IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAMELA KJELLBERG,

OPINION AND ORDER

Plaintiff,

11-cv-115-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought under 42 U.S.C. § 405(g). Plaintiff Pamela Kjellberg seeks reversal of the commissioner's decision that she is not eligible for Disability Insurance Benefits because she is not disabled.

Plaintiff contends that the administrative law judge erred when he (1) determined that her impairments did not meet or equal a listed impairment; (2) failed to grant controlling weight to the opinion of Dr. Thomas Reiser, who performed a surgical fusion of her spine; and (3) relied on the Medical-Vocational Guidelines to find that plaintiff could perform a significant number of jobs in the national economy. In fact, the administrative law judge considered plaintiff's impairments singly and in combination before finding that these impairments did not meet or equal a listed impairment and he gave proper weight to the medical opinions. In addition, he applied the Medical-Vocational Guidelines correctly in finding that plaintiff was not disabled.

For these reasons, plaintiff's motion for summary judgment will be denied and the administrative law judge's decision will be affirmed.

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

RECORD FACTS

A. Background

Plaintiff Pamela Kjellberg was born on August 29, 1970, making her 37 when she applied for disability insurance benefits in March 2008. She has a high school education and she has worked as an assembler and at a Hardee's restaurant. AR 15.

In her application, plaintiff alleged that back problems had prevented her from working since March 1, 2007. AR 91, 112. In a report she filed with her application, plaintiff reported the following activities: (1) preparing meals; (2) doing the laundry; (3) dusting and vacuuming; (4) riding a bicycle twice a month; (5) walking; (6) sewing; and (7) playing with her children. AR 135-37 She also reported working on the computer, going to church, driving a car and visiting friends at least once a month. AR 137.

After the local disability agency denied plaintiff's application initially and upon reconsideration, she requested a hearing, which was held on January 12, 2010 before Administrative Law Judge Sherwin F. Biesman, who heard testimony from plaintiff. AR 22-33. He issued a decision on March 9, 2010, finding plaintiff not disabled. AR 10-16. This decision became the final decision of the commissioner on January 8, 2011, when the Appeals Council denied plaintiff's request for review. AR 1-3.

B. Medical Evidence

Plaintiff learned in 2007 that she had spina bifida at the L5 level with bilateral spondylosis and minimal disk narrowing. She completed two months of physical therapy and was referred to a back specialist. AR 177-78. She went to the Midwest Spine Institute in June 2007, where Steven Lawson, a physician's assistant, diagnosed a congenital back defect and mechanical pain. She had a magnetic resonance imaging scan that indicated degenerative disk disease at L4-L5 and L5-S1 with mild changes proximally, spondylosis on the left at L5-S1, and facet degeneration bilaterally at L4-L5 and L5-S1. AR 199.

On June 19, 2007, Dr. Thomas Reiser recommended a staged L4-L5 and L5-S1 fusion, AR 463-466, which plaintiff underwent in July 2007. After the surgery, her back functioning stabilized and her pain was controlled by medication. AR 192-223.

In June 2008, an MRI of plaintiff's back showed changes at L2-L3 and L3-L4. AR 237, 437. Later that month, plaintiff saw Lawson again; he diagnosed degenerative disk disease, low back pain and lower extremity neuritis and recommended conservative treatment. AR 437.

A month later, plaintiff saw Dr. Robin Reichert at the New Richmond Clinic and learned that she had Type 2 diabetes. At that time, she weighed 228 pounds. AR 256. Two months later, on September 10, 2008, Reichert reported that plaintiff's Kjellberg's blood sugars were fairly well controlled. AR 253.

In June 2009, Dr. Louis Saeger, a physician at the Midwest Spinal Institute, implanted a spinal cord stimulator in plaintiff. AR 426-27. The next day, he reported that the stimulator seemed to be functioning nicely and that plaintiff had less pain in her lower back and hip. AR 424.

On September 5, 2009, physician assistant Lawson completed a work restriction form. AR 474-75. In his opinion, plaintiff could sit for four hours, stand for three hours, walk for two hours; lift up to 20 pounds occasionally from table height and carry up to 30 pounds; not climb heights, crawl or duck walk; occasionally bend, reach at or above shoulder level and push and pull. She could not work at unprotected heights. He also noted that plaintiff would have to rest for thirty minutes in an eight-hour day. Id. On October 2009, Dr. Saeger stated his agreement with the restrictions Lawson had listed for plaintiff. AR 483.

C. Consulting Physicians

On April 3, 2008, state agency physician Michael Baumblatt, M.D., completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of degenerative disc disease, spina bifida occulta and lower back pain. AR 224. Baumblatt found that she could lift 20 pounds occasionally and 10 pounds frequently and stand, sit or walk six hours in an eight-hour workday. AR 225. Baumblatt noted that plaintiff should avoid performing work-related activities that involved frequent ladder climbing, stooping, bending, kneeling or crouching. AR 226.

On April 21, 2008, state agency physician Robert Callear completed a physical residual functional capacity assessment, listing diagnoses of multilevel degenerative disc disease, previous fusion, spina bifida occulta and lower back pain. AR 239. Callear found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently and she could stand, sit or walk six hours in an eight-hour workday. AR 240. He noted that plaintiff reported pain with climbing ladders, stooping, kneeling and crouching and that she could do these activities only occasionally, AR

241, but that she had no visual, manipulative, communicative or environmental limitations. AR 242-43. He added that he found plaintiff's statements about her symptoms and their functional effects to be fully credible. AR 244.

D. Hearing Testimony

At the January 2010 administrative hearing, plaintiff testified that she lived with her husband and five kids, who range in age from three to seventeen. AR 22. She testified that she had last worked as a cook at Hardee's about five and half years previously. The family income included her husband's unemployment income and her $800 a month child support. AR 23.

Plaintiff testified that after her last child was born, she had back problems and an x-ray showed she had spina bifida. AR 24. She had a spinal fusion in July 2007, AR 24, and a spinal cord stimulator was implanted in June 2009, AR 25. She had completed physical therapy and had had epidural steroid injections. AR 25. She was taking Vicodin for pain. She testified tht on that medication her pain was a six, zero being the least pain and ten the worst. AR 26. She was also taking medications for leg tremors, for her back, for her diabetes and for her migraine headaches. AR 27-28.

Plaintiff said she had dyslexia. She had been able to work despite this condition, but she testified that she would be unable to perform a secretarial job or any other job having to do with reading or spelling. AR 29.

E. Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge

performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. At step one, the administrative law judge found that plaintiff had not engaged in substantial gainful activity from March 1, 2007, her alleged onset date, through her date last insured of September 30, 2008. At step two, he found that she had severe impairments of degenerative disc disease of the lumbar spine, status post lumbar fusion and obesity. AR 12.

At step three, the administrative law judge found that plaintiff did not have an impairment that met or medically equaled any impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 13. Specifically, the administrative law judge stated that the medical record did not show the requisite levels of pain, muscle spasm, limited spine motion, motor loss weakness or sensory and reflex loss to meet or equal listing 1.04, Disorders of the spine. Id. He relied on notes from her surgeon, Dr. Reiser, that plaintiff had reported good progress after her June 2007 surgery and on a June 2008 MRI that revealed mild spondylotic changes at L2-L3 and L3-L4 and an intact fusion and laminectomy at L4-L5 and L5-S1. The administrative law judge evaluated the effect of plaintiff's obesity upon her other impairments and concluded that her back pain and diabetes were affected by her obesity but not to the degree that it met or equaled listings 1.04 or 9.08. Id.

The administrative law judge found that plaintiff retained the residual functional capacity to perform a reduced range of sedentary work. In reaching this decision, he considered the medical evidence and the opinion of Dr. Saeger that plaintiff could perform a reduced range of light work, which effectively limited plaintiff to a sedentary level of work. The administrative law judge found that she should also be limited to no lifting overhead or at or above shoulder height, only occasional use of arm controls, no repetitive neck motion and no work at

unprotected heights. AR 14-15. The administrative law judge also considered plaintiff's daily activities, including meal preparation, doing laundry, dusting and vacuuming and her activities, including riding a bicycle twice a month, walking, sewing and playing with her children. He also noted that she worked on the computer, went to church, drove a car and visited friends at least once a month. AR 14. In his opinion, plaintiff was "attempting to obtain a more secure source of income because her husband has been unable to find work since he was laid off work and there are five children (ages 3 to 17) to feed." AR 14.

At step four, the administrative law judge found that plaintiff was unable to perform her past relevant work as an assembler. At step five, the administrative law judge relied on Medical-Vocation Rule 201.27 as a guide for his decision and found that jobs existed in significant numbers in the national economy that could be performed by a person of plaintiff's age, with her education, work experience and the ability to perform a reduced range of sedentary work. Therefore, he concluded, without calling a vocational expert, that plaintiff was not disabled. AR 15.

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). 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, she must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Listed Impairments

Plaintiff contends that the administrative law judge erred because he did not consider all of her illnesses and impairments to determine whether they met or medically equaled a listed impairment. The administrative law judge stated, however, that the medical record did not show the requisite levels of pain, muscle spasm, limited spine motion, motor loss weakness or sensory and reflex loss to meet or equal listing 1.04, Disorders of the Spine. He relied on Dr. Reiser's notes that plaintiff reported good progress after her June 2007 surgery and on a June 2008 MRI that revealed mild spondylotic changes at L2-L3 and L3-L4 and an intact fusion and laminectomy at L4-L5 and L5-S1. He stated that he had evaluated the effect of plaintiff's obesity and concluded that it affected her back pain and diabetes but not to the degree to meet or equal listings 1.04 or 9.08, Diabetes Mellitus. Although plaintiff argues that the administrative law judge should have considered her dyslexia, nothing in the record suggests that her dyslexia would keep her from working; it had not done so in the past. The administrative law judge did not err in determining that plaintiff's impairments did not meet or medically equal a listed impairment.

C. Treating Physician's Opinion

Although an administrative law judge must consider all medical opinions of record, he is not bound by those opinions. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005). "[T]he weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). When, however, the record contains well supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the regulation. Id. These factors include the number of times the treating physician has examined the claimant, whether the physician is a specialist in the allegedly disabling condition, how consistent the physician's opinion is with the evidence as a whole and other factors. 20 C.F.R. § 404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion, id., and must base his decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999). By itself, an opinion of a non-examining physician is not sufficient to provide evidence necessary to reject a treating physician's opinion. Gudgel v. Barnhart, 345 F.3d 467, 470 (7th Cir. 2003).

Plaintiff contends that the administrative law judge did not give controlling weight to the opinion of Dr. Thomas Reiser, but she does not identify any opinion of Dr. Reiser that the administrative law judge failed to consider. He referred specifically to Reiser's post surgical examination notes that after the June 2007 surgery, plaintiff's back functioning stabilized and

her pain was controlled by medication. AR 13. Reiser never gave an opinion about plaintiff's functional limitations, so the administrative law judge had no occasion to discuss the weight he would give to it.

In her reply brief, plaintiff argues that the administrative law judge had no basis for his opinion that she was seeking disability benefits in an effort to obtain a more secure source of income because her husband had been laid off. This opinion was unnecessary and inappropriate. The matter before the administrative law judge is whether the evidence shows that a claimant is disabled, not to speculate on his or her reasons for applying for assistance. In this instance, however, the opinion does not undermine his findings. Substantial evidence supports his conclusion that jobs exist in the national economy that plaintiff can perform. He could rely on the medical evidence, plaintiff's daily activities and the residual functional capacity evaluation signed by Dr. Saeger. Saeger's conclusion that plaintiff could perform a reduced range of light work was consistent with the administrative law judge's own finding that she could perform sedentary work with no lifting overhead or at above shoulder height, occasional use of arm controls, no tasks requiring repetitive neck motion or work at unprotected heights. The administrative law judge also stated that even if plaintiff needed to rest 30 minutes a day as Saeger had found, she could do this during regularly scheduled breaks. Further, both state agency physicians found plaintiff capable of performing light work that did not involve frequent ladder climbing, stooping, bending, kneeling or crouching. Substantial evidence in the record supports the administrative law judge's conclusion that plaintiff could perform a reduced range of sedentary work.

D. Step Five

The last issue to be considered is whether the administrative law judge erred when he relied on the Medical-Vocational Guidelines. At the last step of the sequential evaluation process, the administrative law judge can satisfy the commissioner's burden by relying on one of the Medical-Vocational Guidelines found in 20 C.F.R. Part 404, Subpart P, App. 2. Caldarulo v. Bowen, 857 F.2d 410, 413 (7th Cir. 1988). These rules take administrative notice of the numbers of unskilled jobs that exist throughout the national economy at the various functional levels (sedentary, light, medium, heavy and very heavy), taking into account the other vocational factors of age, education and work experience. 20 C.F.R., Subpart P, App. 2, § 200.00(b). Because the rules account only for limitations that affect the person's ability to meet the exertional requirements of jobs, they are dispositive only when the person's limitations are exertional in nature, such as limitations on sitting, standing, amount of weight lifted. 20 C.F.R. Part 404, Subpart P, App. 2, § 200.00(e). When a person has additional non-exertional limitations, such as limitations on the ability to balance, manipulate objects, hear, see, perform mental tasks or tolerate environmental conditions such as heat, cold, dust and fumes, the guidelines can be used only as a "framework for consideration" and the administrative law judge must cite other evidence for his conclusion that significant numbers of jobs exist in the economy that the claimant can perform. Id.

In the regulations, the commissioner recognizes that in some cases, a person's non-exertional limitations may be so insignificant that it is obvious they would not diminish the relevant job base and the relevant Medical-Vocational Guideline may still be applied. Soc. Sec. Ruling 83-14. In "more complex" cases, however, the administrative law judge may need the

assistance of a vocational expert. Id. The Court of Appeals for the Seventh Circuit has said that a vocational expert is not required if there is "reliable evidence of some kind that would persuade a reasonable person that the limitations in question do not significantly diminish the employment opportunities otherwise available." Warmoth v. Bowen, 798 F.2d 1109, 1112 (7th Cir. 1986).

Initially, plaintiff argued that the administrative law judge could not use the grids as a framework because she was limited to less than a full range of sedentary work, without stating which non-exertional impairments significantly diminished the employment opportunities available. In her reply brief, she argued that the grids should not have been used because she was limited to no more than four hours of sitting a day. Plaintiff relies on Social Security Ruling 83-10, which states that sedentary work generally requires sitting six hours in an eight-hour day. The amount of sitting, however, is an exertional requirement, not a non-exertional one that would preclude the use of the grids. The question is whether plaintiff retains the residual functional capacity to perform the exertional requirements of sedentary work. The administrative law judge found that she did, even though Saeger had found that she could sit only four hours a day. The administrative law judge addressed Saeger's restrictions and stated it was a reduced range of light work, which was sedentary work. Although Saeger's sitting restrictions did not total six hours in an eight-hour work day, the administrative law judge found from plaintiff's account of her daily activities and the medical evidence that she was able to perform sedentary work.

In this case, in which there was no reliable evidence that plaintiff's non-exertional limitations significantly diminished the available employment opportunities, the administrative

law judge did not need to consider the testimony of the vocational expert. Those limitations did not preclude the administrative law judge from applying the Medical Vocational Guidelines. Howell v. Sullivan, 950 F.2d 343, 349 (7th Cir. 1991) (application of grids is appropriate where administrative law judge found that plaintiff had no significant non-exertional limitations).

ORDER

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

Entered this 11th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge