IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KIM M. ALTHOFF,

Plaintiff,

OPINION AND ORDER

v.

11-cv-012-bbc

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

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This case concerns an application filed by Kim Althoff for Disability Insurance Benefits in August 2007, in which she alleged that she has been disabled since May 27, 2007 by fibromyalgia, hip, knee, back and shoulder pain, migraine headaches and depression. After a hearing on July 10, 2009, Administrative Law Judge Wendy Weber found plaintiff not disabled. This decision became the final decision of the commissioner when the Appeals Council denied review on November 9, 2010.

On appeal, plaintiff contends that the administrative law judge erred by (1) failing to find that plaintiff's fibromyalgia was a severe impairment; (2) failing to give appropriate weight to the opinions of plaintiff's treating physician; and (3) failing to properly consider

her mental impairments. I conclude that plaintiff is correct and that this case must be remanded. The following facts are drawn from the administrative record (AR).

FACTS

A. Plaintiff

Plaintiff was born on February 14, 1964 and she was 43 years old when she allegedly became disabled. She graduated from high school and worked in the past as a nurse assistant. AR 18.

B. Medical Evidence

1. Physical impairments

On July 3, 2006, plaintiff fell on her way to work, injuring her shoulder, knee and elbow. As a result of the fall, she experienced persistent pain in her right shoulder. AR 261, 411.

On October 18, 2006, plaintiff began seeing Dr. Ross Lange as her primary care physician. AR 263. She reported migraine headaches, as well as pain in her knees, hips, shoulders, back and neck that had been exacerbated by her fall. AR 260-63. On examination, Lange noted tenderness in plaintiff's ankles, knees, hips, wrists, elbows, shoulders and back as well as the anterior chest wall. However, he noted that plaintiff had

full range of motion and good strength and reflexes in her extremities. AR 264. Lange concluded that plaintiff's history and exam findings strongly suggested fibromyalgia and he referred her to a rheumatologist. AR 265.

On April 27, 2007, plaintiff saw Dr. Shambeel H. Rizvi, a rheumatologist, for shoulder pain. A May 2007 magnetic resonance imaging scan of plaintiff's cervical spine showed disc bulging at C2-3, C3-4, C4-5 and C6-7, with a fusion at C5-6. AR 335. The impression was "multiple level disc bulging with multiple level neural foraminal narrowing bilaterally." AR 336. On May 23, 2007, Rizvi advised plaintiff that "her neck pain and symptoms can be explained solely on the basis of fibromyalgia." AR 327.

On June 14, 2007, plaintiff saw Dr. Mark Schuler for diffuse pain. On examination, Schuler found that plaintiff had "significantly more tenderness over typical myofascial trigger point areas over control points such as the thigh and calf." AR 428. Schuler diagnosed fibromyalgia exacerbated by plaintiff's July 2006 fall. He stated that plaintiff could work temporarily for 4 hours a day for a total of 20 hours a week. AR 429.

On February 7, 2008, Dr. Alan C. Reynolds gave plaintiff trigger point injections in her trapezius muscle and right shoulder. AR 566. A week later, plaintiff saw Dr. William Mason, because Dr. Reynolds was not available, and reported that the injections did not help at all and may have exacerbated her pain. AR 564. On February 21, 2008, Dr. Reynolds saw plaintiff, prescribed Lyrica for her and referred her for psychological services. AR 563.

On April 17, 2008, plaintiff saw nurse practitioner Connie Ecklund, who noted that plaintiff had stopped taking the Lyrica because it made her nauseated and dizzy. Ecklund diagnosed neck pain and neuropathy in the upper right extremity. Ecklund referred plaintiff to Dr. James Banovetz. AR 561.

On April 29, 2008, Banovetz saw plaintiff and reviewed the magnetic resonance imaging scans with her, concluding that they did not show her neck or shoulder to be a direct source of her pain. He recommended that she focus on treating her pain. Also, he suggested that she relax her shoulder and use it as frequently as she could. Banovetz explained to plaintiff the importance of not keeping her arm tight against her body because it made her symptoms worse. AR 424. On June 2, 2008, plaintiff returned to see nurse practitioner Ecklund, reporting that she had seen Dr. Banovetz and that he had offered no surgical options. AR 558.

In May 2008, Dr. Lange stated on a worker's compensation form that plaintiff was unable to return to work. AR 411-12. On August 19, 2008, Dr. Lange wrote in a letter that plaintiff could perform light duty four hours a day, two days a week. AR 432. On September 3, 2008, Lange completed a form for plaintiff's worker's compensation claim, stating that she was unable to do any work with the right upper extremity. AR 435-436.

On October 22, 2008, plaintiff saw Dr. Lange, who noted that plaintiff had persistent difficulties with pain in her right shoulder, but that numerous tests, studies and consultations

had failed to determine the obvious cause. AR 541. On September 3, 2009 Lange diagnosed right shoulder pain caused by a flare-up of plaintiff's underlying pain condition. AR 582.

2. Mental impairments

On March 18, 2008, plaintiff saw Dr. Jeffrey Rothweiler for a psychological evaluation and pain management. He diagnosed pain disorder associated with both psychological factors and a general medical condition. Rothweiler also noted that plaintiff had poor pain coping skills. AR 579. On April 9, 2008, Rothweiler provided plaintiff with breathing and relaxation exercises, noting that plaintiff was anxious and depressed. AR 578.

On April 23, 2008, plaintiff reported that she performed the exercises intermittently and that they helped. Rothweiler observed that plaintiff displayed fewer signs that she was in pain, but still showed significant anxiety. AR 577. On June 16, 2008, plaintiff again displayed significant signs that she was in pain. AR 575. Plaintiff did not attend her June 30 and July 22, 2008 appointments. AR 573, 574. Rothweiler concluded that plaintiff benefited from practicing relaxation, but engaged in only cursory attempts to practice the techniques and underused and over-protected her arm. AR 574.

C. Consulting Physicians and Psychologists

On September 28, 2007, state agency physician Pat Chan completed a physical residual functional capacity assessment of plaintiff, listing diagnoses of fibromyalgia and multi-level disc bulging. AR 294. Chan found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk six hours in an eight-hour workday and sit six hours in an eight-hour work day, with only occasional climbing, balancing, stooping, kneeling, crouching or crawling. AR 295-300.

On March 17, 2008, state agency physician Mina Khorshidi completed a physical residual functional capacity assessment of plaintiff, listing diagnoses of fibromyalgia, degenerative disc disease, right shoulder tendonopathy and goiter. AR 367. Khorshidi found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk six hours in an eight-hour workday and sit six hours in an eight-hour work day, with limited reaching in all directions, including overhead. AR 368-73.

On October 1, 2007, state agency psychologist Keith Bauer completed a psychiatric review technique form regarding plaintiff, listing a diagnosis of affective disorder. AR 302. Bauer found that plaintiff's activities of daily living were not restricted and that she had no difficulties in maintaining social functioning, concentration, persistence or pace and no episodes of decompensation. AR 312. He noted that there was no evidence establishing the presence of "C" criteria. AR 313.

On March 7, 2008, Dennis Elmergreen, Psy.D, examined plaintiff at the request of the state disability agency. AR 363. He found plaintiff oriented to time, place and person, but he observed that she had difficulty focusing and reasoning and was highly distracted by her physical discomfort. Elmergreen wrote that plaintiff "certainly appeared to be a woman who was not in any emotional or mental condition to handle any type of work." AR 364. He assessed plaintiff as having a Global Assessment of Functioning Score of 40-45, which indicates serious symptoms or impairments. AR 365.

On March 18, 2008, state agency psychologist Michael Mandli completed a psychiatric review technique form of plaintiff, listing a diagnosis of affective disorder. AR 379. Mandli found that plaintiff had moderate restrictions of activities of daily living, mild difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace and no episodes of decompensation. AR 389. He noted that there was no evidence establishing the presence of "C" criteria. AR 390.

Mandli also completed a mental residual functional capacity assessment of plaintiff, finding her moderately limited in (1) her ability to understand, remember and carry out detailed instructions; (2) her ability to maintain attention and concentration for extended periods; and (3) her ability to complete a normal work day and work week without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods. AR 375-376.

D. Hearing Testimony

At the administrative hearing, plaintiff testified that she had stopped working on April 27, 2007 because of pain from a work injury, AR 28, that her neck, shoulder, ribs, hips and knees hurt her, that she has difficulty bending, kneeling and lifting her arm, AR 30, and that she had weakness and numbness in her right hand from her shoulder down. Plaintiff testified that she took oxycodone, muscle relaxants, antidepressants and thyroid medications, AR 31, that the antidepressants made her nauseated and tired and give her headaches, AR 32, and that the other medications made her tired. AR 33.

On questioning by her attorney, plaintiff testified that if she let her right arm swing, it put pressure on her neck and shoulder, causing sharp pains and muscle spasms. She holds her arm across her stomach with her left hand. AR 33. Also, she testified that because of the pain she has difficulty concentrating. AR 35.

The administrative law judge called Sam Nafoosi to testify as a neutral medical expert. AR 36. Nafoosi testified that plaintiff had a disorder of the cervical spine and a major depressive disorder. Nafoosi found that plaintiff's low back pain and fibromyalgia were not "medically determinable"; in other words, they were not severe impairments. AR 39. He found that plaintiff could lift more that 20 pounds on occasion, and 10 pounds frequently with no restrictions on walking, standing or sitting, that she could occasionally work above

shoulder level and frequently move her head if the range of motion was reduced from extreme range of motion by 50%. AR 40.

On questioning by plaintiff's attorney, Nafoosi testified that there might be a major somatic component to plaintiff's impairments because her subjective complaints were out of proportion to the physical findings. AR 42. Nafoosi thought that plaintiff's headaches could be caused by her cervical problems, her medications or her psychiatric condition. AR 43.

The administrative law judge called Stephen M. Berry as a neutral vocational expert, asked him to assume an individual with the physical limitations found by Dr. Nafoosi, and then asked whether such an individual could perform plaintiff's past work. AR 44. Berry concluded that the individual could not perform plaintiff's past work but could perform jobs in the national economy, including cashier II (DOT #211.462-010) with 5,200 jobs in Wisconsin and 100,000 in the nation; assembler of small parts (DOT #706,684-022), with 2,400 jobs in Wisconsin and 120,000 in the nation; and cafeteria attendant (DOT # 311.677-010), with 2,200 jobs in Wisconsin and 42,000 jobs in the nation. The expert testified that this testimony was consistent with The Dictionary of Occupational Titles and its companion publication. AR 45.

The administrative law judge added limitations that plaintiff was limited to simple, repetitive tasks; no hypervigilance; not in charge of safety operations and no high production

quota or rapid assembly work. AR 45. The expert testified that the individual could perform the cashier II and cafeteria attendant positions, but only about 50% of the small parts assembler jobs. AR 46.

E. The Administrative Law Judge's Decision

In reaching her 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. 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, a finding of disability follows automatically. If the claimant meets steps one and two, but not three, then she must satisfy step four, id. on which she bears the burden of proof, as in steps one through three. 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 since May 27, 2007, her alleged onset date. At step two, she found that plaintiff had severe impairments of disorder of the cervical spine and depressive disorder. The administrative law judge found that plaintiff did not have a medically determinable impairment of fibromyalgia because there was no evidence establishing such a diagnosis. Specifically, she relied on the testimony of the medical expert and the lack of any mention of the eleven "tender points" that must be established to support a fibromyalgia diagnosis. AR 12-13.

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. She considered Listings 1.04, Disorders of the Spine, and 12.04, Affective Disorders. AR 13.

The administrative law judge determined that plaintiff retained the residual functional capacity to perform light work with occasional above-the-shoulder use of both extremities; no movement of the head to the extreme range of motion but frequent movement if the range of motion is reduced by 50%; only simple, repetitive tasks; no jobs requiring hypervigilance; no jobs responsible for the safety operations of others; and no high production quotas or rapid assembly-line work. AR 14.

In making her physical residual functional capacity assessment, the administrative law judge gave great weight to the opinion of Dr. Nafoosi, the neutral medical expert, and some weight to the state agency physicians. She concluded that the evidence of record supported her determination. AR 15-16. She stated that, "although there are complaints of disabling pain, especially in the right shoulder, the objective medical evidence does not support these allegations." AR16.

The administrative law judge took into consideration the opinion of Dr. Lange, plaintiff's treating physician, that plaintiff was capable of light duty four hours a week two days a week, and found that the opinion was based on right knee and right hip pain, which were not related to any medically determinable impairments. AR 15. Also, she found internally inconsistent Dr. Lange's opinions that plaintiff was permanently unable to do any work with the right upper extremity and was unable to work at all. She explained that the former was not supported by the medical evidence and the latter was a determination reserved to the commissioner. AR 17.

In determining plaintiff's mental residual functional capacity, the administrative law judge found the state agency psychologists' opinions entitled to some weight. AR 16. However, she discounted the opinion of Dr. Elmergreen, the state agency psychologist who found that plaintiff was in no emotional or mental condition to work, because the ultimate determination of disability was reserved to the commissioner. AR 17.

In addition, the administrative law judge found that plaintiff's allegations concerning her symptoms were not credible to the extent they were inconsistent with the residual functional capacity that she had found. AR 17.

At step four, the administrative law judge found that plaintiff could not perform her past work as a nurse assistant. At step five, the administrative law judge found that jobs that existed in significant numbers in the national economy that plaintiff could perform. She concluded that plaintiff was not disabled from her alleged onset date of May 27, 2007 through January 15, 2010, the date of her decision. AR 18-19.

Subsequently, plaintiff filed a second application for benefits, alleging an onset of her disability as of January 16, 2010. She was awarded benefits pursuant to that application. Duncan Aff., dkt. #14, exh. 1.

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

B. Fibromyalgia

Plaintiff argues that the administrative law judge erred when she failed to find that plaintiff's fibromyalgia was a severe impairment and failed to consider its symptoms when determining her residual functional capacity. In reaching the conclusion that fibromyalgia was not a severe impairment, the administrative law judge relied on the testimony of the medical expert and the absence of any mention of the eleven "tender points" that must be established to support a fibromyalgia diagnosis. However, as plaintiff points out, there is

evidence in the record that plaintiff had fibromyalgia. In October 2006, Dr. Lange concluded that plaintiff's history and exam findings strongly suggested fibromyalgia. In 2007, Dr. Schuler diagnosed fibromyalgia in plaintiff after he was able to discern significantly more tenderness over typical myofascial trigger point areas over control points such as the thigh and calf. Also, Dr. Rizvi diagnosed fibromyalgia, and both state agency physicians listed fibromyalgia as plaintiff's primary diagnosis.

The administrative law judge took issue with the lack of evidence of the actual number of plaintiff's tender points. The administrative law judge is correct that the rule of thumb is that a patient must have tenderness in at least 11 of 18 fixed locations throughout the body, as set forth in The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia: Report of the Multicenter Criteria Committee, 33 Arthritis & Rheumatism 160 (1990). However, the only evidence that contradicts the diagnosis of fibromyalgia is the opinion of Nafoosi that fibromyalgia was not "medically determinable." The evidence in the record, Dr. Schuler's notes about plaintiff's trigger points in particular, and the several doctors who diagnosed fibromyalgia support a finding that plaintiff has fibromyalgia. The administrative law judge should have considered it a severe impairment.

As the commissioner points out, this error was harmless if the administrative law judge considered the symptoms of plaintiff's fibromyalgia in determining her residual functional capacity. However, the judge did not take into account plaintiff's symptoms of

overall pain and fatigue caused by her fibromyalgia when determining plaintiff's residual functional capacity. Although she considered plaintiff's allegations of disabling pain, she stated that the objective medical evidence did not support those allegations. As the Court of Appeals for the Seventh Circuit has explained:

> [Fibromyalgia's] cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are "pain all over," fatigue, disturbed sleep, stiffness, and—the only symptom that discriminates between it and other diseases of a rheumatic character—multiple tender spots . . . that when pressed firmly cause the patient to flinch.

Sarchet v. Chater, 78 F.3d 305, 306 (7th Cir. 1996). The testimony of the medical expert that plaintiff's subjective complaints were out of proportion to the physical findings is not inconsistent with a fibromyalgia diagnosis. The administrative law judge erred in discounting plaintiff's subjective complaints of pain and fatigue simply because the complaints were not supported by objective evidence. Therefore, this case must be remanded for consideration of the symptoms of plaintiff's fibromyalgia in determining her residual functional capacity.

C. Treating Physician Opinions

Plaintiff claims that the administrative law judge erroneously rejected the opinion of

plaintiff's treating physician that plaintiff was unable to work. The commissioner has established a regulatory framework that explains how an administrative law judge is to evaluate medical opinions, including opinions from state agency medical or psychological consultants. 20 C.F.R. §§ 404.1527(d), 416.927(d). Generally, opinions from sources who have treated the plaintiff are entitled to more weight than non-treating sources, and opinions from sources who have examined the plaintiff are entitled to more weight than opinions from non-examining sources. 20 C.F.R. §§ 404.1527(d)(1) and (2), 416.927(d)(1) and (2). Other factors the administrative law judge should consider are the source's medical specialty and expertise, supporting evidence in the record, consistency with the record as a whole and other explanations regarding the opinion. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005); 20 C.F.R. §§ 404.1527(d)(3)-(6), 416.927(d)(3)-(6). The administrative law judge "must explain in the decision" the weight given to the various medical opinions in the record. 20 C.F.R. §§ 404.1527(f)(2)(ii); 416.927(f)(2)(ii).

"[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). In a recent decision Scott v. Astrue, ___ F.3d. ___, 2011 WL 3252799, *10-11 (7th Cir. Aug. 1, 2011), the court of appeals reaffirmed this standard.

An administrative law judge must provide "good reasons" for the weight she gives a treating source opinion, id., and must base her decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999). An opinion of a non-examining physician is not sufficient by itself to provide evidence necessary to reject a treating physician's opinion. Gudgel v. Barnhart, 345 F. 3d 467, 470 (7th Cir. 2003).

In this case, the administrative law judge gave greater weight to Nafoosi, a medical expert who did not examine plaintiff, than she gave to Dr. Lange, who was plaintiff's treating physician. She stated that Dr. Lange's opinions were internally inconsistent, because at one time he found plaintiff unable to work and at another time found that she was only unable to work with her right upper extremity. However, Dr. Lange's opinion that plaintiff could not work with her right upper extremity was specifically related to her worker's compensation

claim concerning her shoulder and was not necessarily inconsistent with his opinion that plaintiff was unable to work at all because of her combined impairments.

The administrative law judge discounted Lange's opinion that plaintiff could do no work with her right upper extremity because the judge believed that it was not supported by the medical evidence. This reason is not persuasive because the symptoms of fibromyalgia need not be supported by objective evidence. Further, the administrative law judge did not consider the consistency of Lange's opinion that plaintiff had only limited ability to work, with that of Dr. Schuler, who examined plaintiff in June 2007.

In addition, the administrative law judge did not consider the factors outlined in the regulation, including the number of times the treating physician has examined the claimant, whether the physician is a specialist in the allegedly disabling condition and how consistent the physician's opinion is with the evidence as a whole. 20 C.F.R. § 404.1527(d)(2). This was an error. Moss v. Astrue, 555 F. 3d 556, 560 (7th Cir. 2009) (remand granted when administrative law judge's decision "altogether failed to address the statutory factors). Nafoosi's opinion is not sufficient by itself to support rejection of Dr. Lange's opinion. Therefore, I find that the administrative law judge did not give sufficient reasons for failing to give controlling weight to Dr. Lange's opinion that plaintiff was unable to do any work with her right upper extremity. On remand, the administrative law judge should re-weigh the

medical opinions in the record and assess what weight to give Dr. Lange's opinion pursuant to the regulations.

D. Mental Impairments

Plaintiff raises two challenges to the administrative law judge's consideration of her mental impairments. First, plaintiff argues that the administrative law judge erred in determining plaintiff's mental residual functional capacity. The administrative law judge limited plaintiff to simple, repetitive tasks, no jobs requiring hypervigilance, no jobs responsible for the safety operations of other and no high production quota or rapid assembly line work. As plaintiff points out, this mental residual functional capacity does not take into account the mental limitations found by Dr. Elmergreen and Dr. Mandli. Further, the administrative law judge does not clearly articulate the evidence she relied on in determining plaintiff's mental limitations. It is possible that she arrived at these limitations by considering Mandli's and Elmergreen's concerns about plaintiff's difficulties in concentrating, but she has not built a logical and accurate bridge from this evidence to her conclusion..

Second, plaintiff contends that the administrative law judge failed to consider whether plaintiff met Listing 12.07, Somatoform Disorder, after Nafoosi testified that there might be a major somatic component to her impairment. In addition, plaintiff's psychologist diagnosed pain disorder with both psychological factors and a general medical condition.

On remand, the administrative law judge should consider whether plaintiff has a listed impairment of a somatoform disorder, re-determine plaintiff's mental residual functional capacity and articulate clearly the evidence on which she relies to reach her decision. After the administrative law judge considers plaintiff's fibromyalgia and re-determines her residual functional capacity, she should proceed to step five to determine whether plaintiff is disabled. The administrative law judge should also consider whether the fact that plaintiff has been found disabled on her second application as of the day after the date of her decision is relevant to her decision that plaintiff was not disabled prior to that date.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Kim M. Althoff's application for disability insurance benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 8th day of September, 2011.

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