IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELEANORE L. GROSLAND,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

04-C-006-C

JO ANNE B. BARNHART, Commissioner
of Social Security,

Defendant.

This is an appeal of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Eleanore Grosland, who suffers from post-polio syndrome, challenges the commissioner's determination that she is not entitled to disability insurance benefits under Title II of the Social Security Act, sections 216(i) and 223, codified at 42 U.S.C. §§ 416(i), 423(d). An administrative law judge denied plaintiff's claim after a hearing, finding that plaintiff had failed to show that she was unable to perform substantial gainful activity before December 31, 1994, the date on which she was last eligible for disability insurance benefits. In particular, the ALJ found that although plaintiff might have had post-polio syndrome and other impairments at the time, her symptoms were not so severe as to prevent her from performing at least sedentary work. The ALJ's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review. Plaintiff now seeks judicial review of the commissioner's decision. Because I find that substantial evidence in the record supports the ALJ's conclusion that

plaintiff was able to perform substantial gainful activity despite her severe impairments at all times through December 31, 1994, I am recommending that this court affirm the commissioner's decision. The following facts are drawn from the administrative record.

FACTS

I. Background and Evidence

Plaintiff contracted the poliomyelitis virus, commonly known as polio, in 1951. She was then five years old. After a lengthy hospitalization, plaintiff had nearly a full recovery, with the exception of mild residual weakness in her left leg and foot and a mild deformity in the arch of her left foot. In spite of these residual effects of the virus, plaintiff was able to work without difficulty for many years as a cosmetologist, a job that required her to spend most of her workday on her feet.

In 1987, plaintiff began to develop symptoms that her doctors have now concluded were manifestations of post-polio syndrome, a condition that affects polio survivors anywhere from 10 to 40 years after recovery from an initial attack of the poliomyelitis virus. In particular, plaintiff began to experience increasing muscle weakness, fatigue and balance problems. Plaintiff quit working in late 1989 or early 1990, when a recurrent fracture in her left foot caused by a fall made it difficult for her to perform her job as a cosmetologist.

Although plaintiff eventually was able to bear weight on her left foot, she did not return to her job as a cosmetologist or to any other regular employment. From 1990-1994,

plaintiff sought treatment sporadically for other extremity injuries, including tendonitis in her thumb and wrist, a broken right wrist and a refracture of the left foot. The latter two injuries were caused by falls. Apart from the left foot, which might have never fused completely after the first fracture, plaintiff's injuries resolved with conservative treatment. Physical examinations during this time period revealed few abnormalities apart from the particular injury site and residuals from plaintiff's polio. Plaintiff also sought treatment on occasion for chest pain, shortness of breath and muscle aches, but her doctors found no abnormalities.

In 1995, plaintiff's doctors began to suspect that she had post-polio syndrome, a diagnosis that was eventually confirmed in 2000. The medical records suggest that plaintiff's symptoms of fatigue, pain and difficulty walking have worsened progressively since 1995. Since March 2000, she has been treated for her post-polio syndrome primarily by Dr. Vishwanat, a neurologist, who has prescribed Neurontin.

On May 7, 2001, plaintiff was seen by Stephen Porter, Ph.D., a vocational rehabilitation specialist, to determine whether she should apply for Social Security Disability or whether she "could safely and competently re-enter the workforce." AR 164. After administering aptitude and learning tests and considering plaintiff's age, medical history and transferable skills, Porter concluded that plaintiff was disabled for social security purposes. In particular, Porter concluded that

> [g]iven Ellie's current medical status in which she carries a diagnosis of post-polio syndrome, her clear problems with ambulation which involve increasing

> loss of strength in both her legs and her arms, and most important a significant loss in stamina, it would not be right or reasonable to think that she could work more than a very few hours a week in a highly supportive environment. Stated simply, Ellie does not have the capacity make $700 per month.

Id.

In 2001, plaintiff filed an application for disability insurance benefits under Title II of the Social Security Act, alleging that she had been unable to work since 1989-1990 because of post-polio symptoms, including difficulty breathing, chronic fatigue, weak muscles and difficulty walking and balancing. Plaintiff's insured status for purposes of eligibility for DIB expired on December 31, 1994, meaning that in order to qualify for benefits, plaintiff had to show that she was unable to perform any substantial gainful activity as a result of a medically determinable impairment on or before that date.

The state agency denied plaintiff's claim initially and upon reconsideration, finding from the medical records that plaintiff's condition did not prevent her from working on any date through December 31, 1994. Plaintiff requested an administrative hearing, which was held on September 16, 2002. Before the hearing, plaintiff submitted letters from her treating physicians, including an August 26, 2002, letter from Dr. Harbst in which he indicated that plaintiff was under his care for impairment related to post-polio syndrome. Dr. Harbst indicated that plaintiff was significantly limited in her daily functioning due to fatigue and impaired ambulation. In addition, he stated that plaintiff had quit her job in

1990 "due to her inability to work as a result of her symptoms associated with post polio syndrome." AR 253.

Dr. Vishwanat wrote a letter on August 22, 2002 in which he stated that plaintiff was "significantly disabled" by the aches, pains and fatigue associated with her post-polio syndrome. Dr. Vishwanat noted that plaintiff had had increasing fatigue as well as generalized aches and pains over the past 20 years or so that could be attributed to her condition.

At the hearing, plaintiff testified that she had had to stop working in either December 1989 or January 1990 because she could no longer perform her job as a beautician; she reported that after she broke her foot in July 1989, she had to use crutches and thus, could not use her hands to do her job. She complained that she was fatigued and in constant pain. Plaintiff further stated that she had difficulty using her fingers and hands to perform job activities, such as shampooing hair, sweeping the floor, and lifting. She also complained of headaches, depression, anxiety, difficulty sleeping and fatigue.

Plaintiff reported that during the relevant period from 1990 through 1994, she performed some simple household chores, but spent most of the day watching television and resting because she did not have the energy to do anything else. She stated that since 1990, she never walked without some sort of assistive device such as crutches, a walker, or a cane or without holding onto an object like a table or chair.

The ALJ questioned plaintiff about some of the medical records that suggested that she had actually been more active during the relevant time period. For example, the ALJ noted that some notations indicated that plaintiff had worked at her family's cement business after she had quit working as a beautician. Plaintiff responded that she had "tried to do some painting and so forth" but "it really didn't work out because I couldn't maintain, you know, a brush and I'd drop it." AR 76. When asked about records that noted that plaintiff raised exotic birds, plaintiff said, "Well, we had a few birds as pets pretty much too." AR 77. The ALJ also brought up a note from September 30, 1992, that indicated that plaintiff had hurt her thumb and wrist while doing "a lot of heavy lifting" in connection with a move. Plaintiff stated, "I can't remember that far back, I guess, all the details." AR 78.

Porter testified on plaintiff's behalf at the hearing. He testified that from his review of the medical records, plaintiff was suffering from symptoms of post-polio syndrome as early as 1987, and those symptoms eventually caused her to be unable to work as a beautician in 1990. Porter indicated that the fact that plaintiff had continued to work as a beautician from 1987 to 1990 in spite of her symptoms indicated that she was not a malingerer and wanted to work. According to Dr. Porter, the fact that plaintiff was not a malingerer indicated that she had "hit the end of the road" when she stopped working in 1990 and that she could not have performed even sedentary work after that point. AR 55.

II. ALJ's Decision

On December 12, 2002, the ALJ issued a written decision in which he applied the familiar five-step process for determining whether claimant was disabled during the relevant time period, asking (1) whether she was employed or engaged in substantial gainful activity, (2) whether her impairment or combination of impairments was severe, (3) whether she met any of the impairments on the "list" in 20 C.F.R. Part 404, Subpart P, Appendix 1 (i.e. was she entitled to a conclusive presumption of disability), (4) whether she was unable to perform her past relevant work, and (5) whether she was unable to perform any other work within the economy. 20 C.F.R. § 404.1520; *see Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997).

At step one, the ALJ credited plaintiff's allegation that she had not engaged in any substantial gainful activity after her alleged onset date of 1989. At steps two and three, he found that the medical evidence established that as of December 31, 1994, plaintiff had a history of polio as a child with some residuals in conduction affecting the left ankle and foot, possible post-polio syndrome, some osteoporosis, a history of DeQuervain's syndrome and a mild, nonsevere affective disorder, but than none of these impairments singly or in combination met or equaled any impairment listed in Appendix A, Subpart P, Regulations No. 4.

At step four, the ALJ found that as of December 31, 1994, plaintiff had the residual functional capacity to perform a full range of at least sedentary work. The ALJ noted in his

decision that plaintiff had testified that she had problems with endurance, fatigue, balance, anxiety, depression and headaches since 1990. Also, the ALJ noted that Stephen Porter, Ph.D. had testified and had opined that plaintiff has been disabled since 1990. Although the ALJ did not make an explicit finding concerning plaintiff's credibility or the weight of Porter's testimony, he found that although plaintiff may have had some degree of pain and limitations during the relevant time period, "it was not all that severe or limiting and would not have significantly compromised claimant's ability to engage in work activities." AR 28. In the body of his decision, the ALJ observed that there were significant gaps in treatment during the relevant time period and that notes in the medical records showed that plaintiff was "far from being completely inactive," noting that plaintiff had taken a trip to England in 1991 and had hurt her wrist while doing heavy lifting in 1992. The ALJ noted that even after plaintiff's insurance expired, there were records that indicated that she maintained a very busy schedule. As for plaintiff's allegation of ongoing headaches, the ALJ noted that headaches were mentioned only once in the medical records, on a date after her disability insurance had expired.

The ALJ noted that plaintiff had submitted reports from her various physicians to support her claim. However, he indicated that these reports were of limited usefulness because "none of them really address claimant's status between 1990 and 1994 other than to make the general statement that claimant likely had post-polio syndrome at that time." AR 27. On the other hand, medical staff for the local disability agency had opined that as

of December 31, 1994, plaintiff had the ability to perform sedentary work. Applying the Medical-Vocational Guidelines found at Appendix 2, Subpart P of Regulations No. 4 (the "grids"), the ALJ found at step five of the sequential evaluation process that an individual of claimant's age, education and work skills who could perform a full range of sedentary work was not disabled.[1] Accordingly, he found that plaintiff was not entitled to a period of disability or disability insurance benefits.

ANALYSIS

Under 42 U.S.C. § 405(g), the commissioner's findings are conclusive if they are supported by "substantial evidence." *See Stevenson v. Chater*, 105 F.3d 1151, 1153 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). "Substantial evidence is more than a mere scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Stevenson*, 105 F.3d at 1153 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), as quoted in *Richardson v. Perales*, 402 U.S. 389, 401 (1971)) (other citations omitted). A standard this low could allow for different supportable conclusions in a given claimant's case. That being so, this court cannot in its review reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *See*

[1] Plaintiff has not challenged the ALJ's use or application of the Medical-Vocational Guidelines.

Brewer, 103 F.3d at 1390 (citations omitted); *Kapusta v. Sullivan*, 900 F.2d 94, 96 (7th Cir. 1990).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review, *see Brewer*, 103 F.3d at 1390, and the ALJ's written opinion need not evaluate every piece of testimony and evidence submitted, the ALJ "must at least minimally discuss a claimant's evidence that contradicts the Commissioner's position." *Godbey v. Apfel*, 238 F.3d 803, 808 (7th Cir. 2001). The ALJ's opinion must adequately articulate how the evidence was weighed so that this court may trace the path of his or her reasoning. *Id*. For example, ignoring an entire line of evidence would fail this standard. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). However, as with any fact finder, the ALJ is entitled to choose between competing opinions. *Luna v. Shalala*, 22 F.3d 687, 690 (7th Cir. 1994). Most importantly, "the ALJ must build an accurate and logical bridge from the evidence to his conclusion." *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000). In addition, the court reviews the ALJ's decision to ensure that no errors of law occurred. *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001).

Plaintiff contends that the ALJ erred in concluding that she was not disabled before December 31, 1994, from post-polio syndrome. First, plaintiff appears to contend that the ALJ erred in not finding that she suffered from post-polio syndrome before 1994. Plaintiff points to the ALJ's decision wherein he stated, "'[t]he fact is that if claimant had post polio syndrome, she would have had it for much of her life, yet she was still able to work and

engage in a wide range of activities." AR 27. Plaintiff argues that this statement is contrary to Social Security Ruling 03-1p, which explains that post-polio syndrome is a progressive condition that may not manifest itself until 10-40 years after the initial polio infection. *See* SSR 03-1p, *Development and Evaluation of Disability Claims Involving Postpolio Sequelae*, 68 Fed. Reg. 127, 39611-39644 (July 2, 2003), *available at* http://www.ssa.gov/OP_Home/rulings/di/01/SSR2003-01-di-01.html. Plaintiff argues that the ALJ ignored evidence in the record that indicates that her symptoms leading up to her date last insured were consistent with post-polio syndrome even though plaintiff was not officially diagnosed with the syndrome until after her disability insurance expired.

I agree that insofar as the ALJ did not find plaintiff to have had post-polio syndrome before her last date insured, that finding is not supported by substantial evidence. Although the reports from plaintiff's doctors are not written in the clearest of terms, the general tenor of these reports is that plaintiff's diagnosis of post-polio syndrome, though not made conclusively until 2000, is retroactive to the late 1980s. The ALJ appears to have discounted this retroactive diagnosis in favor of medical notes from earlier clinic visits during which plaintiff's doctors did *not* find evidence of post-polio syndrome. However, it is reasonable to assume that plaintiff's current treating physicians are familiar with her medical history and took it into account when they opined that plaintiff had post-polio syndrome long before she was officially diagnosed with it. The ALJ should have deferred to the treating

physicians and found that plaintiff had post-polio syndrome, rather than "possible" post-polio syndrome, before her date last insured.

In any case, it is not necessary to dwell on this error because it does not affect the outcome. Even if the ALJ had found that plaintiff had post-polio syndrome before December 31, 1994, that finding would not equate with a finding that plaintiff was disabled. Claims involving post-polio syndrome are evaluated in the same manner as any other impairment: to qualify for disability benefits, the claimant must establish not only the existence of the impairment by medically acceptable clinical and laboratory diagnostic techniques, but must also establish that that impairment prevented her from performing any substantial gainful activity. *See* SSR 03-1p ("Once postpolio sequelae has been documented as a medically determinable impairment, the impact of any of the symptoms of postpolio sequelae, including fatigue, weakness, pain, intolerance to cold, etc., must be considered both in determining the severity of the impairment and in assessing the individual's RFC."). In spite of the ALJ's failure to list post-polio syndrome as one of plaintiff's impairments, he did find that plaintiff had other severe impairments and he proceeded to evaluate all of plaintiff's reported symptoms in his decision as part of the step four analysis.[2] Therefore, it is of no great moment that the ALJ found at step two that plaintiff only "possibly" had post-polio syndrome before her insurance expired.

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[2] Notably, plaintiff does not contend that her post-polio syndrome was so severe before December 31, 1994, as to satisfy the criteria of any listed impairment.

Plaintiff next contends that the ALJ did not properly weigh the medical evidence, her testimony and the reports from her doctors in arriving at his conclusion that plaintiff retained the ability to perform a full range of sedentary work as of December 31, 1994. Plaintiff argues that the ALJ should have credited Porter's opinion that plaintiff was disabled as of the time she quit working in 1990. However, Porter was a vocational expert, not a treating physician, so his opinion was not entitled to any special weight. *Cf.* 20 C.F.R. § 404.1527 (explaining that medical opinions from treating sources may be entitled to controlling weight). Furthermore, the ultimate issue of whether an individual is "disabled" is reserved for the commissioner. 20 C.F.R. § 404.1527(e)(1). As the ALJ noted, the medical records contradicted Porter's finding that plaintiff was totally disabled as of 1990, in that they indicated that plaintiff was quite active during the relevant time period and even after her last date insured. Records from the relevant time period and afterwards showed that plaintiff on at least one occasion was able to perform heavy lifting, regularly cared for exotic birds that she and her husband raised commercially, worked at her family's cement lawn ornament business, traveled to England and maintained a "very busy schedule." In addition, the ALJ noted that there were large gaps in plaintiff's medical treatment during the relevant time period. For example, plaintiff sought no treatment from July 17, 1991 to September 30, 1992, at which time she hurt her wrist when performing lifting associated with a move. During the next year, plaintiff did not seek any treatment for post-polio type symptoms.

Although plaintiff points out that she offered an explanation for some of the medical reports in her testimony, the ALJ was not required to accept plaintiff's suggestion that her activities were sporadic over the notations in the medical records which suggested that plaintiff led a fairly normal life from 1990 until her insured status expired. Faced with the conflicting evidence, the ALJ could reasonably conclude that the contemporaneous medical reports were more credible than plaintiff's memory of what she had been doing 10 years in the past.

In her reply brief, plaintiff suggests that the ALJ could not have rejected her testimony without making an explicit finding that she was not credible. Plaintiff's failure to raise this argument in her initial brief means that she has waived it. *See Wildlife Exp. Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n. 5 (7th Cir. 1994) ("Arguments raised for the first time in the reply brief are waived."). In any case, although I agree that the ALJ should have made some finding about plaintiff's credibility, his failure to do so is harmless because his reasoning is clear from his decision. *See* SSR 96-7p (ALJ's decision "must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight"). In his decision, the ALJ summarized plaintiff's testimony and indicated that he had considered it. In addition, he contrasted plaintiff's testimony concerning her fatigue, inactivity during the day and headaches with the medical reports, which indicated that plaintiff maintained a busy schedule and did not complain of headaches at any time before her insured status expired.

In the end, the ALJ found that "[w]hile claimant may have had some degree of pain and limitations as of December 31, 1994, it was not all that severe or limiting and would not have significantly compromised claimant's ability to engage in work activities." On the whole, the ALJ's decision makes clear that he did not give much weight to plaintiff's allegations of total disability and the reasons for that weight. Because those reasons are amply supported by the record, this court should not disturb the ALJ's implicit credibility finding. *Sims v. Barnhart*, 309 F.3d 424, 431 (7th Cir. 2002) (ALJ's credibility determinations are not disturbed on appeal unless patently wrong).

Finally, I agree with the ALJ that the letters from plaintiff's treating physicians did little to advance plaintiff's claim. None of the doctors offered any opinion regarding plaintiff's ability to work from 1990-1994. Dr. Harbst stated that plaintiff had "quit her job [as a cosmetologist] in 1990 due to her inability to work as a result of her symptoms associated with post polio syndrome," but this statement does not contradict the ALJ's finding that plaintiff could perform sedentary work in spite of her symptoms. As the ALJ noted in his opinion, plaintiff's past work was more strenuous than sedentary in that it was light work, and the ALJ made no finding that she could return to that level of work.

In sum, substantial evidence in the record supports the ALJ's conclusion that plaintiff's symptoms from her impairments were not so severe before December 31, 1994 as to render her unable to perform at least sedentary work. Accordingly, this court should affirm the decision of the commissioner.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner of Social Security denying plaintiff Eleanore L. Grosland's application for disability insurance benefits be AFFIRMED.

Entered this 9th day of July, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge