IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AMY L. MARCHEL,

OPINION AND ORDER

Plaintiff,

11-cv-13-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security
Administration,

Defendant.

- -

Plaintiff Amy L. Marchel is seeking review of a decision by the Commissioner of Social Security, denying her claim for Disability Insurance Benefits and Supplemental Security Income under the Social Security Act. 42 U.S.C. § 405(g). She contends that the administrative law judge erred in two respects: she failed to give weight to the opinions of a nurse practitioner who had treated plaintiff and she failed to take into consideration certain limitations found by the neutral medical expert.

Although the administrative law judge gave good reasons for not giving weight to the opinion of the nurse practitioner, she did not give any reasons for not considering the limitations assessed by the medical expert. Therefore, the decision will be reversed and remanded for further proceedings.

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

RECORD FACTS

A. Background

Plaintiff was born on March 7, 1973. She has a high school education and no past relevant work. (She worked for a short period of time at Goodwill Industries, with the help of a job coach.) She filed an application for disability insurance benefits and supplemental security income on November 29, 2005, alleging disability as of March 1, 1991 because of depressive disorder, personality disorder, borderline intellectual functioning and asthma. AR 131-138. After the local disability agency denied her application initially and upon reconsideration, she requested a hearing, which was held on February 10, 2009 before Administrative Law Judge Sharon Turner. The administrative law judge heard testimony from plaintiff, AR 570-83, a neutral medical expert, AR 583-92, and a neutral vocational expert, AR 592-606. The administrative law judge issued her decision on May 7, 2009, finding plaintiff not disabled. AR 16-26. This decision became the final decision of the commissioner on December 10, 2010, when the Appeals Council affirmed the decision of the administrative law judge. AR 2-4.

B. Medical Evidence

Plaintiff has a history of depression. In December 2004, she was discharged from a three-day hospitalization for depression. AR 267-68. Her diagnosis was "major depression, recurrent moderate to severe" and "posttraumatic stress disorder chronic with continued symptoms." AR 268. She was hospitalized again between May 2 and May 5, 2006 for

major depression, recurrent, and generalized anxiety disorder with panic attacks. AR 307-06. From 2005 through March 2006, she received mental health services through Portage County Health and Human Services, AR 364-70, and during the first half of 2006, she went to therapy sessions at Children's Service Society of Wisconsin. AR 297-303.

Plaintiff had an eight session psychological evaluation in 2006. AR 453-455. The evaluator found that she met the criteria for major depressive disorder and borderline personality disorder. AR 455. On the Wechsler Adult Intelligence Scale-3, she had a verbal IQ of 70, a performance IQ of 100 and a full IQ of 91. AR 454. The evaluator found her skill level in all three areas well below average and her skills significantly deficient. Id. The Minnesota Multiphase Personality Inventory-2 profile showed that plaintiff was experiencing a significant level of depression and anger, difficult with trust, feelings of insecurity and at high risk for abusing alcohol or drugs. Id.

Plaintiff's Global Assessment Functioning (GAF) scores have ranged from 30-51. AR 268. (This score reflects a clinician's assessment of an individual's overall level of functioning. Sims v. Barnhart, 309 F.3d 424, 427 n.5 (7th Cir. 2002)).

Between January 2008 to August 2008, plaintiff saw nurse practitioner Barbara A. Schira, APN-BC, four times and talked with her on the telephone on other occasions. AR 377-88. (Before then, plaintiff had seen a psychologist and psychiatrists on a number of occasions. AR 389-400.) During this time, Schira assessed plaintiff, reviewed her medications and performed at least two mental status examinations. Schira noted that plaintiff had a good mood, no cognitive deficits, logical and coherent thought processes, with

good attention to hygiene and grooming and no hopelessness or helplessness. AR 382, 387.

In May 2008, Schira completed a Mental Work Functions Questionnaire. AR 459-64. By the time she did this, she had seen plaintiff at least three times in 2008 and several times before then. Schira gave plaintiff a diagnosis of bipolar disorder, general anxiety disorder and post-traumatic stress disorder. She assessed a GAF of 51 (indicating moderate symptoms) and noted that plaintiff had problems with depression, severe mood changes, significant anger, low energy, trust issues, insecurity, learning disabilities and poor interpersonal relationships. She concluded that plaintiff would miss more than four days of work a month. AR 459.

When plaintiff saw Schira on August 25, 2008, plaintiff said she wanted to work only 20 hours because she had family and other obligations and because she was concerned that she would end up back in the hospital if she worked more than 20 hours in her job at Goodwill Industries. Schira found plaintiff in a good mood but "overwhelmed with working too much and anxious." AR 377. She restricted her to 20 hours of work a week. AR 378

C. Hearing Testimony

At the hearing, plaintiff testified that her last work was at Goodwill, where she had worked for a couple of months sorting through donations, pricing them and putting them on the shelf, but had stopped in September 2008 because of stress and depression. She said that she had gotten a certificate as a nursing assistant in 2001. AR 572. She said that she wanted to work in health care a couple of hours a day and "work her way up a little bit at

a time." AR 573.

Plaintiff testified that she had three children, two of whom lived with her. She does housework and likes to scrapbook and play cards with friends. She helps her youngest child read and reads the newspaper, books by Danielle Steele and children's books. AR 574, 578. She testified that she takes Lamictal, Seroquel and Abilify and that the Abilify makes her "wired." She was not taking any medication for her diabetes. AR 576.

The administrative law judge called Dr. Joseph Malancharuvil, Ph.D., to testify as a neutral medical expert. He reviewed plaintiff's medical history, noting that she had a "depressive disorder not otherwise specified with major depressive symptoms" and a "personality disorder not otherwise specified with some borderline features." AR 584. As for activities of daily living, she had mild limitations and she had mild to moderate limitations in the areas of maintaining social functioning and maintaining concentration, persistence or pace. It was his opinion that plaintiff was restricted to moderately complex tasks with four to five-step instructions. Id. He found her precluded from operating hazardous machinery, from safety operations and from fast-paced work, such as a rapid assembly line. Malancharuvil testified:

> So from a psychological point of view she definitely is capable of simple repetitive work and she—most likely is more. She may not be able to tolerate full work but for—in a simple work setting she may be able to do that too.

AR 585-86. He concluded that plaintiff could perform simple work in a low stress environment for 40 hours a week. AR 586. Malancharuvil also limited plaintiff to work that did not require significant reading or more than simple addition and subtraction. "[S]he's

restricted to very simple abilities in [regard to reading, language, math and reasoning skills]. So she should be given verbal instructions with an ability to read simple things like 'stop' or 'press this,' things like that." AR 591.

The administrative law judge called Joseph Torres to testify as a neutral vocational expert. AR 592. She asked him to assume an individual of plaintiff's age, education level and no past work, able to perform work with no exposure to hazardous machinery, no safety operations and no fast-paced work but able to perform simple repetitive tasks. AR 593-94. He testified that such an individual could perform the following unskilled jobs: 120,000 hand packager jobs (DOT # 920.587-018);120,000 warehouse worker I jobs (DOT # 920.687-058); 110,000 fast food worker jobs (DOT # 311.422-010); and 90,000 packer jobs (DOT # 920.687-166). AR 594.

In her second hypothetical question, the administrative law judge limited the hypothetical individual to a "habituated" work setting and no exposure to dust, fumes and gases. Torres testified that such an individual could perform the jobs he had identified. In a third hypothetical, the administrative law judge added the additional restriction that the individual would be limited to 20 hours of work a week. Torres testified that there would be no jobs in the national economy that the hypothetical individual could perform. The administrative law judge then asked Torres whether his testimony conformed with the Dictionary of Occupational Titles. He responded that it did. AR 595.

Plaintiff's lawyer asked Torres a fourth hypothetical question, limiting the hypothetical individual to reasoning involving only one or two steps, simple math

calculations and no written instructions. Torres testified that because of the restriction to one to two step reasoning the individual would be precluded from working in the "open labor market." AR 599. In a fifth hypothetical, the lawyer asked Torres whether a person who could not meet competitive standards for following work procedures and carrying out simple and short instructions could perform work in the national economy. Torres answered that there would be no work for such an individual. AR 600. In response to questioning by counsel, Torres said that the Dictionary defined simple repetitive work as the ability to perform simple or short cycled work. AR 604.

D. 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. At step one, the administrative law judge found that plaintiff had not engaged in substantial gainful activity since January 1, 1997, her alleged onset date. At step two, she found that plaintiff had the severe impairments of depressive disorder, not otherwise specified; personality disorder, not otherwise specified; borderline intellectual functioning; and asthma. AR 18.

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. Relying on Dr. Malancharuvil's testimony, she concluded that plaintiff did not have an impairment that met or medically equaled

listings 12.04, Affective Disorders; 12.05, Mental Retardation; or 12.08, Personality Disorder. Instead, she found that plaintiff had mild restrictions of daily living and mild to moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or pace. She concluded that plaintiff had one episode of decompensation and no evidence of "paragraph C" criteria. AR 19-20.

In considering listing 12.05, Medical Retardation, the administrative law judge considered plaintiff's IQ scores, which were 91 full scale, 79 verbal and 100 performance. She concluded that plaintiff did not meet the criteria of either "paragraph B," which require a valid verbal, performance or full scale IQ of 59 or less or "paragraph C," which require an IQ of 60 through 70 and another physical or mental impairment that imposes additional work limitations. AR 21. She found that plaintiff retained the residual functional capacity to perform a full range of work at all exertional levels so long as she was limited to simple, repetitive tasks; habituated work setting; no exposure to dusts, fumes or gases; no hazardous machinery; no safety operations; and no involvement in fast-paced work such as rapid assembly lines. Id.

In determining this residual functional capacity, the administrative law judge set out the requirements of 20 C.F.R. § 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. She concluded that plaintiff was not credible when she testified that she could not work full-time because of her impairments. In making this determination, she considered plaintiff's treatment history, which suggested to the administrative law judge that plaintiff had been progressing in her treatment and that her impairments were not as

disabling as she alleged. The administrative law judge also considered plaintiff's reading and her nursing assistant certificate as evidence that she was not as cognitively impaired as she alleged. AR 24.

In determining plaintiff's residual functional capacity, the administrative law judge gave significant weight to the opinions of Dr. Malancharuvil. She found the medical evidence of record to be consistent with Malancharuvil's opinion that plaintiff could process ordinary work instructions and could perform simple work in a low stress environment for 40 hours a week. AR 22. She also took into consideration plaintiff's scores on the Minnesota Multiphase Personality Inventory-2 and on the Weschler Adult Intelligence Scale III. AR 22-23.

The administrative law judge also considered nurse practitioner Schira's opinion that plaintiff would miss more than four days of work a month and could work no more than 20 hours a week. She discounted this opinion because (1) Schira was an "other source," that is, not an acceptable medical source under the regulations; (2) she had no degree in psychology; (3) she had seen plaintiff at most four times; and (4) she had noted that during the counseling sessions plaintiff had a good mood, no cognitive deficits, logical and coherent thought processes, no hopelessness or helplessness and good attention to hygiene and grooming. The administrative law judge concluded that Schira had imposed the 20-hour work restriction only because plaintiff had asked for it and not because Schira believed that she was unable to work full time. AR 23-24.

Because the administrative law judge found at step four that plaintiff had no past

relevant work, she proceeded to step five to determine whether there were jobs existing in significant numbers in the national economy that plaintiff could perform. She found that plaintiff could perform the jobs identified by the vocational expert and that his testimony was consistent with the information contained in the Dictionary of Occupational Titles. AR 23-24. Her conclusion was that plaintiff was not disabled.

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. Opinion of Nurse Practitioner Schira

Plaintiff contends that the administrative law erred in giving little weight to the opinions of Barbara Schira that plaintiff would miss more than four days of work a month

and could work only 20 hours a week. Evidence from "other sources" such as nurse practitioners can establish the severity of the impairment and how it affects the claimant's ability to function. 20 C.F.R. § 404.1513(d). As explained in Social Security Ruling, 06-03p, available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR2006-03-di-01.html:

> With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not "acceptable medical sources," such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed "acceptable medical sources" under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.

The ruling adds that adjudicators should consider the same factors in weighing opinions from "other" medical sources that they use in weighing "acceptable" medical sources, including the length and frequency of the treatment relationship, the consistency of the opinion with other evidence, the source's specialty and the degree to which the source presents relevant evidence to support the opinion. Id.

The administrative law judge followed the ruling when evaluating Schira's opinions. She did not discount them merely because she thought Schira was not an acceptable medical source, but because she had good reasons for doing so. She considered the short time that Schira had treated plaintiff, the fact that Schira did not have either a degree in psychology or a nursing specialty in psychology and the fact that her treatment notes were inconsistent with her stated opinion. Further, the administrative law judge found that Schira's restriction of plaintiff's work to 20 hours a week was made at plaintiff's request and was not based on

Schira's professional assessment. Her explanation for giving little weight to Schira's opinions 0is reasonable and supported by substantial evidence in the record. It was not error for her to give little weight to Schira's opinion.

C. Mental Residual Functional Capacity

Plaintiff contends that the administrative law judge erred in determining her mental residual functional capacity because she failed to include in her assessment of plaintiff all of the limitations that Dr. Malancharuvil identified. She does not object to the administrative law judge's reliance on Dr. Malancharuvil's testimony to find that plaintiff is able to work 40 hours a week, despite the inconsistencies in this testimony. (Malancharuvil testified at first that plaintiff might not be able to tolerate full-time work, but then concluded that she *may* be able to work in a simple work setting. AR 585-86. He went on to say that she "definitely is able to manage simple work with the normal stress of—" and then, in answer to the administrative law judge's question, agreed that plaintiff could work in a low stress environment 40 hours a week. AR 586.)

Rather, plaintiff argues that the administrative law judge erred both in making her residual functional capacity assessment and in posing hypothetical questions to the vocational expert when she failed to consider all of the restrictions that Malancharuvil had identified. She omitted from her hypothetical Malancharuvil's testimony that plaintiff could not perform work that required significant reading or more than simple addition and subtraction and that plaintiff would be limited to reading simple words like "stop" or "press

this." She did not give any reason for rejecting these limitations.

In response to plaintiff's argument, the commissioner argues that the administrative law judge's failure to include these limitations is not reversible error because the vocational expert was at the hearing and heard the medical expert's testimony. The commissioner does not acknowledge that the Court of Appeals for the Seventh Circuit has held that the hypothetical question to the vocational expert must include all limitations supported by medical evidence in the record. Young v. Barnhart, 362 F.3d 995, 1003 (7th Cir. 2004). If it does not, the harmless error standard applies only if the record indicates that the vocational expert reviewed the file or heard the specific testimony. In that situation, the administrative law judge (and the reviewing court) can assume "that the vocational expert included all of these limitations in his assessment of the number of jobs that the applicant can perform." Id.

However, the court of appeals has held that this assumption cannot be relied upon when the administrative law judge takes "a different approach to the hypothetical question and decide[s] to ask the vocational expert a series of hypothetical questions with increasingly debilitating limitations," circumscribing in each question the exact limitations the vocational expert is to follow. Id. In those situations, the administrative law judge cannot assume that the vocational expert took into account all of the "physical, psychological or cognitive limitations that he may have absorbed either through reviewing the evidence in the record or by listening to the hearing testimony." Id. She may consider the testimony only when the record shows that the vocational expert learned independently of the other limitations

through questioning at the hearing or review of the record and "there is evidence that he accounted for these limitations." Id. at 1003 n.2. See also O'Connor-Spinner v. Astrue, 627 F.3d 614, 619 (7th Cir. 2010) ("In such cases we infer that the [vocational expert's attention is focused on the hypotheticals and not on the record.") (citations omitted).

In this case neither the administrative law judge nor plaintiff's counsel asked the vocational expert whether there were jobs that the hypothetical individual could perform if she was limited to reading only simple words like "stop" or "press this." The commissioner points to no evidence in the record that the vocational expert considered this specific testimony. Rather, he argues that it does not appear that the jobs the vocational expert identified would require performance of significant reading or calculations greater than simple addition or subtraction. For this argument, he relies on Donahue v. Barnhart, 279 F.3d 441, 444 (7th Cir. 2002), in which the court held that omitting limitations from a hypothetical question is not reversible error if the vocational expert's answer did not include any jobs that could not be performed by someone with those limitations. For her part, plaintiff quotes the Dictionary of Occupational Titles in support of her argument that the jobs that the vocational expert identified in her case require a reasoning development of 2, which the Dictionary defines as being able to carry out detailed but uninvolved written or oral instructions. If the administrative law judge accepted Malancharuvil's testimony that plaintiff could read only simple words, she erred in finding that plaintiff would be able to perform the identified jobs.

Plaintiff's testimony that she could read and had completed schooling to become a

certified nursing assistant suggests that her reading ability was not as limited as Malancharuvil found. However, the administrative law judge did not say she was rejecting that portion of Dr. Malancharuvil's opinion that limited plaintiff's reading abilities. It is not appropriate for this court to guess what evidence the administrative law judge might have relied on to exclude this limitation from her residual functional capacity assessment, particularly when the vocational expert testified about it in response to questions from plaintiff's counsel . Therefore, it is necessary to remand this case to the commissioner for further proceedings.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Amy L. Marchel's application for disability insurance benefits is REVERSED and the case is REMANDED to the commissioner under sentence four of 42 U.S.C. § 405(g) for a new determination of her mental residual functional capacity and a subsequent determination of disability at step five.

Entered this 7th day of February, 2013.

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