IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CINDY S. RISBERG,

OPINION and ORDER

Plaintiff,

11-cv-139-bbc

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Cindy S. Risberg seeks reversal of the commissioner's decision that she is not disabled. Plaintiff contends that the administrative law judge erred in weighing the medical opinions and in assessing her credibility. Having carefully reviewed the record and the administrative law judge's decision, I am rejecting plaintiff's arguments and affirming the commissioner's decision.

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

FACTS

A. Background

Plaintiff was born on August 23, 1953. She completed high school and two years of technical college. AR 87, 131. She last worked in December 2005 as a part-time temporary customer service operator. AR 107.

On October 27, 2006, plaintiff filed an application for disability insurance benefits, alleging that she had been unable to work since May 25, 2006 because of a lumbar spine impairment, right shoulder impingement and obesity. AR 87-89. Plaintiff stands approximately five feet six inches tall and weighs 284 pounds. AR 180.

After the local disability agency denied plaintiff's application initially and upon reconsideration, plaintiff requested a hearing, which was held on September 29, 2009 before Administrative Law Judge Gail Reich. The administrative law judge heard testimony from plaintiff, AR 38-53; from a neutral medical expert, AR 54-57, and from a neutral vocational expert, AR 57-63. On February 11, 2010, the administrative law judge issued her decision, finding plaintiff not disabled. AR 17-25. This decision became the final decision of the commissioner on December 7, 2010, when the Appeals Council denied plaintiff's request for review. AR 4-6. The Appeals Council granted plaintiff an extension of time to file her civil action. AR 1.

B. Medical Evidence

On May 25, 2006, plaintiff saw Dr. Nasima R. Soomar for an annual physical examination. Plaintiff reported chronic problems with back pain, which radiated to her right leg. AR 180. Her examination was normal. AR 181. Soomar recommended that plaintiff exercise for 30-60 minutes four to six times a week and referred her for a magnetic resonance imaging scan. AR 182.

The June 6 scan of plaintiff's lumbar spine showed degenerative disc change at L4-5 and L5-S1 and facet arthritis at L3-4, L4-5 and L5-S1. Also, there was some lateral recess compromise at the L4-5 level on the left side with no nerve root compression. AR 166. An x-ray showed Grade 1 displacement of L4-L5 and minimal to moderate degenerative vertebra changes at multiple levels. AR 184. Soomar referred plaintiff to the pain clinic. AR 188.

On September 19, 2006, plaintiff was evaluated at the pain clinic by Dr. Armando A. Villarreal. Plaintiff reported she had suffered low back pain for many years. Villarreal noted that her activities of daily living were not affected by her pain. AR 191. Plaintiff reported sleeping in a recliner because of pain and doing less cooking and housekeeping than usual. AR 195-96. On examination, Villarreal noted plaintiff was "morbidly obese," with tenderness on palpation of the lumbar spine and pain with range of motion. He believed that plaintiff had evidence of lumbar disc disease as well as lumbar facet arthritis. Villarreal recommended that plaintiff start an aqua therapy program and take Ultram. AR 192.

On November 13, 2006, plaintiff was evaluated at the pain clinic by psychologist F. Cal Robinson, who reported that "it would be nice if [plaintiff] could get on disability so she could then begin making some things for a home/cottage industry." AR 199. Robinson noted that plaintiff was severely limited in work behavior and in home duties because of her pain. AR 199. He found no reason she could not take opioid medications. AR 200.

On November 14, 2006, plaintiff was seen in the pain clinic by social worker Kathleen Ertz for socioeconomic concerns and pain strategies. Ertz noted that plaintiff did some small woodworking and glass etching and enjoyed reading and watching movies. She concluded that plaintiff would not qualify for the aqua therapy program or transportation to the services. Independent therapy was suggested. AR 203.

On December 7, 2006, plaintiff returned to see Dr. Villarreal. She reported that she was unable to participate in physical therapy because of lack of transportation and financial problems. She had stopped taking Ultram because it caused her headaches. Villarreal prescribed Percocet and recommended physical therapy and a dietician program. AR 274.

On January 3, 2007, plaintiff saw physical therapist Thomas Katz for a new patient evaluation. He recommended weight loss, general conditioning and water exercise. Katz thought plaintiff's rehabilitation potential was fair in light of the severity of her condition. AR 259. Plaintiff saw Katz again on January 10, 2007 and reported starting Curves on a 30-day free pass. Katz provided her a home exercise program. AR 260. Plaintiff canceled her

appointment with Katz on January 17, 2007 because of having "frozen pipes." AR 261. On January 24, 2007, plaintiff saw Katz and reported that she had been going to Curves without any increased pain. He gave her more home exercises and suggested that she reduce her excuses for not performing some sort of physical activity. AR 262. On February 7, 2007, plaintiff canceled her appointment because her car would not start. She did not wish to reschedule her appointment. AR 263.

On March 6, 2007, plaintiff returned to see Dr. Villarreal. He noted that plaintiff had been put on short-acting opioids and was participating in physical therapy. However, he noted that her physical therapist had reported that plaintiff did not seem to follow her home exercise program. Villarreal noted that plaintiff was making an effort to lose weight and had lost six pounds. Plaintiff reported that the medication was helping but that she preferred to cut the tablets in half to prevent or decrease drowsiness. AR 279. Villarreal informed plaintiff that Dr. Jane Stark had evaluated plaintiff previously (see § C infra) and he would not contradict any of Dr. Stark's assessments. AR 280.

On May 16, 2007, Villarreal changed plaintiff's pain medications to ibuprofen and Tylenol arthritis. AR 291, 293. By 2008, plaintiff had been prescribed oxycontin for pain, AR 422.

C. Consulting Physicians

On February 1, 2007, Jane M. Stark, M.D., a doctor at the Marshfield Clinic, examined plaintiff at the request of the Social Security Administration. Stark noted that plaintiff weighed 287 pounds, stood five feet six inches and was complaining of low back and right shoulder pain. On examination, Stark noted that plaintiff moved easily although slowly from a sitting to standing posture, had minimal tenderness to palpation of her right shoulder, full range of motion and no atrophy in her upper extremities. AR 254-55. Stark assessed right shoulder pain and impingement, low back pain, lumbar degenerative disc disease, facet arthropathy and obesity. She concluded that plaintiff could do light work but would need to "frequently alternate between sitting, standing and walking as tolerated." Plaintiff could bend or twist at the waist only occasionally and seldom kneel, squat or crawl. Stark recommended the following restrictions for plaintiff's upper extremities:

> She should occasionally work over shoulder height or below waist height, but may continuously work between waist and shoulder height. She may continuously use her upper extremities with the exception of occasional reaching with an outstretched arm bilaterally.

AR 256.

On February 14, 2007, state agency physician Robert Callear completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of degenerative disc disease, right shoulder impingement and obesity. AR 264. Callear 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. AR 265.

D. Hearing Testimony

At the administrative hearing, plaintiff testified that she was 56 years old and had an associate degree in electronics. She last worked in December 2005, AR 41, as a temporary employee answering trouble calls for Excel Energy. AR 48. Before that, she had worked as an order clerk at the Pleasant Company. AR 51. Plaintiff testified that she did household chores, including dishes, laundry and grocery shopping; drove her husband to appointments, AR 42; and liked to read, crochet and watch television. AR 43.

Plaintiff testified that she could not work because of her pain in her lower back and that she took two 12-hour oxycontin tablets each day. This medication helped but she also took oxycodone tablets for breakthrough pain. AR 43-44, 46. She was cutting the oxycodone tablets in half, because the pills made her a "little bit spacey." At the hearing she stated that her pain was a five on a scale of one to 10, with ten being the worst, and that she had not taken a pain pill before the hearing. Also, she testified that she had joined Curves but had not exercised recently. AR 45. She weighed 284 pounds. AR 47-48.

The administrative law judge called Thomas Maxwell, M.D., as a neutral medical expert. Maxwell testified that plaintiff had degenerative disc disease of the lumbrosacral

spine, chronic pain syndrome, morbid obesity and hypothyroidism, but that none of these impairments met or equaled a listed impairment, individually or in combination. In his opinion, these impairments would limit plaintiff to lifting and or carrying 20 pounds occasionally and 10 pounds frequently, sitting for six hours and standing or walking for six hours, with a sit or stand option but no climbing of ladders, ropes or scaffolds, no work at unprotected heights or near hazardous machinery, no kneeling, crouching or crawling and occasional pushing with the lower extremities. AR 53-54. Further, Maxwell testified that he incorporated into his limitations the side effects of plaintiff's medications, such as dizziness, sedation and light headedness. He did not believe that plaintiff needed any shoulder limitations. AR 55. On cross examination by plaintiff's attorney, Maxwell testified that obesity was an aggravating factor of plaintiff's spinal condition. AR 56.

Next, the administrative law judge called Louie Jones, a neutral vocational expert, who testified that plaintiff had worked as a customer service representative (DOT # 239.262-014), which is a sedentary and skilled job with a specific vocational preparation level of five; as an electronics technician (DOT # 828.261-022), a medium unskilled position with a specific vocational preparation level of seven; as an order clerk (DOT # 249.362-026), a sedentary, semi-skilled job with a specific vocational preparation of four; and a test technician (DOT # 726.261-018), a medium skilled job with a specific vocational preparation of seven. AR 57. The administrative law judge asked Jones whether an

individual with plaintiff's work limitations could perform her past work. Jones testified that such an individual could perform the jobs of customer service representative and order clerk. He explained that these jobs would accommodate a brief, intermittent sit or stand option. AR 58. In answer to a question posed by plaintiff's attorney, Jones explained that the individual could walk away from the work station for no more than five minutes each hour. AR 60.

E. Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge performed the five-step sequential analysis in 20 C.F.R. §§ 404.1520 and 416.920. At step one, the administrative law judge found that plaintiff had not engaged in substantial gainful activity since December 28, 2005, her original alleged onset date. At step two, she found that plaintiff had severe impairments of degenerative disc disease of lumbar spine, chronic pain syndrome, obesity and hypothyroidism. AR 19. 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 stated that she had considered plaintiff's obesity in conjunction with the other severe impairments in making her step three determination. AR 20.

Before reaching step four, the administrative law judge found that plaintiff retained

the residual functional capacity to perform light work with a sit or stand option (allowance for brief and intermittent periods as consistent with her overall capacity to sit for six hours and stand or walk for six hours). Further, she found that plaintiff must avoid work involving kneeling, crouching, crawling, climbing ladders, ropes and scaffolds, unprotected heights and hazardous machinery with only occasional pushing or pulling with lower extremities. AR 20.

In determining this residual functional capacity, the administrative law judge assessed the credibility of plaintiff's testimony that she was unable to work in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. Specifically, she considered plaintiff's testimony that she could not work because she has severe pain and must take oxycontin and oxycodone four times a day and that the pain medication makes her sleepy. AR 20. The administrative law judge concluded that plaintiff's testimony that she was unable to work was not supported by the medical history or by the lay evidence, including her daily activities. The judge considered the x-rays and magnetic resonance imaging scans of plaintiff's lumbar spine, which showed degenerative disc disease but no nerve root compression or abnormality. AR 21. Also, she considered plaintiff's activities of daily living, which included doing chores, dishes and laundry, driving and exercising. She noted that evidence in the record indicated that plaintiff had been taking less medication than prescribed, which the administrative law judge thought tended to show that plaintiff's symptoms were not disabling. AR 22. Further, in determining plaintiff's credibility, the

administrative law judge considered plaintiff's hearing testimony, pointing out that plaintiff did not testify that her pain interfered with her activities of daily living and that at the hearing plaintiff had described her pain as a five on a scale of one-10, without medication. AR 23. The administrative law judge found from this evidence that plaintiff was not precluded from working. Id. After noting that plaintiff was not compliant with her physical therapy program, the administrative law judge concluded that plaintiff's symptoms and limitations were not work preclusive. AR 24.

In determining plaintiff's residual functional capacity, the administrative law judge weighed the opinions of the examining physician and the medical expert. As to Dr. Stark's opinion, the administrative law judge noted that Stark had found that plaintiff could continuously use her upper extremities but was limited to occasional reaching with an outstretched arm bilaterally. The administrative law judge rejected this finding because it conflicted with plaintiff's reports of her activities of daily living, which included doing chores, dishes, laundry, driving and exercising and because the record contained no medical evidence supporting this limitation. She noted that even if this limitation were added, the jobs identified would not be precluded. AR 21-22.

The administrative law judge discussed the opinions of Stark and medical expert Maxwell concerning a sit or stand option requirement for plaintiff. She concluded that Maxwell's testimony, as well as other medical and lay evidence, suggested that the change

of position need only be brief and intermittent and she rejected Dr. Stark's more restrictive work capacity. AR 22

At step four, the administrative law judge found that plaintiff was able to perform her past work as a customer service operator (DOT # 239.362.014) and a phone operator or order processor (DOT 249.362-026). After considering the testimony of Maxwell, the medical evidence and plaintiff's daily activities, the administrative law judge concluded that plaintiff could perform light work allowing for brief and intermittent changes of position. Next, she relied on the testimony of the vocational expert that a person who needed brief and intermittent changes in position from sitting to standing could perform plaintiff's past work. The administrative law judge found that plaintiff was not disabled because she could perform her past work. AR 24.

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, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, id., and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). 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. Medical Opinions

Plaintiff contends that the administrative law judge erred in giving more weight to he opinion of Dr. Maxwell, who did not examine plaintiff, than to the opinion of Dr. Stark, who did examine her. 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).

In this case, there was no opinion by a treating physician. Although plaintiff argues that plaintiff's treating physician adopted Dr. Stark's opinion, the record does not support this argument. Rather, Dr. Villarreal said only that he would not contradict any of Stark's assessments.

The only two opinions considered by the administrative law judge were given by Dr. Stark, an examining source, and Dr. Maxwell, a non-examining source. In her decision, the administrative law judge discusses both opinions and gives less weight to the opinion of Stark, setting out specific reasons for doing so. Starting with Stark's opinion that plaintiff could continuously use her upper extremities but reach with either outstretched arm only occasionally, the administrative law judge found that the opinion was not supported by the

medical evidence or plaintiff's daily activities. She also stated that even if plaintiff had such a limitation, she would not be precluded from performing the identified jobs. Turning to Stark's opinion that plaintiff's required sit or stand option was more limited than Maxwell had found, the administrative law judge stated that the medical and lay evidence supported Maxwell's conclusion that the change of position need only be brief and intermittent. She rejected Stark's opinion to the extent it was a more restrictive capacity than found by Maxwell. This rejection included Stark's opinion that plaintiff was limited to occasional bending, which was not consistent with Maxwell's opinion and would not have precluded plaintiff from performing the identified jobs. The administrative law judge's explanation satisfies the regulatory requirement of explaining the weight given to the two medical opinions.

Other evidence in the record supports the administrative law judge's conclusion. Dr. Stark noted that plaintiff has some pain with rotation in only the right shoulder, but in discussing the use of her upper extremities Stark limited outstretched reaching to both arms. Even given this limitation, plaintiff was not precluded from performing the jobs of customer service operator or order clerk. Also, there is evidence in the record that plaintiff needed only brief and intermittent change of positions, which the vocational expert testified could be accommodated.

In sum, the administrative law judge provided good reasons, supported by substantial

evidence in the record, for rejecting Stark's opinion that plaintiff required a limitation on the use of her upper extremities, a more limited sit or stand option and only occasional bending. Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006) (administrative law judge determines how much weight to give various medical opinions and court will uphold that decision if it is supported by substantial evidence). The administrative law judge did not err in discounting Stark's opinion.

C. Credibility

Finally, plaintiff contends that the administrative law judge erred in assessing plaintiff's 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 her 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." 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, the administrative law judge considered plaintiff's testimony that she could not work because of severe pain and the side effects of her pain medications, oxycontin and oxycodone. In finding that this testimony was not credible, the administrative law judge considered plaintiff's testimony about her daily activities, which included doing household chores and dishes, fixing meals, shopping for groceries and driving. She also considered that at the time of the hearing plaintiff stated that without any medication her pain was a five out of 10. The administrative law judge concluded that the combined factors of plaintiff's activities, including exercising at Curves three times a week, and her self-assessed pain level indicated she was not precluded from working. Also, she found that plaintiff's non-compliance with her physical therapy program suggested that plaintiff thought she did not

need physical therapy.

The administrative law judge gave specific reasons for not believing plaintiff's assertions that her pain precluded her from working. Her reasons are supported by the record. 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 her inability to work were not worthy of belief. Shramek, 226 F.3d at 811.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Cindy S. Risberg's motion for summary judgment is DENIED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 27th day of September, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge