

APR 10 2008

Harrelson v. Barnhart, No. 06-35284

BERZON, Circuit Judge, dissenting:

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

I respectfully dissent. The majority accepts five of the ALJ's seven reasons for rejecting Harrelson's subjective pain testimony. In fact, only one incident relied upon by the ALJ actually undermines her credibility. I would remand to the ALJ for consideration of whether he would reject Harrelson's pain testimony based on that single incident alone.

1. The ALJ found Harrelson's testimony of extreme pain "inconsistent with reports to physicians." Harrelson's reports to doctors plainly indicate some progress as certain treatments – namely, methadone – proved helpful to ease the pain. But the record indicates that, even after starting methadone, Harrelson complained about serious pain.

The chronology of her reports of pain is worth recounting in some detail. In December 2000, she reported "pain in her back, buttocks, and down her right leg. . . . She states that her low back pain is worse when she sits or stands and she just doesn't sit or stand for very long." In October 2001, she reported pain "'like a knife' . . . so severe she feels a pulling and numbness on the right side of her face . . . [and] sharp, shooting pains radiating down the triceps region." In January 2002, she rated "her current pain at 5/10 if, and only if, she takes 9 to 12 Ultram

per day. . . . She is particularly painful in the morning, and describes the severity as 10/10, or as intense as the pain of labor.” In February 2002, her doctor noted that her fibromyalgic symptoms were “quite severe [and] . . . required treatment with agents as strong as MS Contin . . . [although despite the medication she is] still having some problems.” In March, after switching to OxyContin, her doctor reported that “[s]he has done well with the 20 mg of OxyContin but apparently needs an increase in her dosage.” In May 2002, after an increase in the dosage of OxyContin, her doctor noted that she “has had some positive changes as far as her fibromyalgia, with further reduction in her pain level, . . . [but] at best she is probably 60% improved.”

In July 2002, she switched from OxyContin to methadone. Harrelson apparently responded well to methadone: In August she reported that “with medications her pain is a 5/10. Without medications, she reports her pain to be a 10+/10. Patient states she is happy to have the extra mobility with the pain medications.” By September she said that “her pain management is good” and the following month reported being “quite happy . . . with current meds working well and pain well controlled.” In November she was “doing a whole lot better, primarily because of methadone management for chronic pain along with breakthrough medication including Norco.”

But in December, indications of continued pain problems emerge. Although Harrelson reported being “happy with pain control,” she requested a hospital bed because she had “continuing difficulty getting out of the bed. By this she apparently means that she is stiff and sore in the morning and it is hard to extricate herself.” The following month, she complained that “her pain is no better, and it is still hard to move, especially in the morning on awakening.” In March 2003, her doctor noted that her fibromyalgia “is significantly disabling fore [sic] her.”¹

In sum, Harrelson plainly received some benefit from switching to methadone for pain management. Her initial reports of improvement were quite strong, perhaps because her *relative* pain decreased. In other words, she originally suffered from such excruciating pain that any reduction was cause for celebration. But she did continue to complain about pain. “Occasional symptom-free periods – and even the sporadic ability to work – are not inconsistent with disability.” *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995).

There was one incident cited by the ALJ, however, that to some degree undermines Harrelson’s credibility. On November 8, 2002, Harrelson’s doctor noted that her “appearance is dramatically better” than it was in July, before she

¹Regardless of whether the doctor meant she was legally disabled, he at least meant, as the majority concludes, that her “symptoms were causing her significant problems.” Maj. op. 5.

started methadone treatment. She had gained weight and was “doing a whole lot better, primarily because of methadone management for chronic pain along with breakthrough medication including Norco.” Six days later, Harrelson filed her reconsideration report with the Social Security Administration. In the report she stated “I can hardly get out of bed” and “I can’t move without extreme pain.” She also claimed to “have gotten much worse [since filing the initial claim]. Mobility has greatly decreased.” The proximity and contrast of these two reports constitutes evidence weighing against her credibility.

2. The ALJ noted that “there is no indication [Harrelson] stopped working [at her last job] due to any physical or mental impairment.” There is no reason this fact is inconsistent with her subjective pain testimony. She left the job in February 2000, the same month she claims to have become disabled. She testified that after she was laid off, “I started looking for work, but with my health the way it was, I wasn’t having any success.” Under these circumstances, the fact that the onset of her disability coincided with her being fired for unrelated reasons is no reason to discount her testimony. *See Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993) (fact that claimant “left her last job not because of medical necessity, but to follow her husband to the State of Washington when he retired” not sufficient to reject her subjective pain testimony); *cf. Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir.

2001) (fact that claimant left last job for reasons unrelated to disability *is* relevant when claimed disability stemmed from injury taking place a week and a half prior to termination and there was no allegation of a delay between the injury and the onset of the disability).

3. The ALJ noted that “[n]one of [Harrelson’s] treating physicians has indicated that she is disabled.” This gap is not a reason to disbelieve her pain testimony. First, “the adjudicator may not discredit a claimant’s testimony of pain and deny disability benefits solely because the degree of pain alleged by the claimant is not supported by objective medical evidence.” *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc). Further, as noted above, her treating physicians largely *did* corroborate her testimony of pain. Their belief in her complaints of pain is best illustrated by their willingness to prescribe her large doses of extremely serious pain medications. That no doctor specifically commented that she was disabled does not contradict her pain testimony.

4. Dr. Eckstein found indications of questionable validity in the results of a psychological test taken by Harrelson. But this concern reflects only upon Harrelson’s reporting of her *psychological* condition, not her physical pain.

5. In January 2003, Harrelson was examined by psychiatrist Dr. Villanueva. After conducting an interview and various tests, Dr. Villanueva asked Harrelson to

take an additional psychological test. Harrelson complained that his office was cold and left without completing the test. Although Dr. Villanueva asked her to return to take the test, she did not. Again, this concern about Harrelson's cooperation with a psychological examination should have no bearing on her testimony about physical pain.

* * *

In sum, only one incident relied upon by the ALJ could be used to support a finding that Harrelson's pain testimony was not credible: The contrast between her report of pain in her reconsideration report and at a doctor's visit less than a week earlier. Although this single incident could possibly constitute the requisite "clear and convincing" evidence sufficient to reject Harrelson's subjective pain testimony, the ALJ did not so find. I would remand to the ALJ for a determination whether he finds this sole incident clear and convincing evidence that Harrelson is not credible regarding her degree of pain.

I respectfully dissent.