IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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VIRGIL M. SHAUGER,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

11-cv-129-bbc

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This case concerns an application filed by Virgil M. Shauger for Disability Insurance Benefits in August 2007, in which he alleged that he has been disabled since April 1, 2004 as a result of double vision and headaches. After a hearing on July 20, 2009, administrative law judge Wendy Weber found plaintiff not disabled. This decision became defendant's final decision when the Appeals Council denied review on January 13, 2011.

On appeal, plaintiff contends that the administrative law judge erred in weighing the medical opinions, in determining plaintiff's credibility and in determining at step five that there were jobs existing in significant numbers in the national economy that plaintiff could perform. I find that the administrative law judge properly weighed the medical opinions,

properly assessed plaintiff's credibility and properly determined at step five that plaintiff was not disabled. 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. Medical Evidence

1. Before plaintiff's alleged onset date (April 1, 2004)

In 1988, while plaintiff was working as a welder, he fell 13 or 14 feet, landing on the left side of his head on the concrete. He was diagnosed with left sixth nerve palsy, which is a nerve disorder preventing the left eye from looking outward. The primary symptom is diplopia or double vision. AR 263-65. He was seen by a neurologist until 1989, with normal test results. Plaintiff did not receive any treatment. AR 232-33, 260-62, 308.

Plaintiff did not seek treatment for this disorder again until 1996. The neurologist noted that plaintiff's condition was stable. He underwent more testing, which did not show abnormal results. AR 258.

In December 1998, plaintiff had an eye examination. His visual acuity was 20/15 in both eyes. The doctor's impression was that plaintiff had sixth nerve palsy, which caused him to have double vision. AR 308-309.

2. From onset date to last insured date (April 2004-December 2007)

In July 2007, plaintiff had an eye examination. AR 269-70. His uncorrected visual acuity was 20/30 and 20/40, and his corrected visual acuity with normal lenses was 20/25 in both eyes. Prism glasses were prescribed to minimize his diplopia. AR 269, 276, 284. There is no evidence in the record that plaintiff ever obtained these prism glasses.

3. After plaintiff's date last insured (December 2007)

In August 2009, plaintiff saw Dr. Maxim Gorelik. On examination, plaintiff had double vision at all gazes except extreme right gaze and difficulty seeing objects in his left hemifield. Gorelik noted plaintiff had trouble walking and trouble falling asleep. AR 316-17. Gorelik stated, "The patient may benefit from prism glasses or surgery to correct his left eye malpositioning." AR 318. Gorelik concluded that plaintiff's double vision and depth perception would make it difficult and dangerous to work in an environment that requires hand-eye coordination such as a machine shop or a kitchen in which dangerous machines are used for food preparation. Also, he opined that plaintiff would have difficulty obtaining gainful employment because he is not able to perform his previous work as "a machine operator in the machine shop." AR 318.

B. Consulting Physicians

In October 2007, plaintiff saw internist Martha Pollock for a consultative examination, at the request of the state agency. On examination, plaintiff's visual acuity was 20/50 in both eyes without glasses. Neurologically, plaintiff had a nerve disorder of the left eye, which cause his left eye to look outward. Pollock noted that plaintiff had abnormality in the extraocular movements of his left eye, but his physical examination was otherwise unremarkable. AR 271-73.

On November 3, 2007, state agency physician James Patty completed a physical residual functional capacity assessment for plaintiff, listing the diagnosis of "left lateral rectus palsy"(weakness in muscle controlling movement of left eye). Patty found that plaintiff had no exertional limitations but had limited depth perception and field of vision. AR 277, 278. Patty indicated that plaintiff should avoid hazardous machinery and heights. AR 279. He wrote, "double vision as a result of the left lateral rectus palsy is manageable with prism glasses which should be able to eliminate or at least minimize a tendency for diplopia in all gazes except left gaze." AR 280.

On December 6, 2007, state agency physician Efren Baltazar completed a physical residual functional capacity assessment for plaintiff, also listing a diagnosis of "lateral rectus palsy." AR 283 Baltazar found that plaintiff had no exertional limitations, but he should never climb ladders, ropes or scaffolds and only occasionally climb ramps and stairs. AR

285. Also, Baltazar found plaintiff had limited depth perception and field of vision that might make it difficult for him to balance. AR 285-86. He indicated plaintiff should avoid even moderate exposure to machinery and heights and concentrated exposure to vibration. AR 287. Baltazar concluded that plaintiff is capable of performing activities within these parameters. AR 288.

C. Hearing Testimony

At the hearing, plaintiff testified that he had last worked in 2003 for his own business and that he had a tenth grade education. AR 28, 33. He testified that his vision had become a problem after he suffered a head injury 20 years earlier. AR 34. To make both eyes focus, plaintiff has to turn his head to the left. Also, he has headaches two to three times a day, for which he takes Ibuprofen. Plaintiff has to stop reading after 10-15 minutes because his eyes burn and water. AR 29-30. Because he lies down during the day when he gets a headache, he has trouble sleeping at night. AR 33. In his application, plaintiff indicated he tripped over objects in front of him because of depth perception problems and that he had balance problems. AR 154.

Plaintiff testified that his eye problems are progressively worsening. He has not seen an eye specialist or neurologist because the last time he went to a doctor, he was told there was nothing they could do. AR 32.

Plaintiff testified that his wife does the yard work, the house work and pays the bills. AR 30-31. He does not drive a car, but drives a golf cart two blocks to the neighbor's house. Although he chooses not to drive, he has no restrictions on his driver's license. AR 31.

The administrative law judge called Dr. Sami Nafoosi, a doctor in internal medicine to testify as a neutral medical expert. AR 34. Nafoosi testified that plaintiff had palsy in the lateral rectus muscle of the left eye, which did not meet or equal a listed impairment. AR 35-36. He concluded that plaintiff would be limited to jobs in which he would not have to work at heights, around heavy moving machinery, or near open water and that he could not perform work requiring depth perception. He noted that plaintiff's monocular vision was adequate. AR 36.

Next, the administrative law judge called vocational expert Stephen M. Berry to testify. AR 40. The administrative law judge asked Berry to assume an individual of plaintiff's age, educational back ground and work experience who was limited to jobs that would not require work at heights, around heavy moving machinery, near open water or that involved depth perception. AR 40. Berry testified that the individual could not perform his past work as a welder but could perform the following jobs: dining room attendant (DOT 311.677-018), an unskilled job performed at a medium exertional level, with 2,500 jobs in Wisconsin and 48,000 jobs in the nation; kitchen helper (DOT 318.687-010), an unskilled job performed at the medium exertional level with 3,200 jobs in Wisconsin and 59,000 jobs

in the nation; and laundry worker II (DOT 361.685-018), an unskilled job performed at a medium exertional level, with 500 jobs in Wisconsin and 8,500 jobs in the nation. AR 41.

On cross examination, plaintiff's attorney asked Berry whether the number of jobs of dining room attendant and kitchen helper would be eroded because of a limitation prohibiting work in confined spaces. AR 41. Berry testified that there would be a 50% reduction in the number of dining room attendant and kitchen helper jobs. AR 42. Plaintiff's attorney asked Berry whether the individual could maintain gainful employment if he had to take non-scheduled breaks of 10 to 30 minutes of duration two to three times each day. Berry responded that the individual would not be able to maintain gainful employment. AR 41.

The administrative law judge asked Berry whether his testimony, other than the testimony concerning the 50% reduction, was consistent with the Dictionary of Occupation Titles and its companion publications. He responded that it was. AR 42.

D. 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. At step one, she found that plaintiff had not engaged in substantial gainful activity since Apri1, 2003, the alleged onset date, through his date last insured of December 31, 2007. AR 15.

At step two, she found that plaintiff had the severe impairment of palsy lateral rectus muscle of the left eye. AR 12. At step three, she found that plaintiff 's impairment did not meet or medically equal any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 15.

Once the administrative law judge concluded that plaintiff's impairments were not severe enough to establish that he was presumptively disabled under the regulations, she proceeded to assess plaintiff's work-related limitations to determine whether there was work in the economy that he could perform in spite of his impairments. She found that plaintiff retained the residual functional capacity to perform a full range of work at all exertional levels with no work involving heights, heavy moving machinery, open pools of water, depth perception or confined spaces. AR 16.

In determining plaintiff's residual functional capacity, the administrative law judge gave the greatest weight to the opinion of board certified internist Sami A. Nafoosi, an impartial medical expert who "had the opportunity to review the entire evidence of record and listen to the claimant's testimony at the hearing." Nafoosi concluded that plaintiff could not perform work that involved heights, heavy moving machinery, open pools of water, depth perception or confined work spaces. AR 17.

Also, the administrative law judge considered the statements of Maxim Gorelik, who had examined the plaintiff in August 2009 and had determined that plaintiff should avoid dangerous working environments. She concluded that this opinion was consistent with her

residual functional capacity assessment. However, she discounted Gorelik's opinion that plaintiff is likely to have difficulty obtaining gainful employment because such an opinion was outside the scope of Gorelik's specialty. Finally, the administrative law judge noted that Gorelik had recommended that plaintiff get a special pair of glasses to correct his left eye positioning. AR 17.

The administrative law judge considered the medical evidence that plaintiff was diagnosed with left sixth nerve palsy, which is paralysis of the muscle that controls lateral movement of the left eye. Plaintiff's vision was 20/15 in both eyes in 1998 and 20/30 and 20/40 in July 2007. Plaintiff is able to see only the right half of the left visual field. The administrative law judge noted that these problems cause plaintiff to suffer double vision and depth perception problems. AR 17.

Also, the administrative law judge considered the credibility of plaintiff's testimony in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. She took into account plaintiff's statements that he has no depth perception, has little balance, trouble focusing his eyes and prone to tripping over objects and she considered his statements that his condition has worsened over time and he has trouble sleeping at night because of pain associated with his eye problems. The administrative law judge found that plaintiff's credibility was adversely affected by his sparse and sporadic treatment for his eye problem and no treatment for headaches. The reason plaintiff gave for his lack of treatment

was that the doctors could do nothing more for his condition. However, the administrative law judge noted that in 2009 Gorelik had recommended a special type of glasses to help with the malpositioning of plaintiff's left eye. The administrative law judge concluded that plaintiff's "medically-determinable impairments could reasonably be expected to cause [his] alleged symptoms; however, [his] statements concerning the intensity, persistence and limiting effects of those symptoms are not credible to the extent they are inconsistent" with her assessment that plaintiff could perform a full range of work at all exertional levels with some non-exertional limitations. AR 16-17.

At step four, the administrative law judge found that plaintiff's restrictions would keep him from performing his past work (welder). AR 18. At step five, she relied on the testimony of a vocational expert to determine the extent to which plaintiff's non-exertional limitations would erode the occupational base of unskilled work at all exertional levels. The expert testified that a hypothetical individual with plaintiff's characteristics would be able to perform jobs as dining room attendant (DOT 311.677-018), an unskilled job performed at a medium exertional level, with 1,250 jobs in Wisconsin and 24,000 jobs in the nation (after the numbers were reduced by 50% because of the confined spaces limitation); kitchen helper (DOT 318.687-010), an unskilled job performed at the medium exertional level with 1,600 jobs in Wisconsin and 24,500 jobs in the nation (after the numbers were reduced 50% because of the confined spaces limitation; and laundry worker II (DOT 361.685-018), an

unskilled job performed at a medium exertional level, with 500 jobs in Wisconsin and 8,500 jobs in the nation. The administrative law judge found the vocational expert's testimony to be consistent with the information contained in The Dictionary of Occupational Titles. The administrative law judge found plaintiff not disabled because there were a significant number of jobs available in the national economy that he could perform. AR 18-19.

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 her conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Treating Physician's Opinion

Although an administrative law judge must consider all medical opinions of record, she 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). 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).

Plaintiff claims that the administrative law judge erred in giving greater weight to the opinion of Dr. Nafoosi, the medical expert, than she gave to the opinion of Dr. Maxim Gorelik, who examined plaintiff. First, plaintiff argues that the administrative law judge erred in stating that Nafoosi had the opportunity to review the entire evidence of record because at the July 2009 hearing Nafoosi did not review Gorelik's August 2009 opinion. This argument is unpersuasive because at the time of his testimony Nafoosi had reviewed the evidence in the record.

Second, plaintiff alleges that in other cases Nafoosi's testimony was found to lack

support. That may be true, but it is not relevant because in this case the medical evidence supports his opinion that plaintiff had depth perception problems. In fact, Dr. Gorelik's opinion is consistent with that of Nafoosi: plaintiff has double vision and depth perception problems. Plaintiff seems to argue in his brief that Gorelik found that plaintiff had diminished hand-eye coordination as well, but Gorelik merely stated that plaintiff's double vision and depth perception would make it difficult and dangerous to work in an environment that required hand-eye coordination. He did not say that plaintiff had diminished hand-eye coordination. The administrative law judge did not discount this part of Gorelik's opinion, but rather included the double vision and depth perception difficulties when determining that plaintiff could not work around dangerous machinery or heights.

The only statement by Dr. Gorelik that the administrative law judge discounted was the statement that plaintiff would have difficulty finding gainful employment. The administrative law judge gave this statement little weight because it was outside the scope of Gorelik's expertise and because Gorelik believed that plaintiff's eye condition could be treated with a special pair of glasses. The administrative law judge did not err in giving this statement little weight. The decision whether plaintiff can work is not a medical opinion but rather an opinion on the ultimate issue of disability, which is for the Commissioner to make. 20 C.F.R. § 404.1527(e); Johansen v. Barnhart, 314 F.3d 283, 288 (7th Cir. 2002).

C. Credibility

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: 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 his 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 said 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). In this case, however, the administrative law judge specifically found that plaintiff's testimony concerning the severity of his eye impairment was not credible because of his sparse treatment history. She concluded that plaintiff's testimony was not credible to the extent that it was inconsistent with her assessment that plaintiff could perform work at all exertional levels with some non-exertional limitations.

Plaintiff argues that the administrative law judge failed to follow Social Security Ruling 96-7. The ruling requires that the administrative law judge question the individual to determine whether there are good reasons for the sparse treatment in the record. The administrative law judge did do this and plaintiff stated that he was told there was nothing else that could be done. In her decision the administrative law judge addressed this reason and found it lacking because in 2009 Dr. Gorelik had recommended a special type of glasses to help with malpositioning. Plaintiff's argument that this recommendation was made in August 2009 after his July 2009 testimony is unpersuasive because he was initially prescribed the same type of glasses in July 2007. There is no evidence in the record that he obtained these glasses, but the fact that Gorelik recommended them again in 2009 suggests that plaintiff never obtained the glasses. The administrative law judge correctly discounted plaintiff's given reason for his sparse treatment because there was treatment available to him.

Now plaintiff argues that the administrative law judge should have considered his

inability to afford medical treatment. This argument fails because plaintiff never said he was unable to afford medical treatment. Further, there is no evidence in the record that this was the reason.

I am persuaded that the administrative law judge built an accurate and logical bridge from the evidence to her conclusion that plaintiff's subjective complaints about his were not worthy of belief. Shramek, 226 F.3d at 811.

D. Step Five

Plaintiff claims that the administrative law judge failed to adequately develop the record to explain a conflict between the vocational expert's testimony and The Dictionary of Occupational Titles as required by Social Security Ruling 00-04p. Specifically, he argues that the administrative law judge erred in relying on the vocational expert's testimony that plaintiff's restriction from working in confined spaces reduced the number of dining room attendant and kitchen helper jobs by 50% because she did not inquire into the basis for the expert's conclusion. Plaintiff argues that there is a conflict between the testimony and the DOT. He relies on the administrative law judge's question to the expert to support this argument. The administrative law judge asked the expert, "is your testimony, other than the erosion question, consistent with the DOT and its companion publication?"

As defendant points out, because The Dictionary does not address the subject of

confined works spaces, the vocational expert's testimony cannot conflict with it. On the other hand, plaintiff may be arguing that there is no basis for the vocational expert's testimony. However, the hearing testimony and the administrative law judge's decision indicate that the vocational expert based his estimate of a 50% decrease in the available dining room attendant and kitchen helper jobs on his knowledge and experience. Further, even if the kitchen helper and dining room attendant jobs are not available, there are a significant number of laundry worker jobs available in the national economy and the expert did not apply a reduction to them. Because a significant number of jobs exists in the national economy that plaintiff can perform, he is not disabled.

ORDER

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

Entered this _____ day of August, 2011.

BY THE COURT:

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BARBARA B. CRABB
District Judge