Tr. at 263.)

In approximately July 1999, non-examining state-agency physician Firstname NonexaminerOne, M.D. determined that Lastname could do a limited range of medium work. (Tr. at 100, 266-74.) See 20 C.F.R. § 404.1567(c) (2003) (defining “medium” work). Non-examining state-agency physician Firstname NonexaminerTwo, M.D., later agreed with Dr. NonexaminerOne. (Tr. at 103, 266.)

On September 21, 2000, Firstname ExaminerTwo, M.D., examined Lastname in connection with his claim of disability. (Tr. at 308-11.) Dr. ExaminerTwo diagnosed pulmonary tuberculosis, back pain, and neck pain. (Tr. at 311.) Dr. ExaminerTwo opined that Lastname could perform a limited range of sedentary and light work. (Tr. at 315-17.) For example, Dr. ExaminerTwo believed that Lastname could stand and/or walk at least two hours in an eight-hour day, the amount of standing and/or walking that sedentary work requires. (Tr. at 315.) See Social

Security Ruling 96-9p¹ (describing the requirements of “sedentary” work).

On August 21, 2000, medical expert Firstname MEOne, M.D., testified that Lastname had work-related limitations:

. . . Well, sir, I would consider that any claimant who has marked weight loss that Mr. Lastname has certainly would be unable to lift, [or] carry any significant amount of weight. I would give him an occasional lifting of 20 pounds. I think he could lift maybe ten pounds at the most. I find it difficult to correlate the statements that he has made, at the lack of medical evidence, that his inability to walk for any length of time, I would be more happy to entertain this impairment as significant if we had pulmonary function studies on Mr. Lastname. [sic] Lacking those, I find it difficult to confirm his allegations. It may be correct but we have no medical evidence to confirm that. As far as sitting is concerned, I don't think we have any impairments that pertain to sitting. There's no mention made of any significant musculoskeletal impairments which would prevent lifting his arms overhead. Again, for part two of postural, regards to his allegations, I would find it difficult to make a decision [INAUDIBLE] as to how far he could walk. I think because of his complaints of weakness, I would [INAUDIBLE] the use of scaffolds, ladders, ramps, . . . et cetera. Stairs possibly moderately or frequently climbed. As far as all the other aspects of postural, I would certainly give that minimal impairment. We have no evidence of any visual, hearing, speech impairments. Because of his alleged weakness, as far as environmental, I assume they do not believe that Mr. Lastname would be a good candidate to work around machinery or moving parts.

(Tr. at 52-53.)

IV. Background: Standard of Judicial Review

When an ALJ issues the “final decision” of the Commissioner, 42 U.S.C. § 405(g), a court must reverse the ALJ’s decision if the ALJ’s decision is not supported by substantial evidence or is based on legal error. 42 U.S.C. § 405(g); Eads v. Secretary of Dep’t of Health and Human Servs., 983 F.2d 815, 817 (7th Cir. 1993). “[I]f the Commissioner commits an error of law, [a court] may reverse without regard to the volume of evidence in support of the factual findings.” White ex rel. Smith v. Apfel, 167 F.3d 369, 373 (7th Cir. 1999). The Commissioner may not rely on post hoc rationalizations when defending the ALJ's decision. See Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002) (citing SEC v. Chenery Corp., 318 U.S. 80, 93-95 (1943)).

¹ Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-09-di-01.html.

V. Background: ALJ NumberTwo's Step-Two Decision

A. ALJ NumberTwo Rendered a Step-Two Decision.

As a first task of a plaintiff on judicial review of the Commissioner's denial of benefits, the plaintiff must identify the ALJ's findings in the context of the five-step sequential evaluation. 20 C.F.R. § 404.1520 (2003) (sequential evaluation).

At step one, ALJ NumberTwo found that Lastname had not engaged in substantial gainful activity. (Tr. at 17.) 20 C.F.R. § 404.1520(b) (2003) (step one). Lastname's work after his alleged onset date did not rise to the level of substantial gainful activity. (Tr. at 16-17.) At step two, ALJ NumberTwo found that Lastname did not have a “severe” impairment(s). (Tr. at 17.) 20 C.F.R. § 404.1520(c) (2003) (step two).

B. Step Two Screens Out Groundless Claims.

Because ALJ NumberTwo decided that Lastname was not disabled at step two, Lastname sets forth the legal standard for step two. 20 C.F.R. § 404.1520(c) (2003) (step two).

1. “Severe” Means More Than Minimal.

At step two of the sequential evaluation, a claimant is “not disabled” if he or she does not have a “severe” impairment(s). 20 C.F.R. § 404.1520(c) (2003) (step two). “An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1521(a) (2003); see also Johnson v. Sullivan, 922 F.2d 346, 350-52 (7th Cir. 1991) (en banc) (invalidating the agency's policy of not considering the combined impact of non-severe impairments at step two). “Severe” has a technical definition. Social Security Ruling (SSR)² 96-3p defines an impairment as “not severe” if it is “a slight abnormality (or a combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities.” SSR 96-3p³ (copy attached). Basic work activities are the “abilities and aptitudes to do most jobs” such as lifting, carrying, and reaching. 20 C.F.R. § 404.1521(b) (2003). Thus, a step-two severe impairment is an impairment

² Social Security Rulings are published in the Federal Register and republished at http://www.ssa.gov/OP_Home/rulings/. Social Security Rulings are binding on all components of the agency. 20 C.F.R. § 402.35 (2003); Prince v. Sullivan, 933 F.2d 598, 602 (7th Cir. 1991).

³ Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-03-di-01.html.

that significantly — i.e., more than minimally — diminishes a claimant's ability to do basic work activities such as lift, carry, and reach. SSR 96-3p.

2. Step Two Does Not Involve Consideration of a Claimant's Age, Education, and Work Experience.

When an ALJ determines whether a claimant has a step-two severe impairment, the ALJ does not consider the claimant's age, education, and work experience. SSR 96-3p (“The vocational factors of age, education, and work experience are not considered at this step of the process.”). Thus, the legal standard at step two is the same for claimants irrespective of their age, education, and work experience. For example, the test at step two is the same for claimants who are twenty years old and sixty years old and the same for claimants who are illiterate or college graduates.

3. Step Two is a De Minimis Screening Device.

Step two is a creation of regulation. Compare 20 C.F.R. § 404.1520(c) (2003) (step two), with 42 U.S.C. § 423(d) (statutory definition of disability); see, generally, Bowen v. Yuckert, 482 U.S. 137 (1987) (upholding validity of step-two regulation). The “step-two inquiry is a de minimis screening device to dispose of groundless claims.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing Yuckert, 482 U.S. at 153-54).

4. The Burden of Proof is on the Claimant at Step Two.

The burden is on the claimant to prove that he or she has a step-two severe impairment. See Zurawski v. Halter, 245 F.3d 881, 885-86 (7th Cir. 2001) (noting that the burden of proof in Social Security cases shifts to the Commissioner at step five of the five-step sequential evaluation); see also SSR 96-3p (“In addition, if, after completing development and considering all of the evidence, the adjudicator is unable to determine clearly the effect of an impairment(s) on the individual's ability to do basic work activities, the adjudicator must continue to follow the sequential evaluation process until a determination or decision about disability can be reached.”).

VI. Argument

A. ALJ NumberTwo Erroneously Evaluated
Lastname's Musculoskeletal Impairments.

At step two, ALJ NumberTwo was required to consider all of Lastname's impairments and their combined effect. 20 C.F.R. §§ 404.1521, 404.1523 (2003); SSR 96-3p; Johnson, 922 F.2d at 350-52. According to ALJ NumberTwo, Lastname had a single medical diagnosis: a history of tuberculosis. (Tr. at 17.) And ALJ NumberTwo alleged in particular that there was “no evidence establishing the presence of any medically determinable musculoskeletal impairment that could be expected to produce back or neck pain.” (Tr. at 16-17.) ALJ NumberTwo thereby made a harmful mistake of fact: there was evidence, including objective medical evidence, that Lastname had a musculoskeletal impairment that could cause back pain. (Tr. at 382-83.) In May 2002, Dr. ExaminerOne noted that an August 25, 2000, MRI of Lastname's lower back showed “disc bulges . . . with early degenerative changes throughout the lower lumbar spine, worse at L3-L4, L4-L5, and L5-S1, with moderate central stenosis at L4-L5 and L5-S1, with bilateral foraminal stenosis at these levels and the level of L3-L4.” (Tr. at 382.) Dr. ExaminerOne diagnosed mild lumbar spine strain. (Tr. at 384.) In addition, Dr. ExaminerOne diagnosed mild left ankle strain.⁴ (Tr. at 383-84.) Therefore, substantial evidence does not support ALJ NumberTwo's finding that Lastname did not have any musculoskeletal impairment.

There is another way of understanding ALJ NumberTwo's error. In the Seventh Circuit, an ALJ may not ignore an entire line of evidence. Golembiewski v. Barnhart, 322 F.3d 912, 917-18 (7th Cir. 2003). ALJ NumberTwo ignored an entire line of evidence: Dr. ExaminerOne's report based on objective medical evidence diagnosing mild lumbar strain and mild left ankle strain. (Tr. at 382-84.) Rephrased, because ALJ NumberTwo did not grapple with Dr. ExaminerOne's May 2002 report, ALJ NumberTwo failed to evaluate “significant evidence contrary” to his decision. Lauer v. Apfel, 169 F.3d 489, 494 (7th Cir. 1999).⁵

⁴ There was objective medical evidence of a musculoskeletal impairment in 2000. (Tr. at 285.) Lumbosacral spine x-rays showed a spur at the level of L3. (Tr. at 285.)

⁵ See also Godbey v. Apfel, 238 F.3d 803, 808 (7th Cir. 2000) (“While the ALJ need not articulate his reasons for rejecting every piece of evidence, he must at least minimally discuss a

B. The ALJ Violated 20 C.F.R. § 404.1530 (2003).

The ALJ relied on 20 C.F.R. § 404.1530 (2003), to decide that Lastname was not disabled at step two. (Tr. at 16.) The ALJ thereby made a harmful mistake of law. Under 20 C.F.R. § 404.1530 (2003), an ALJ may find a claimant not disabled based on his failure to follow prescribed treatment only in narrow circumstances. 20 C.F.R. § 404.1530 (2003). An ALJ must first conclude that a claimant would be disabled without taking into account any failure to follow prescribed treatment. 20 C.F.R. § 404.1530 (2003); SSR 82-59 (“Individuals with a disabling impairment which is amenable to treatment that could be expected to restore their ability to work must follow the prescribed treatment to be found under a disability, unless there is a justifiable cause for the failure to follow such treatment.”) (emphasis in original). Here, ALJ NumberTwo never found that Lastname would be disabled before taking into account any failure to follow prescribed treatment. (Tr. at 14-18.) As such, ALJ NumberTwo was not permitted to use section 404.1530 to find Lastname not disabled at step two of the five-step sequential evaluation. See McKnight v. Sullivan, 927 F.2d 241, 242 (6th Cir. 1990) (explaining that the failure-to-follow-prescribed-treatment regulation should not be applied at step two); see also Shramek v. Apfel, 226 F.3d 809, 812-13 (7th Cir. 2000) (noting that the failure-to-follow-prescribed-treatment regulation applies when treatment would restore a claimant's ability to work).

C. ALJ NumberTwo Erroneously Evaluated the Determinations of Dr. NonexaminerOne and Dr. NonexaminerTwo.

The Court should reverse ALJ NumberTwo's decision with a remand for a rehearing because ALJ NumberTwo erroneously evaluated the determinations of non-examining state-agency physicians Dr. NonexaminerOne and Dr. NonexaminerTwo. Dr. NonexaminerOne determined that Lastname could, among other things, lift fifty pounds occasionally. (Tr. at 267-73.) Therefore, Dr. NonexaminerOne believed that Lastname could perform a range of “medium” work. See 20 C.F.R. § 404.1567(c) (2003) (defining “medium” work). Dr. NonexaminerTwo later agreed with Dr. NonexaminerOne. (Tr. at 266.) Under SSR 96-6p, ALJ NumberTwo was

claimant's evidence that contradicts the Commissioner's position.”); Binion ex rel. Binion v. Chater, 108 F.3d 780, 788 (7th Cir. 1997) (“An ALJ must consider all relevant evidence and may not select and discuss only that evidence that favors his ultimate conclusion.”).

required to evaluate the determinations of Dr. NonexaminerOne and Dr. NonexaminerTwo. SSR 96-6p⁶ (an ALJ is “not bound by findings made by State agency or other program physicians and psychologists, but [the ALJ] may not ignore these opinions and must explain the weight given to the opinions in [the ALJ's] decision[]”). With respect to those determinations, ALJ NumberTwo stated, “The undersigned, having found no severe medically determinable impairment which lasted for more than 12 months, agrees that claimant could perform at least medium, (and more) work.” (Tr. at 17.) This is not a legally sufficient ground to reject the determinations of Dr. NonexaminerOne and Dr. NonexaminerTwo. As a matter of law, a limitation to medium work is a step-two severe impairment.⁷ It was disingenuous for ALJ NumberTwo purportedly to agree with Dr. NonexaminerOne and Dr. NonexaminerTwo when the ALJ in fact disagreed with Dr. NonexaminerOne and Dr. NonexaminerTwo. When an ALJ addresses significant evidence contrary to his decision such as Dr. NonexaminerOne's and Dr. NonexaminerTwo's determinations, the ALJ cannot reasonably reconcile those determinations with his decision by erroneously claiming that those determinations are not contrary to his decision.

D. Lastname Had a Pulmonary Condition
For More Than Twelve Months.

Under the regulations, a claimant must have a step-two severe impairment for twelve continuous months. 20 C.F.R. § 404.1509 (2003); SSR 96-3p. This is called the “duration” requirement. 20 C.F.R. § 404.1509 (2003). ALJ NumberTwo found that Lastname did not have tuberculosis for more than twelve consecutive months. (Tr. at 16 (“claimant's tuberculosis did not last for 12 months”); see also id. at 17.) ALJ NumberTwo was mistaken. Lastname was diagnosed with tuberculosis in December 1995. (Tr. at 428.) He still had tuberculosis in April

⁶ Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-06-di-01.html.

⁷ As a matter of law, a limitation to “medium” work requiring lifting of fifty pounds is a step-two impairment. Many claimants are disabled at step five, see 20 C.F.R. § 404.1520(f) (2003) (step five), if they are limited to medium work, see 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 3, Rules 203.01, 203.02, 203.10 (2003) (specifying vocational characteristics of claimants disabled at step five who can perform medium work). If a limitation to medium work were not a step-two severe impairment, such claimants would be “not disabled” at step two, something manifestly inconsistent with the regulations.

1999. (Tr. at 303, 400.) Therefore, Lastname had tuberculosis for at least three years.

The ALJ made another mistake regarding the duration of Lastname's tuberculosis. The ALJ implicitly assumes that there was no residual effect whatsoever from Lastname's tuberculosis as soon as Lastname ceased to test positive for tuberculosis. (Tr. at 16-17.) On the contrary, there was objective x-ray evidence of the residuals of tuberculosis in Lastname's right lung. (Tr. at 265.) Thus, even if Lastname no longer had active tuberculosis, this did not mean that Lastname had unrestricted pulmonary functioning. In fact, the overwhelming medical opinions since mid-1999 establish that Lastname had serious functional limitations — constituting a step-two severe impairment — despite an improvement in his tuberculosis:

<u>Physician</u>	<u>Date</u>	<u>Tr.</u>	<u>Opinion</u>
Dr. NonexaminerOne non-examiner	7/99 (approx.)	100, 266-73	limited range of medium work
Dr. NonexaminerTwo	11/99 (approx.)	102-03, 266-73	limited range of medium work
Dr. MEOne medical expert	8/21/00	52-53	limited range of sedentary & light work
Dr. ExaminerTwo examiner	9/21/00	315-17	limited range of sedentary & light work

ALJ NumberTwo did not know something that these physicians did not. In other words, ALJ NumberTwo improperly played doctor when assuming that tuberculosis had no residual effect on Lastname. See Clifford v. Apfel, 227 F.3d 863, 870 (7th Cir. 2000) (ALJ should not play doctor).⁸

In sum, substantial evidence does not support ALJ NumberTwo's evaluation of Lastname's

⁸ See also Green v. Apfel, 204 F.3d 780, 781 (7th Cir. 2000) (ALJ should not play doctor); Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996) (same); Herron v. Shalala, 19 F.3d 329, 334 n.10 (7th Cir. 1994) (same); Scivally v. Sullivan, 966 F.2d 1070, 1076 (7th Cir. 1992) (same); Schmidt v. Sullivan, 914 F.2d 117, 118 (7th Cir.1990) (same); Bauzo v. Bowen, 803 F.2d 917, 926 (7th Cir. 1986) (same); Rousey v. Heckler, 771 F.2d 1065, 1070 (7th Cir. 1985) (same).

tuberculosis.

E. Lastname's Combined Impairments Constituted
A More-Than-Minimal Step-Two Impairment.

Given Lastname's combined impairments, substantial evidence does not support the ALJ's finding that Lastname was not disabled at step two. 20 C.F.R. §§ 404.1521, 404.1523 (2003) (requiring consideration of combined impairments); SSR 96-3p (same); Johnson, 922 F.2d at 350-52 (same). Examining physician Dr. ExaminerTwo found that Lastname could perform a limited range of sedentary and light work due to his pulmonary condition, back pain, neck pain, tingling, and diminished body weight. (Tr. at 316.) This is a much greater restriction than a step-two, more-than-minimal impairment. The ALJ erroneously rejected Dr. ExaminerTwo's opinion reflecting Lastname's combined impairments: the ALJ accepted that Lastname had only a single impairment. (Tr. at 17.) For a similar reason, the ALJ erroneously rejected Dr. MEOne's opinion that Lastname could do a limited range of sedentary and light work. (Tr. at 52-53.) Dr. MEOne considered Lastname's multiple medical conditions while the ALJ did not. (Tr. at 49-52.)

VII. Conclusion

The Court should reverse the Commissioner's final decision with a remand for a rehearing and readjudication. 42 U.S.C. § 405(g) (sentence four); see Sarchet v. Chater, 78 F.3d 305, 309 (7th Cir. 1996) ("When the decision of that tribunal on matters of fact is unreliable because of serious mistakes or omissions, the reviewing court must reverse unless satisfied that no reasonable trier of fact could have come to a different conclusion, in which event a remand would be pointless.").

Respectfully submitted,

Firstname Lastname