

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

HELEN M. YOURCHUCK,

Plaintiff,

OPINION AND ORDER

v.

10-cv-812-bbc

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

Plaintiff Helen M. Yourchuck seeks disability insurance benefits, contending that her back pain prohibits her from working. This is the second time she has appealed to this court from a decision by an administrative law judge denying her benefits. On February 15, 2007, Judge John C. Shabaz remanded plaintiff's action for judicial review of an adverse decision to the Commissioner of Social Security. On remand, the administrative law judge held a second hearing and issued a second decision, finding that plaintiff was not disabled from her alleged onset date, January 1, 2000, through her last insured date, June 30, 2006. On October 16, 2010, the Appeals Council declined to take jurisdiction over plaintiff's claim, leaving the decision of the administrative law judge as the final decision of the commissioner.

Plaintiff seeks judicial review of the second adverse decision of the commissioner under 42 U.S.C. § 405(g).

Plaintiff contends that the administrative law judge failed to make a proper credibility assessment, which made his residual functional capacity and step four and five findings improper. I find that the administrative law judge's credibility assessment was proper. Therefore, I do not need to address plaintiff's additional arguments. For these reasons, I am denying plaintiff's motion for summary judgment and affirming the administrative law judge's decision.

The following facts are drawn from the administrative record (AR).

FACTS

A. Plaintiff

Plaintiff was born on October 25, 1971, making her 28 at her alleged onset date. She graduated from high school. AR 36, 269. She worked at several places: as an "unloader" at Walmart from August to October 1999; as a cashier at a Dollar Tree store from July 2000-June 2001; and as a cashier at Jodens Shell from August to October 2001. AR 77, 78, 80. She alleged disability as of January 2000 because of back pain. AR 106.

B. First Case

In plaintiff's previous case, the administrative law judge found that plaintiff had severe impairments of degenerative disc disease and obesity, but that she retained the residual functional capacity to perform light work with only occasional climbing, stooping, bending, crouching, crawling or kneeling and a sit or stand option, with standing limited to 30 minutes at a time. The administrative law judge found plaintiff not disabled because she was able to perform her past relevant work as a file clerk and other jobs available in significant numbers in the national economy. AR 33-34.

On her first appeal to this court, plaintiff argued that the administrative law judge erred in assessing plaintiff's credibility, in determining her residual functional capacity and in determining that she could perform her past work and other jobs existing in significant numbers in the economy. Judge Shabaz remanded the case to the commissioner to re-assess plaintiff's credibility, specifically, to address the side effects of her pain medication and her daily activities. He also suggested that after assessing plaintiff's credibility, the administrative law judge might need to make a new determination of plaintiff's residual functional capacity and whether she was disabled at steps four and five.

C. Medical Evidence

Plaintiff has a history of lower back pain going back to the mid-1990's. Since then she has been seeing Physician's Assistant Gretchen C. Considine. AR 194. She has participated in physical therapy. AR 174-177.

On January 21, 2000, plaintiff saw Dr. William R. Niedermeier for her low back pain. AR 169, 225. Plaintiff reported taking Darvocet and Naprosyn for her pain. Niedermeier recommended physical therapy and a Transcutaneous Electrical Nerve Stimulation (TENS) unit for plaintiff. He noted that plaintiff was obese, with chronic pain and decreased muscle tone through her trunk. Plaintiff reported that she was operating a kennel with her husband, lifting 50 pounds of feed regularly and handling hay bales. AR 169-70.

On October 30, 2001, plaintiff saw Physician's Assistant Gretchen Considine for low back pain. Considine noted that plaintiff moved around the room easily and that the examination was normal. She recommended water exercise and weight loss and prescribed Ibuprofen, Flexeril and Vicodin, mainly for use at night. AR 184.

In February 2002, Dr. Niedermeier examined plaintiff and noted that her gait, reflexes and motor strength were normal. X-rays showed minimal anterior osteophyte formation at 3-4. He recommended exercise and weight control. AR 223. A March 2002 magnetic resonance imaging scan showed degenerative changes in one disc space in the lower spine with no significant disc disease, stenosis or narrowing. AR 222. After reviewing the report,

Niedermeier recommended conservative treatment, including weight control, exercise and anti-inflammatories. AR 221.

On October 21, 2002, plaintiff saw Dr. Michael Lamson for chronic low back pain. She had somewhat limited forward flexion, but otherwise unrestricted movement. Her strength and reflexes were normal. He prescribed aquatic therapy. AR 220. When plaintiff returned to see Dr. Lamson on December 16, 2002, he recommended that she see one of his partners to discuss a surgical option. AR 219.

On December 10, 2002, Physician's Assistant Considine indicated plaintiff took cyclobenzaprine and hydrocodone, which may cause drowsiness. AR 214.

In April 2003, plaintiff saw Dr. William Fowler, who noted that "her presentation seems consistent with chronic benign myofascial pain." He suggested that she continue an exercise program and taking Nortriptyline and Flexeril at night. AR 373.

In June 2003, plaintiff saw Physician's Assistant Considine for increased back pain. She reported that the pain had been worse because of more activity, including painting and working in her garden. Plaintiff reported taking Vicodin as needed but not every day. Considine recommended Neurontin with the hopes of decreasing plaintiff's narcotic pain medication. She also noted that plaintiff was morbidly obese. AR 380. On March 17, 2004, Considine noted that a magnetic resonance imaging scan indicated mild disc disease.

She prescribed Vicodin for plaintiff, advising her that it may cause constipation and drowsiness. AR 375.

Plaintiff saw Dr. Fowler again on April 19, 2004. He noted that she continued to be quite busy with horse and other livestock farm work and was taking Vicodin three times a day. He indicated that her symptoms were relatively unchanged since her visit the previous year. Fowler stated that plaintiff found it increasingly difficult to perform the recommended daily exercises and her daily farm work. He recommended that plaintiff do aerobic and stretching exercises and suggested a trial of a Duragesic patch, a long acting narcotic analgesic. AR 370-72.

On February, 10, 2005, plaintiff saw Physician's Assistant Considine. At that time plaintiff was taking Oxycontin, which she did not like to take because it "wipe[d] her out" for a couple of hours. Considine prescribed Celebrex for her pain when she was "on the road" giving support seminars for troops being deployed to Iraq. AR 239.

In June 2005, plaintiff was seeing a Polarity Therapist, who relieved her pain through talk, medication, acupuncture and massage. The therapist wrote that plaintiff had difficulty completing her daily chores with her animals and gardens but rarely complained about her pain. AR 235.

D. Hearing Testimony

1. Plaintiff

At the first hearing before Administrative Law Judge John Pleuss, plaintiff testified that she had excruciating pain in her lower back. AR 257. She testified that her pain medications made her sick to her stomach, dizzy and “hazy.” AR 262.

Plaintiff testified that she still did some chores on her farm, but that they took her much longer. AR 260. She said she could not drive for long distances, and when she rode in a car, she had to take breaks. AR 262-63. She was going deer hunting once a year, riding a four-wheeler to a modified deer stand. AR 263.

Plaintiff testified that she was four feet eleven inches tall and weighed 205-210 pounds. AR 264. She testified that she could not work eight hours a day, five days a week, because she has to lie down with her feet elevated and would miss one day of work a week. AR 265.

Following remand, Administrative Law Judge Pleuss held a hearing on December 15, 2009. Plaintiff testified then that she was five feet tall and weighed 212 pounds. She had last worked in 2001 as a cashier at Joden’s Shell and had stopped working there because she missed one to three days of work a week. AR 419. She testified that she had worked as a file clerk for the State of Wisconsin for six months in 1992. AR 421-22.

Plaintiff testified that she had sharp pain in her lower back, which was usually an 8 on a scale of one to 10, with 10 being the worst. At times, she had tingling going down her right leg. She took 30 milligrams of MS Contin for the pain and Vicodin for “break through” pain. She also took a muscle relaxant. AR 422-23, 427. Plaintiff testified that some days the medication made her feel as if she were in a “complete fog” and it caused her memory and attention problems. AR 423. Plaintiff testified she had a home traction device and had been having “polarity therapy.” AR 429-30.

Plaintiff testified that changes in weather and riding in a car made the pain worse. When she went on a five-and-a-half hour car ride to see her family, she had to stop every half hour for five or ten minutes to move around. AR 423-24. She could sit comfortably for 10-15 minutes before the pain increased. AR 424. She testified that her husband did most of the shopping, cooking and washing dishes. When he was deployed to Iraq, she hired a part-time person to help her with the farm chores. She used an ice cream bucket to take feed to her geese and ducks. AR 425-26. She testified that her back pain was getting progressively worse. AR 444.

2. Plaintiff's husband

Dean Yourchuck, plaintiff's husband, testified that plaintiff was in pain most of the day. He explained that Oxycontin “wipe[d] her out” for about four hours. AR 441-42. He

stated that she could not work because she would be absent one to three days a week because of pain and because she could not function when she took the pain pills. AR 443.

3. Vocational expert

Karl F. Botterbusch testified at both hearings as the neutral vocational expert. The administrative law judge asked Botterbusch to assume an individual of plaintiff's age, education and work experience with the residual functional capacity to perform light work with no climbing, crawling or kneeling, occasional stooping, bending or crouching and standing for only 30 minutes. He also indicated the individual would be "limited, but satisfactory" with regard to maintaining attention and concentration, demonstrating reliability and completing a normal work day and work week without interruptions from unreasonable rest periods. Botterbusch concluded that such an individual could perform her past work as an order clerk (DOT # 249.362-026), but not as a file clerk. AR 448-49.

Botterbusch testified that there were other light, unskilled jobs with a sit or stand option, including injection molding machine tender, DOT #556.685-038, (2,200 in Wisconsin and 88,600 in the United States); parking lot attendant, DOT #915.473-010, (1,500 jobs in Wisconsin and 131,000 jobs in the United States); photocopy machine operator, DOT #207.685-014 (800 jobs in Wisconsin and 40,000 in the United States); and

office helper, DOT # 239.567-010, (2,200 jobs in Wisconsin and 100,000 jobs in the United States). AR 448-49.

In response to a question from plaintiff's attorney, the expert explained that he would define "limited but satisfactory" as requiring additional effort. AR 449-52.

E. The Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge incorporated by reference his prior decision, including his analysis of the medical records. Then he performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. Under this test, the administrative law judge considers sequentially 1) whether the claimant is not currently employed; 2) whether the claimant has a severe impairment; 3) whether the claimant's impairment meets or equals one of the impairments listed in 20 C.F.R. § 404, Subpt. P, App. 1; 4) whether the claimant is unable to perform her past work and 5) whether the claimant is capable of performing work in the national economy. Knight v. Chater, 55 F.3d 309, 313 (7th Cir. 1995). If a claimant satisfies steps one through three, she is found automatically to be disabled. If the claimant meets steps one and two, but not three, then she must satisfy step four. Id. The claimant bears the burden of proof in steps one through four. If the claimant satisfies step four, the burden shifts to the commissioner at step 5 to prove that the claimant is capable of performing work in the national economy. Id.

At step one, the administrative law judge found that plaintiff had not engaged in substantial gainful activity between January 1, 2000, her alleged onset date, and June 30, 2006, the date she was last insured. At step two, he found that she had severe impairments of obesity and degenerative disc disease. At step three the administrative law judge found that plaintiff did not have an impairment or combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. § 404, Subpart P, Appendix 1. AR 302-303.

The administrative law judge determined that plaintiff retained the residual functional capacity to perform light work with no climbing, crawling or kneeling, occasional stooping, bending or crouching and standing limited to 30 minutes. He also indicated that plaintiff would be limited but satisfactory with regard to maintaining attention and concentration, demonstrating reliability and completing a normal work day and work week without interruptions from unreasonable rest periods. AR 304. To allow for the drowsiness caused by plaintiff's pain medications, the administrative law judge included limitations of maintaining attention and concentration. AR 307.

In determining this residual functional capacity, the administrative law judge considered the credibility of plaintiff's testimony that she was unable to work because of pain and the side effects of her pain medication in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. In assessing the credibility of plaintiff's testimony,

the administrative law judge considered the medical evidence. He noted that there were no significant clinical findings that would support plaintiff's allegations of pain and that, except for pain medication, her doctors suggested conservative treatment, including exercise and weight loss. Next, the administrative law judge considered her daily activities. He considered evidence submitted prior to her first hearing that after her alleged onset of disability plaintiff was hunting deer, raising horses and dogs for profit, carrying five-gallon buckets of food to feed her pigs, doing voluntary work for the military and driving a "four-wheeler." He found that this evidence that plaintiff was doing some farm work in April 2004 suggested she had a capacity to do some work. He found also that plaintiff's testimony was not credible because even before her alleged onset date she had not worked at substantial gainful activity. AR 305-307.

Finally, in making his credibility assessment, the administrative law judge considered the side effects of plaintiff's pain medications. He noted that before the expiration of her insured status she was taking nightly doses of Nortriptyline and Flexeril, with Vicodin as needed, and that she had been prescribed Duragesic patches in 2004. AR 304-306. However, he found that at times during the relevant period she often took no medications at all and that, in October 15, 2007, she took no pain medications for two weeks until her prescription was re-filled. AR 305, 307. Also, the administrative law judge considered the testimony of plaintiff and her husband about her current pain and medication side effects. He concluded

that, although plaintiff might be currently disabled by her pain and the side effects of her medication, her testimony that she was not able to work prior to her last insured date was not credible.

At step four, the administrative law judge found that plaintiff could perform her past work as an order clerk. AR 307. At step five, the administrative law judge found that there were jobs that existed in significant numbers in the national economy that plaintiff could perform. He concluded that plaintiff was not disabled from January 1, 2000 through June 30, 2006, the date she was last insured. AR 308.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). When reviewing the commissioner's findings under § 405(g), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows

reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, id., and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

Under Social Security Ruling 96-7p, an administrative law judge must follow a two-step process in evaluating an individual's own description of his or her impairments. The judge must 1) determine whether an "underlying medically determinable physical or mental impairment" could reasonably be expected to produce the individual's pain or other symptoms; and 2) if such a determination is made, evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Social Security Ruling 96-7p, 1996 WL 374186, *1 (1996); see also Scheck v. Barnhart, 357 F.3d 697, 702 (7th Cir. 2004). When conducting this evaluation, the administrative law judge may not reject the claimant's statements regarding her symptoms on the sole ground that the statements are not substantiated by objective medical evidence. Instead, the administrative law judge must

consider the entire case record to determine whether the individual's statements are credible. Relevant factors the administrative law judge must evaluate are the individual's daily activities; the location, duration, frequency and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; the individual's prior work record and efforts to work; and any other factors concerning the individual's functional limitations and restrictions. SSR 96-7p; 20 C.F.R. §§ 404.1529(c), 416.929(c). See also Scheck, 357 F.3d at 703; Zurawski, 245 F.3d at 887.

An administrative law judge's credibility determination is given special deference because that judge is in the best position to see and hear the witness and to determine credibility. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). In general, an administrative law judge's credibility determination will be upheld unless it is "patently wrong." Prochaska v. Barnhart, 454 F.3d 731, 738 (7th Cir. 2004); Sims v. Barnhart, 442 F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying."). However, the administrative law judge still must build an accurate and logical bridge between the evidence and the result. Shramek, 226 F.3d at 811. The court will affirm a credibility

determination as long as the administrative law judge gives specific reasons that are supported by the record. Skarbeck v. Barnhart, 390 F. 3d 500, 505 (7th Cir. 2004).

In recent opinions, the Court of Appeals for the Seventh Circuit has expressed criticism of the Social Security Administration's credibility assessments. The court has explained that it is not enough for the administrative law judge to say only that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." As the court has noted, assessments like these fail to identify which statements are not credible and what exactly "not entirely" is meant to signify. Martinez v. Astrue, 630 F.3d 693, 694 (7th Cir. 2011).

This case was remanded to the commissioner for a new credibility assessment and consideration of the relevant factors listed in SSR 96-7. In making his new credibility assessment, the administrative law judge addressed plaintiff's statements that her pain and the side effects of her pain medication rendered her unable to work. He considered the evidence concerning the side effects of medications that she was taking during the relevant time period (Nortriptyline, Flexeril and Vicodin). There was evidence in the record that these medications made plaintiff drowsy. There is also evidence in the record that during the relevant period plaintiff was prescribed a Duragesic patch and Oxycontin, which she did not like to take because it "wiped her out." However, the administrative law judge noted that, despite taking these medications, plaintiff was giving support seminars for the military, which

suggests that the side effects of the medicine were not disabling before her date last insured. He found that plaintiff's statements about the side effects of her pain medication pertained to her condition after her last insured date. The administrative law judge also noted that at times during the relevant period plaintiff was taking no medication at all. Although plaintiff argues that this statement is not supported by substantial evidence, the record contains evidence that in 2003 plaintiff was not taking Vicodin every day and that before 2006, she was taking much less medication than she testified she was taking at the second hearing.

In addition, in making his credibility assessment, the administrative law judge considered the medical evidence, plaintiff's daily activities and her work history. He found that the medical evidence did not support the pain alleged by plaintiff. Specifically, he noted that the magnetic resonance imaging scans showed that she had only mild degenerative disc disease. He considered plaintiff's daily activities after the alleged onset of her disability and before her last insured date, including farm work, gardening and painting, and found from the evidence of these activities that she could perform some work. Finally, he considered plaintiff's sparse work history before her alleged onset date.

I am persuaded that the administrative law judge properly considered evidence of plaintiff's activities and the side effects of her medications as well as other relevant factors during the relevant period. He built an accurate and logical bridge from this evidence to determine that plaintiff's testimony that she was disabled by pain and the side effects of her

medication before her last insured date was not credible. Shramek, 226 F.3d at 811. Because I have found that the administrative law judge's assessment was proper, it is not necessary to address plaintiff's arguments that an improper credibility assessment affected the administrative law judge's residual functional capacity assessment and his step four and step five determinations. Those determinations are now moot.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Helen M. Yourchuck's appeal is DISMISSED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 10th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge