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

DUDLEY J. ROBINSON,

Plaintiff,

v.

MICHAEL ASTRUE,
Commissioner of Social Security,,

Defendant.

OPINION AND ORDER

10-cv-120-wmc[1]

Pursuant to 42 U.S.C. § 405(g), Dudley J. Robinson seeks judicial review of an adverse decision of the Commissioner of Social Security that he is not "disabled" within the meaning of 42 U.S.C. § 423(d) and, therefore, not eligible for Disability Insurance Benefits and Supplemental Security Income under Title II and Title XVI of the Social Security Act. 42 U.S.C. §§ 416(i), 1382(c)(3)(a). Specifically, Robinson contends the administrative law judge erred in finding that he could perform simple, repetitive tasks, even though he had moderate difficulties in maintaining concentration, persistence and pace. On the current record, the court is unable to find that the administrative law judge properly considered and incorporated this moderate limitation in formulating a hypothetical to the vocational expert. Accordingly, the court will remand for further proceedings before the Commissioner.

FACTS[2]

A. Procedural Posture

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[1] This case was reassigned to Judge William Conley pursuant to a March 31, 2010 administrative order.

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

Dudley Robinson was born on August 2, 1950. AR 137. While he completed high school, Robinson required special education classes for reading. AR 26-27, 201. Robinson has worked in the past as a "hand packager." AR 27.

On October 17, 2006, Robinson filed an application for disability insurance benefits and supplemental security income, alleging that he had been unable to work since March 10, 2006, because of leg and back problems. AR 137-41, 197. After the local disability agency denied Robinson's application both initially and upon reconsideration, he requested a hearing. Administrative Law Judge Wendy Weber heard testimony on September 8, 2009, from Robinson, AR 21-34, from a neutral medical expert, AR 34-40, and from a neutral vocational expert, AR 41-52. On October 27, 2009, the judge issued a decision finding Robinson not disabled. AR 9-17. Her decision became the final decision of the commissioner on January 13, 2010, when the Appeals Council denied Robinson's request for review. AR 2-4.

B. Medical Evidence[3]

1. Consulting Examiners

On April 11, 2007, a licensed, clinical psychologist, Rachel Pallen, Ph. D., examined Robinson for the state disability agency. Robinson reported back, hip and feet pain. AR 269. After taking a medical history and performing a mini-mental status exam, Pallen

[3] Because Robinson challenges only the administrative law judge's decision regarding his "residual functional mental capacity," the medical evidence set forth here will focus on this capacity.

provided an opinion on his capacity for work. Specifically, Pallen found Robinson has the ability to understand, remember and carry out simple instructions and to respond appropriately to supervisors and co-workers. She found Robinson also has the ability to maintain concentration and attention, but that his ability to maintain an adequate work pace is somewhat poor. Finally, Pallen found that Robinson has the faculties to withstand routine work stresses and adapt to changes. AR 274-75.

Pallen diagnosed Robinson with (1) pain disorder associated with a medical condition, (2) "polysubstance abuse" (currently in full sustained remission), and (3) adjustment disorder with depressed mood (considered mild and assigned a Global Assessment Functioning Score of 65). AR 274.

On April 26, 2007, Richard W. Hurlburt, Ph.D., a licensed psychologist, performed a consultative examination of Robinson for the Wisconsin Department of Vocational Rehabilitation. Hurlburt interviewed Robinson and performed the Weschler Memory Scale-Third Edition, Weschler Adult Intelligence Scale-Third Edition, and the Wide Range Achievement Test-Fourth Edition. AR 305. Robinson's overall memory functioning was in the "low average" range, but his working memory was solidly average. AR 306. The adult intelligence test resulted in a full scale IQ of 78, within the "borderline" range. The results of the wide range achievement test showed Robinson had substantial difficulty in reading, making him "basically illiterate."

In addition to his other cognitive difficulties, Hurlburt found that Robinson quite probably suffered from a general learning disability. Hurlburt concluded:

> He is most likely to be successful if he could be employed in a situation that would respond well to his diligence and provide him with some routine. He is likely to be able to learn new skills if they are not too complex and to perform them well; however, he may have some difficulty with on-the-job decision making.

AR 308.

2. Non-examining, Consulting Psychologist

On May 14, 2007, a state agency psychologist, William A. Merrick, Ph.D., completed a psychiatric review technique form for Robinson, listing diagnoses of affective disorder, "somotoform" disorders, and substance addiction disorder. AR 285. Merrick found that Robinson had no restrictions on activities of daily living; no difficulties in maintaining social functioning; and no episodes of "decompensation," but had mild difficulties in maintaining concentration, persistence or pace. AR 295.

C. Hearing Testimony

At the administrative hearing, Robinson testified as follows:

- He had been working as a maintenance man at the Stay Inn and Suites in Stevens Point in exchange for rent and about $200 a month for miscellaneous expenses. AR 22. He had not worked for wages since 2006. AR 23.

- He could lift 50 pounds, but had back and leg pain. AR 25-26. He had not seen a doctor in the past few years because he has no medical insurance. AR 29.
- Although Robinson had a high school diploma, he required special education classes for reading. AR 26. Robinson can not read very well. AR 27.
- Robinson had been sober for nine years and the only medication he took was Zantac for his stomach. AR 27. He has no driver's license. AR 34.
- Robinson can stand for a half-hour at a time and walk two miles. AR 33.

The administrative law judge called Dr. Steven Wells to testify as a neutral medical expert. AR 34. After reviewing the record, including Dr. Pallen's opinion that Robinson's ability to maintain pace was somewhat poor, Wells testified that Robinson would be limited to simple, repetitive tasks. AR 38. Further, he testified that Robinson had mild restrictions on daily activities, moderate difficulties in maintaining social functioning and in concentration, persistence or pace with no episodes of decompensation. AR 39. On cross-examination, Wells testified that there were no *specific* aspects of concentration that would be limiting beyond simple, repetitive tasks. AR 40.

The administrative law judge called Joseph Torres to testify as a neutral vocational expert. AR 41. As a first hypothetical, the administrative law judge asked the expert to

assume an individual of Robinson's age, education, and work experience, who is limited to simple repetitive tasks, illiterate and able to: (1) lift 50 pounds occasionally, 25 pounds frequently, (2) stand or walk six hours in an eight hour day, (3) sit six hours in an eight hour day, (4) frequently climb stairs and (5) stoop but not crawl. AR 47-48. Torres testified that such an individual could perform Robinson's past work as a hand packager. AR 48. As a second hypothetical, the administrative law judge asked Torres to assume the same individual, but only able to lift 20 pounds occasionally and 10 pounds frequently. Torres responded that, although the individual would not be able to perform Robinson's past work, he could perform as a housekeeper, assembler of small products, and fast food worker. AR 48-49. Torres testified that his opinions were consistent with the *Dictionary of Occupational Title*s. AR 49.

Robinson's lawyer asked Torres how an individual could perform the hand packager job classified as semi-skilled. Torres responded that although it was semi-skilled, the *Dictionary* defined it as simple, repetitive tasks. AR 50. The lawyer then asked whether simple, repetitive tasks would generally limit an individual to unskilled work. Torres testified that it did, except that in this case the *Dictionary* defined it as simple, repetitive tasks. Torres would also classify hand packager jobs as unskilled. AR 51.

D. Administrative Law Judge's Decision

Applying a five-step sequential analysis, the administrative law judge found that Robinson was not disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. Under this test, the

administrative law judge sequentially considers: (1) whether the claimant is 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 can perform his 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, he is automatically found to be disabled. If the claimant meets steps one and two, but not three, then he 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 to prove that the claimant is capable of performing work in the national economy. *Id.*

At step one, the administrative law judge found that Robinson's maintenance work did not rise to the level of substantial gainful activity. She found that Robinson had not engaged in substantial gainful activity since March 10, 2006, his alleged onset date. At step two, she found that Robinson had (1) severe impairments of chronic mechanical lower back pain, possibly secondary to degenerative changes; (2) adjustment disorder with depressed mood, mild, borderline intellectual functioning, somotoform disorder; and (3) a history of alcohol abuse in sustained remission. At step three, she found that Robinson did not have a physical impairment or mental impairment that met or medically-equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1.

As to step three, the administrative law judge concluded that Robinson's mental impairments did not meet or equal the requirements of Listings 12.04, 12.05 or 12.07. She

also concluded that Robinson had mild difficulties in his activities of daily living and in maintaining social functioning, as well as moderate difficulties in maintaining concentration, persistence or pace. Further, the administrative law judge found that (1) Robinson had experienced no episodes of "decompensation" and (2) the evidence failed to establish the presence of a mental disorder so profound as to render him disabled under "paragraph C" criteria. AR 12. The administrative law judge also found that Robinson retained the residual functional capacity to perform work which required (1) lifting and carrying 50 pounds occasionally and 25 pounds frequently; (2) standing or walking at least six hours total out of eight hours; (3) sitting for six hours total of out of eight hours; (4) frequently climbing stairs and stooping, but no crawling; and (5) only simple, repetitive tasks. AR 13.

In reaching her decision, the administrative law judge considered the medical evidence and relied on the opinions of the state agency physicians. AR 14-15. In particular, she found that:

> Although the examining physician, Dr. Rachel Pallen, indicated the claimant with a poor prognosis (as it was indicated that his physical condition would deteriorate) and that his ability to maintain adequate work pace was somewhat poor, Dr. Pallen concluded that the claimant still had the ability to understand, remember and carry out simple instructions. He would respond appropriately to supervisors and co-workers. His ability to maintain concentration and attention was good and he had the faculties to withstand routine work stresses and to adapt to changes.

AR 15. The administrative law judge also considered Dr. Hurlburt's opinion that Robinson was likely to be able to learn new skills if they were not too complex and to perform them well, but that he might have some trouble with on-the-job decision making. Finally, she gave

significant weight to Dr. Wells' opinion that Robinson was limited to simple, repetitive tasks.

At step four, the administrative law judge ultimately found, based on the testimony of the vocational expert, Mr. Torres, that Robinson was able to perform his past work as a hand packager and, therefore, was not disabled. AR 17.

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" if 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, re-weigh 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). For this reason, the administrative law judge must build a logical and accurate bridge from the evidence to her conclusion before denying benefits. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

B. Mental Residual Functional Capacity

Robinson contends that the administrative law judge finding that he had moderate difficulties in maintaining pace, precluded her (1) finding him able to perform simple, repetitive tasks (unskilled work) and (2) failing to note this limitation in her hypothetical question to the vocational expert. In *Craft v. Astrue*, 539 F.3d 668, 677-78 (7th Cir. 2008), the Seventh Circuit held an RFC of "unskilled" work would be appropriate "where the claimant has the ability to understand, carry out, and remember simple instructions; respond appropriately to supervision, coworkers, and usual work situations; and deal with changes in a routine work setting." In *Stewart v. Astrue*, 561 F.3d 679, 685 (7th Cir. 2009), the Court found that an administrative law judge failed to account for a claimant's moderate limitations in concentration, persistence and pace when he posed a hypothetical asking a vocational expert to assume a person who was limited to simple, routine tasks not requiring constant interactions with coworkers or the general public.

District courts have interpreted *Stewart* to mean that the administrative law judge does not have to include limitations of maintaining concentration, persistence or pace in his residual functional capacity finding or the hypothetical question posed to the expert *if* the

ALJ concludes, and the record adequately supports the conclusion, that the individual can perform unskilled work. *Gray v. Astrue,* No. 1:09-CV-167, 2009 WL 1228632, *6 (N. Ind. May 1, 2009(quoting *O'Connor-Spinner v. Astrue*, No. 4:06-CV-171, 2007 WL 4556741, *7 (S.D. Ind. Dec, 20, 2007))(an ALJ is free to formulate his mental residual functional capacity assessment in terms such as 'able to perform simple routine repetitive work' so long as the record adequately supports the conclusion.) In *Jaskowiak v. Astrue*, 2009 WL 2424213, *18 (W.D. Wis. Aug. 6, 2009), this court rejected the notion that a limitation to "unskilled" or "simple" work can never be sufficient to reflect a person's mental limitations, provided the administrative law judge considers mental abilities required of unskilled work and explains her basis for finding that the individual has such abilities.

In this case, there is evidence in the record that Robinson had moderate limitations in maintaining concentration, persistence or pace. Dr. Pallen, who examined Robinson for the state disability agency, found that his ability to maintain an adequate work pace was somewhat poor. Dr. Wells, the medical expert, testified that Robinson had moderate limitations in maintaining concentration, persistence or pace. Although Wells testified that there were limitations in aspects of his ability to concentrate that would likely preclude Robinson performing more than simple, repetitive tasks, he did not testify as to any limitations Robinson might have in his ability to work because of moderate limitations on pace.

The commissioner argues, however, that Wells considered Pallen's opinion about Robinson's pace limitations in finding Robinson could perform simple, repetitive tasks.

Wells *did* refer to Pallen's comment about pace before opining that Robinson could perform simple, repetitive work. Moreover, the administrative law judge considered Pallen's opinion that Robinson's ability to maintain pace was poor, but that he had the ability to understand, carry out, and remember simple instructions; respond appropriately to supervision, coworkers, and usual work situations; and deal with changes in a routine work setting. Also, she considered the opinion of Dr. Hurlburt, who found Robinson was capable of learning new skills if they were not too complex and to perform them well, along with the state agency psychologist's opinion that Robinson had mild difficulties in maintaining pace. These conclusions are supported by substantial evidence of Robinson's ability to function largely independently and to enjoy various physical and psychological aspects of his daily life, including climbing up and down stairs, walking a mile without any assistance or support, bike riding and playing cards. Based on this substantial evidence, the administrative law judge conclusion that Robinson had retained the ability to perform simple, repetitive work appears reasonable.

Robinson's insistence that his residual functional capacity had to include an additional limitation related to concentrating, persistence and pace is nevertheless troubling under 7th Circuit case law. "Concentration, persistence, or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings." 20 C.F.R., Part 404, Subpt. P., App. 1, 12.00 C. 3. The commissioner defines unskilled work as work that requires little or no judgment and involves only simple tasks, which can be learned in a short

period of time. 20 C.F.R. § 416.968(a). While these descriptions certainly overlap, they are not coterminous and the Seventh Circuit requires that the ALJ either formulate the hypothetical question to reflect its finding of a restrictive mental capacity as in *O'Conner* or to explain the reason for omitting this finding as required in *Gray*. *See Jaskowiak* 2009 WL 242421. Here, the administrative law judge may have given adequate consideration to Robinson's moderately limiting mental capacity and concluded that Robinson's deficits in this area were adequately addressed in restricting him to performing unskilled work. Yet, as in *Gray*, the court has "no way of knowing that at this juncture." 2009 WL 1228632 at *7. "Consequently, this case will be remanded to the Commissioner so that the ALJ may properly incorporate all of the limitations that he articulated at step three into his step-five analysis." *Id.* at *8 (citation omitted).

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is REMANDED for further consideration as set forth above. The clerk of court is directed to enter judgment in favor of plaintiff Dudley J. Robinson and close this case.

Entered this 20th day of October, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge