

Pottle v. Astrue, No. 05-36041

GRABER, Circuit Judge, dissenting:

JAN 18 2008

Although I agree that the administrative law judge ("ALJ") did not err in finding that Pottle failed to meet or equal the criteria for Listing 12.05C and did not err in failing to discuss part of Hill's testimony, I respectfully dissent from the remainder of the disposition.

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In my view, the ALJ did not give any "legitimate" reasons, Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1996), for discounting the opinion of Dr. Bryan. The second and third reasons cited by the disposition, maj. dispo. at 3—Pottle's exaggeration of his symptoms and the resulting invalidity of formal personality tests—not only fail to support the ALJ's conclusion, they in fact buttress Dr. Bryan's diagnosis of a personality disorder.

Dr. Bryan's report states in no uncertain terms that he was fully aware both that Pottle over-reported his symptoms and that the personality tests were invalid for that reason. Dr. Bryan's diagnosis of a personality disorder rested on different reasons—the validity of which neither the ALJ nor the disposition challenges. If a doctor runs a multitude of tests, one of which produces invalid results, that doctor still can make a valid diagnosis on the basis of the other, valid test results. The fact that one of the tests produced invalid results—as recognized by the doctor himself—does not in any way render the diagnosis invalid.

In addition, and of particular relevance here—as the disposition recognized, maj. dispo. at 3—the embellishment of symptoms itself is a symptom of a personality disorder. Far from detracting from Dr. Bryan’s diagnosis, then, Pottle’s over-reporting of his symptoms actually supports Dr. Bryan’s diagnosis of a personality disorder. Put another way, if exaggeration of symptoms is a classic marker of a personality disorder, then exaggeration of symptoms, which is known to the diagnostician, cannot at the same time undermine the diagnosis.

The other reason cited by the disposition—the fact that "no other physician, including Pottle’s treating psychiatrist, established such a diagnosis [of a personality disorder]," maj. dispo. at 3—is not a legitimate reason to disbelieve the diagnosis. An ALJ must provide "specific and legitimate reasons" for rejecting an examining doctor’s opinion "even if contradicted by another doctor." Lester, 81 F.3d at 830-31 (emphasis added). The contradiction itself cannot serve as a reason; otherwise the Lester test would be hollow.

Even setting aside that legal error, it is important to examine exactly what Pottle’s treating psychiatrist did state. It is true that she did not "establish" a diagnosis of a personality disorder. But she noted in the diagnosis section of her report that she suspected a personality disorder diagnosis but declined to make the diagnosis at that time only because further observation or testing was required

before she could conclusively establish the diagnosis. Other doctors made the same observations in their reports. As a general matter, if Drs. A, B, and C state that they suspect a particular diagnosis but that further testing is required, and Dr. D determines, after such further testing, that the diagnosis is in fact proper, there simply is no contradiction between the suspected diagnosis by Drs. A, B, and C, and the confirmation of that suspicion by Dr. D. In this case, with the sole exception of Dr. Bryan, all of the doctors in the record based their conclusions only on their own observations and testing and did not have the benefit of any psychiatric reports from other doctors. Dr. Bryan, by contrast, based his conclusion on an extra twenty months of observations and had the benefit of psychiatric reports by four other doctors. Only Dr. Bryan had an opportunity both to examine Pottle and consider his extensive medical records in order to detect a pattern. He was the only doctor who looked at other psychologists' reports and thus was the only doctor who was in a position to make a definitive diagnosis that requires the existence of a pattern of behavior.

Accordingly, I would reverse and remand. Under our case law, and as a matter of plain logic, the ALJ's decision with respect to Pottle's disability was not supported by substantial evidence.