IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CURT FLEISCHMANN,

OPINION AND ORDER

Plaintiff,

11-cv-5-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Curt Fleischmann is seeking judicial review of a decision denying his claim for disability benefits under the Social Security Act. 42 U.S.C. § 405(g). He objects to the conclusion of the administrative law judge that although he could not perform his past work of welding, he was not eligible for disability benefits because he could perform other jobs in the regional and national economy. Plaintiff contends that this conclusion is erroneous because the administrative law judge failed to take into consideration plaintiff's limitations in overhead reaching when she determined his residual functional capacity and she did not give appropriate weight to the opinion of plaintiff's treating physician. Because I agree with plaintiff that the administrative law judge erred in reaching her decision, I am reversing it and remanding the case for further proceedings.

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

RECORD FACTS

A. Background

Curt Fleischmann was born on June 29, 1972 and has a high school education. AR 25. In the past, he has worked as an assistant supervisor, farm worker, security guard, gravel truck driver and welder. AR 24.

On January 25, 2007, plaintiff filed an application for disability insurance benefits, alleging that he had been unable to work since November 16, 2006, because of Prinzmetal angina (angina pectoris of a variant form characterized by chest pain during rest, Dorland's Illustrated Medical Dictionary, at 83.) AR 115, 122. After the local disability agency denied his application initially and upon reconsideration, a hearing was held on July 7, 2009, before Administrative Law Judge Wendy Weber, who heard testimony from plaintiff, AR 40-48, from a neutral medical expert about his psychological limitations, AR 52-55 and from a neutral vocational expert, AR 56-64. On January 21, 2010, the administrative law judge issued her decision, finding plaintiff not disabled. AR 15-26. This decision became the final decision of the commissioner on November 23, 2010, when the Appeals Council denied plaintiff's request for review. AR 1-4.

B. Medical Evidence from Treating and Examining Physicians

- Beginning in March 2005, plaintiff began receiving medical treatment for chest pain. AR 245.
- In June 2006, plaintiff's primary physician, Dr. Timothy Meyer, diagnosed plaintiff's chest pain as not cardiac in nature.

- Also in June 2006, plaintiff was referred to cardiologists at the Marshfield Clinic. One of those cardiologists, Dr. Param Sharma, saw plaintiff and ordered an electrical study of his heart. On July 3, 2006, Dr. Sharma diagnosed a fast heart rhythm that might cause plaintiff symptoms from time to time. He concluded that plaintiff could perform only sedentary work and should avoid heavy lifting. AR 251.

- Plaintiff continued to seek medical attention for chest pain in July, August and November 2006. AR 258, 275, 324. On November 15, 2006, he saw Dr. Timothy Ablett in the Department of Occupational Medicine at the Marshfield Clinic. Ablett diagnosed atypical chest pain. On examination, plaintiff could fully flex, extend and rotate his neck right and left. He was able to fully abduct and elevate his shoulders, had full strength in his biceps and triceps and a full ability to flex and extend his elbows. AR 335. Ablett restricted plaintiff temporarily to work with frequent lifting of 20 pounds and occasionally lifting up to 30 pounds, frequent sitting, seldom standing or walking, seldom climbing stairs or ladders, working over the shoulder or pushing and pulling with his hands. AR 337-38.

- On November 17, 2006, plaintiff returned to see Dr. Meyer, who diagnosed atypical chest pain with normal cardiac evaluation. AR 357.

- By November 28, 2006, plaintiff reported no chest pain, shortness of breath or fatigue. AR 356. According to Meyer, plaintiff's pulmonary function tests, chest x-ray and lab testing were normal. AR 356.

- On January 9, 2007, Dr. Ablett wrote plaintiff to say that extensive cardiac testing had not shown a cardiac source for his symptoms. Ablett recommended a neurological consultation because of plaintiff's lightheadedness and fainting. AR 291.

- On August 7, 2007, plaintiff went to Urgent Care complaining of chest pain. His examination was normal; his assessment was a long, complex history of chest pain. AR 568-69.

- By July 8, 2008, plaintiff told Meyer that he had no chest pain or fainting, no neurological spells and no shortness of breath. AR 639.

- On April 29, 2008, plaintiff told a community services intake worker that he enjoyed hunting, fishing, trap shooting, taking care of his chickens and computer solitaire. He said that he wanted to teach his boys how to hunt and fish. AR 446.

- On August 29, 2008, plaintiff saw Dr. Meyer because he had sprained his right ankle while helping a friend put siding on his house. He had been standing on plywood on two saw horses when he fell. AR 635.

- On November 19, 2008, Dr. Meyer said that plaintiff had reported no new complaints, no chest pain, shortness of breath, weakness, headaches, neurological or sensory complaints. His history of Prinzmetal angina was noted as stable. AR 629.

- Plaintiff's January 28, 2009 multi stage echo-cardiac stress test was normal. He showed no evidence of exercise induced decreased blood flow to the heart or prior heart attack. AR 514. A chest x-ray on March 19, 2009 was normal. AR 543.

- On April 22, 2009, Dr. Meyer reported that plaintiff had no chest pain, shortness of breath or abdominal symptoms. AR 472.

On June 23, 2009, Dr. Meyer completed a work capacity questionnaire, saying that plaintiff had anxiety, depression and non-cardiac chest pain, for which he took nitrates. AR 184. Meyer said that plaintiff was capable of performing low-stress jobs, where he could sit for forty-five minutes at one time, stand for one hour at a time and sit or stand for four hours in an eight-hour work day. Meyer estimated that plaintiff would need two unscheduled breaks during the work day and would be absent from work three days a month. AR 186-88, 191. He said that plaintiff could lift up to 30 pounds occasionally and could move his head, twist, stoop, crouch, climb ladders and climb stairs occasionally. AR 189-90. Meyer noted that plaintiff had no significant limitations with reaching, handling or fingering. AR 191.

C. Consulting Physicians

On March 14, 2007, state agency physician Mina Khorshidi completed a physical residual functional capacity assessment for plaintiff listing diagnoses of angina without ischemia and muscle and ligament pain. AR 408. Khorshidi found that plaintiff could lift 20 pounds frequently and up to 30 pounds maximum, stand or walk two hours in an eight-hour workday and sit six hours in an eight-hour work day with limited reaching in all directions including overhead, occasional climbing and no exposure to hazards. AR 409-12.

On July 24, 2007, state agency physician Syd Foster completed a physical residual functional capacity assessment for plaintiff listing diagnoses of atypical chest pain and syncope of unknown etiology. AR 429. Foster found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk two hours in an eight-hour workday and sit six hours in an eight-hour work day with occasional climbing of ramps and stairs but that he could not climb ladders, ropes or scaffolds and was limited in reaching in all directions with no overhead and should have no exposure to hazards. AR 430-33.

D. Hearing Testimony

At the administrative hearing, plaintiff testified that he was unable to work because of his heart condition and because he did not have a driver's license. AR 43. He testified that he had spells of chest pain and fainting, AR 44-45, but that he was able to do chores, feed the animals, clean the house and do yard work. AR 46. Plaintiff testified that he could stand for 15 minutes, sit for "awhile," lift 50 pounds and walk up to two blocks. AR 47-48.

The administrative law judge called Susan Allison as a neutral medical expert to testify as to plaintiff's mental impairments and limitations. AR 52-55. The administrative law judge asked Allison whether an individual could perform plaintiff's past work if the individual had plaintiff's mental limitations, could lift 20 pounds occasionally, 10 pounds frequently, stand or walk two hours and sit six hours in an eight-hour work day, occasionally climb ramps but not ladders, ropes or scaffolds and who could perform only occasional overhead work. AR 59. Allison testified that such an individual could not perform plaintiff's past work but could perform jobs such as order clerk, of which there were 888 jobs in Wisconsin and 27,278 in the nation, (DOT # 209.567-014); final assembler of eye glasses, of which there were 315 jobs in Wisconsin and 10,967 in the nation, (DOT # 713.687-018); stem mounter, of which there were 116 jobs in Wisconsin and 3,994 in the nation (DOT #725.684-018), and call out operator, of which there were 296 jobs in Wisconsin and 19,003 in the nation (DOT # 237.367-014). AR 60.

In response to a question from plaintiff's attorney whether the limitation of occasional reaching overhead meant the individual was limited in "all reaching," AR 60, Allison said that the Dictionary of Occupational Titles did not differentiate between overhead reaching and reaching in other directions. AR 60-61. Plaintiff's attorney asked Allison whether an individual could perform the jobs she had identified if he could not stand for more than one hour at a time, could not sit, or stand or walk for more than four hours, required two unscheduled breaks, and was limited to only occasional lifting, twisting, stooping, crouching, squatting, climbing ladders and stairs. AR 62- 63. She said he could

not. AR 63.

Finally, the administrative law judge repeated her hypothetical question, eliminating the limitation on overhead work. Allison answered that although such an individual would be precluded from performing plaintiff's past work, he could perform the identified jobs. AR 63.

E. Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge found at step one that plaintiff had not engaged in substantial gainful activity since November 16, 2006, his alleged onset date. At step two, she found that plaintiff had severe impairments of non-cardiac chest pain; syncope; depressive disorder, NOS; psychological physiological reactions; and personality disorder, NOS with gender identity issues. AR 17. At step three, she found that he did not have an impairment that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 18.

The administrative law judge found that plaintiff retained the residual functional capacity to perform light work, except he could stand or walk only two hours in an eight-hour workday; could climb ramps and stairs only occasionally; could not climb ladders, ropes or scaffolds; could handle moderately complex tasks with 4-5 step instructions in a habituated work setting; could not be in charge of safety operations of others; could not be exposed to hazards, fast moving vehicles or machinery; and could not perform fast paced, rapid assembly line work. AR 18-19. In reaching this decision, she weighed the opinions

of the various medical sources. She accepted the opinions of the state agency physicians that plaintiff could perform light work but discounted their opinions that he could not perform overhead work because she thought there was no objective evidence to support the opinions. Also, she stated that it made no difference to the vocational outcome. AR 24.

The administrative law judge rejected the opinion of plaintiff's treating physician that plaintiff could stand or walk for only four hours because of the evidence in the record that he hunted and had put siding on a house. Also, she considered the medical evidence, including the normal test results. Finally, the administrative law judge rejected the July 2006 opinion of plaintiff's cardiologist that plaintiff could perform only sedentary work because it was not consistent with the cardiologist's own findings. AR 24.

At step four, the administrative law judge found that plaintiff was unable to perform his past relevant work. At step five, the administrative law judge found from the testimony of the vocational expert that there were jobs available in the state of Wisconsin that plaintiff could perform. These included order clerk, final assembler of eye glasses, stem mounter and call out operator. She found the vocational expert's testimony consistent with the information contained in the Dictionary of Occupational Titles, AR 25, and concluded that plaintiff was not disabled because he could perform a significant number of jobs available in the national economy.

The Appeals Council declined to review the case. AR 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). 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, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Overhead Reaching Limitation

The administrative law judge accepted the opinion of state agency physician Syd Foster, except for his conclusion that plaintiff could perform no overhead reaching. The only reason she gave for not adopting Foster's conclusion was that there was no objective evidence to support it. She said nothing about the fact that Foster's opinion was consistent with the opinion of Dr. Ablett, who treated plaintiff and limited him to seldom working over his shoulder, and she did not say what objective evidence in the record contradicted Foster's opinion. In his opposition brief, the commissioner points to evidence he believes supports the administrative law judge's decision, but the court is limited to reviewing the specific

finding and reasons for the finding provided by the administrative law judge. Stewart v. Astrue, 561 F. 3d 67 9, 684 (7th Cir. 2009)("An ALJ must articulate in a rational manner the reasons for his assessment of a claimant's residual functional 1capacity, and in reviewing that determination a court must confine itself to the reasons supplied by the ALJ.")

As plaintiff points out, the administrative law judge's omission of the overhead reaching limitation is critical to her step five determination that there are jobs available in the national economy that plaintiff could perform. At the hearing, the vocational expert testified in response to questions from plaintiff's attorney that the Dictionary of Occupational Titles did not differentiate between overhead reaching and reaching in other directions and that the Dictionary indicated that some of the identified jobs required frequent reaching. If the administrative law judge had found that plaintiff could seldom work overhead as the state agency physician had found, Social Security Ruling 00-4p would have required her to resolve these discrepancies. Overman v. Astrue, 546 F.3d 456, 463 (7th Cir. 2008). Instead of doing so, she simply eliminated the limitation on overhead reaching. The result is a decision that cannot stand.

The case will be remanded for further proceedings. If, on remand, the administrative law judge finds that plaintiff does not have an overhead reaching limitation, it will be necessary for him or her to explain what objective evidence supports that finding. If the finding is that plaintiff is limited in reaching of any kind, the administrative law judge will have to resolve any discrepancies between the nature of the jobs as understood by the vocational expert and the nature of the jobs described in the Dictionary.

C. Treating Physician's Opinion

Next, plaintiff contends that the administrative law judge erred in her treatment of the evidence from his treating physician, Dr. Timothy Meyer. She did not take into account Dr. Meyer's estimate that plaintiff could stand or walk for only four hours in an eight-hour work day and he did not factor into her finding other aspects of Meyer's opinion, including his estimate of the number of days plaintiff would be absent from work.

An administrative law judge must consider all medical opinions of record, but 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). In this case, the administrative law judge gave good reasons for rejecting the portion of Dr. Meyer's opinion that plaintiff could stand or walk for only four hours. First, she explained that she was rejecting it on the basis of the medical evidence, including the normal results of plaintiff's x-rays, electrocardiogram and stress echocardiogram. Second, she found that plaintiff's activities of hunting and helping put siding on a house were consistent with performing light work. (Oddly enough, despite her rejection of Meyer's opinion about plaintiff's ability to walk or stand for no more than four hours, her own assessment of plaintiff's residual functional capacity was that he could stand or walk for only two hours in an eight-hour workday. AR 18.)

Plaintiff has a stronger argument about the other portions of Dr. Meyer's opinion, including his opinion that plaintiff would be absent more than three days a month and have

to take two unscheduled breaks during the work day. When that administrative law judge included these limitations in a hypothetical question to the vocational expert, she testified that there were no jobs that the individual could perform. Although the commissioner argues that the reasons the administrative law judge gave for rejecting Meyer's opinion about the standing limitation apply to her rejection of the other limitations, his argument is not persuasive. Nothing in the administrative law judge's decision indicates that she rejected Meyer's opinion about unscheduled breaks and absences or that if she did, what her reasons were for doing so. Therefore, on remand the administrative law judge must address the limitations found by Meyer and either accept or reject them. If she rejects them, she must explain her reasons for doing so.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Curt Fleischmann's application for Disability Insurance Benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 6th day of February, 2013.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge