

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAROLD LAINE RICHISON,

OPINION AND ORDER

Plaintiff,

11-cv-8-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This case concerns an application filed by Larold Laine Richison for Disability Insurance Benefits on April 25, 2007, alleging disability beginning December 1, 2004 because of cartilage damage in his toes, an earlier kidney transplant, diabetes and high blood pressure. After a hearing on December 7, 2009, administrative law judge David K. Gatto found plaintiff not disabled. This decision became the final decision of the Commissioner when the Appeals Council denied review.

On appeal, plaintiff contends that the administrative law judge committed three errors: 1) he erred in finding that plaintiff retained the ability to perform sedentary work; 2) he assessed plaintiff's credibility improperly; and (3) he erred in relying on the Medical-

Vocational Guidelines to find that plaintiff could perform a significant number of jobs in the national economy. I conclude that the administrative law judge did not err in finding that plaintiff retained the ability to perform sedentary work, in assessing his credibility or in applying the Medical-Vocational Guidelines. 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. Kidney transplant

Plaintiff Larold Richison experienced chronic renal failure and had a kidney transplant in 1999. AR 437. He received social security disability benefits from 1999 until 2004. AR 27. Since the transplant, his transplant team at the Hennepin County Medical Center in Minneapolis, Minnesota, has monitored his kidney function and his medications regularly. AR 255, 389-93. His physician at the clinic is Dr. Gary Schwochau. AR 485.

On August 14, 2008, plaintiff was seen by Dr. James Wallace at the St. Croix Regional Medical Center. AR 470. Wallace noted that plaintiff's creatine and blood urea nitrogen were higher than normal and he had more edema. He advised plaintiff to drink more liquids. AR 470.

In September 2008, plaintiff was seen by Dr. Schwochau, who noted that plaintiff's creatine had increased and he had increased lower edema swelling. Schwochau wrote, "Taking meds. Doubt rejection." Schwochau also noted that plaintiff was not experiencing any side effects from his medications. AR 485. In October 2008, plaintiff was seen in the clinic. His edema was better overall but worse at night. AR 409.

In December 2008, plaintiff tore a biceps tendon and injured his shoulder when he fell from a deer stand. AR 599-600. He had shoulder surgery in January 2009. AR 591-92. In February 2009, plaintiff exacerbated his shoulder injury by reaching to pull down the hood of his car. AR 431. In April 2009, plaintiff was released by Dr. Wallace to his normal activities with no restrictions. AR 437.

On January 29, 2009, Dr. Schwochau wrote a letter to plaintiff's attorney, summarizing plaintiff's medical condition. He stated that plaintiff's renal function had slowly deteriorated and that plaintiff experienced chronic lower extremity edema. He noted that plaintiff's medications might contribute to his fatigue and weakness. Schwochau wrote as follows:

Overall I feel Mr. Richison's medical illnesses preclude him from doing extensive physical exertion. His renal function is likely to deteriorate slowly over the ensuing years requiring eventual renal replacement therapy with dialysis.

He also noted that plaintiff had foot pain that did not prevent him from climbing in a deer

stand, falling down and rupturing his biceps tendon. AR 673.

On July 21, 2009, when plaintiff was seen in the transplant clinic, he reported that his kidney function was good. On examination, plaintiff had minimal edema in his extremities. AR 777. In September 2009, plaintiff had an adequate renal transplant blood flow without evidence of renal artery stenosis, swelling in the kidney or fluid collection in the kidney. AR 819.

2. Foot pain

Plaintiff had chronic foot pain for many years, which was misdiagnosed as gout. AR 231. In 2007, the pain was diagnosed as degenerative arthritis and bony abnormalities in his feet. AR 232-34. After cortisone injections and physical therapy yielded minimal improvement, Dr. Patrick Yoon, plaintiff's treating orthopedist, recommended foot surgery. However, the surgery had to be postponed because of plaintiff's poorly controlled diabetes. AR 257. After his diabetes was under control, plaintiff had surgery on his right great toe in June 2007. AR 256. In September 2007, plaintiff reported that he had some decrease in pain and definite increase in mobility since his surgery. AR 315.

When plaintiff saw Dr. Wallace, his family physician, on November 19, 2007, his diabetes was under control. Wallace noted that plaintiff had no edema in his extremities and good pulses in his feet. AR 507.

In March 2008, Dr. Yoon performed joint fusion on plaintiff's left great toe. AR 340. The joint did not unite as quickly as expected after surgery and plaintiff continued to experience foot pain. AR 686-91. On April 30, 2009, Dr. Yoon suspected that the left to fusion was not solid, AR 697, but a May 5, 2009 computed tomography scan of plaintiff's left toes showed that the fusion was intact. AR 558.

In June 2009, when plaintiff was admitted to the hospital for pancreatitis, he had no significant edema. AR 731. At a July examination prior to his gall bladder surgery, plaintiff had minimal edema. AR 777. After his gall bladder surgery in August 2009, he had no lower extremity edema. AR 786.

In September 2009, plaintiff was examined by Dr. Yoon found no evidence of deep venous thrombosis in either lower extremity and that the circulation, motion and sensation in plaintiff's lower extremities was intact. Yoon noted that all the hardware in plaintiff's feet was in place and that plaintiff had normal range of motion in his feet. Yoon recommended bilateral rigid foot orthoses for plaintiff's foot pain. AR 795.

On December 1, 2009, Dr. Yoon wrote a letter to plaintiff's attorney about plaintiff's medical condition. He opined that plaintiff was unable to work at a job that would require any prolonged walking, standing or driving. Also, Yoon noted that plaintiff's medical condition resulted in decreased circulation in both lower extremities and required him to keep his legs elevated much of the day to eliminate swelling in his lower extremities. He

concluded that plaintiff was permanently disabled. AR 825.

B. Consulting Physicians

On September 4, 2007, state agency physician Robert Callear completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of diabetes mellitus, status post kidney transplant and degenerative joint disease of both big toes. 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 279-86.

On March 3, 2008, state agency physician Pat Chan completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of osteoarthritis of big toes, past kidney transplant and diabetes. Chan found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk six hours in an eight-hour workday and sit six hours in an eight-hour work day. AR 326-33.

C. Hearing Testimony

At the hearing, plaintiff testified that he had not worked since 2004 and that he spent most of his time sitting down. AR 27. He testified that he did not do housework and had to elevate his legs during the day. He was taking Vicodin for his foot pain, which makes him drowsy, AR 28, and was visiting the transplant clinic in Minneapolis every one to two

weeks. AR 29.

Plaintiff testified that he had worked in 1999 as a salesperson at a hardware store, but that he had performed mostly physical jobs, such as installing furnaces. He performed this work for 17 years. AR 32.

Mr. Hocken testified as a neutral vocational expert. AR 33. He testified that plaintiff's description of his job indicated that it would be classified as a heavy, unskilled job. In the first hypothetical question put to the vocational expert, the administrative law judge asked him to assume an individual of plaintiff's age and education who could perform light work, but had impairments of a previous kidney transplant and chronic renal failure; treatment for high blood pressure and high cholesterol; hepatitis C virus; diabetes mellitus; gallstones; pancreatitis; osteoarthritis of the toes with surgical procedure; and left shoulder surgery. He asked whether this person could perform plaintiff's past work. The expert testified that the individual could not perform plaintiff's past work, but that there were other light jobs that he could perform. AR 35.

In the second hypothetical, the administrative law judge limited the individual to sedentary work. The expert testified that plaintiff could perform jobs existing in the regional economy, including surveillance system monitor, final assembler and lens inserter. AR 35. The administrative law judge asked whether these jobs could be performed by an individual who had to elevate both legs at least to waist level. The expert stated that this individual

might be able to work as a surveillance system monitor with an accommodation. AR 36.

D. The Administrative Law Judge's Decision

In reaching his 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, he found that plaintiff had not engaged in substantial gainful activity during the period from his alleged onset date of December 1, 2004 through December 31, 2009, his last insured date. AR 11.

At step two, he found that plaintiff had a severe impairment of osteoarthritis of the left and right great toes, which would cause more than minimal functional limitations. AR 11. Also at this step, the administrative law judge addressed plaintiff's status post kidney transplant, diabetes, gallstone pancreatitis, status post gallbladder removal, status post left shoulder surgery, high cholesterol, high blood pressure and hepatitis C. AR 11. The administrative law judge found from the evidence that plaintiff was not physically limited by his kidney transplant and that his diabetes had only a minimal impact on his ability to perform basic work activities. Also, the administrative law judge found that plaintiff's gall bladder removal surgery and left shoulder surgery had only minimal impact on his ability to work and were not expected to last for a period of 12 months or more. AR 12-13. Finally, the administrative law judge found that plaintiff's hepatitis C, high cholesterol and high

blood pressure were not severe impairments. AR 13. At step three, the administrative law judge found that plaintiff did not have an impairment or combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 13.

Once he had concluded that plaintiff's impairments were not severe enough to establish that he was presumptively disabled under the regulations, the administrative law judge 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. He found that plaintiff retained the residual functional capacity to perform the full range of sedentary work. AR 13.

In determining plaintiff's residual functional capacity, the administrative law judge considered the medical opinions in the record. He gave some weight to the opinions of the state agency physicians, but he concluded that plaintiff was more limited than they had found because of evidence received at the hearing. AR 17. The administrative law judge considered the opinion of Dr. Gary Schwochau that plaintiff's impairments precluded him from extensive physical exertion. The administrative law judge concurred that plaintiff could not perform work above sedentary level. AR 17. In addressing Dr. Yoon's opinion, the administrative law judge discounted his opinion that plaintiff had to keep his legs elevated most of the day to eliminate swelling. The administrative law judge found this opinion was

not supported by the objective medical evidence showing that plaintiff's circulation, sensation and motion have been intact and that he had no edema in his lower extremities. He also noted that although Dr. Yoon recommended orthotic supports for plaintiff, he did not recommend elevation of his feet. AR 18.

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. He considered specifically plaintiff's testimony that he had to elevate his legs during the day to prevent swelling. After considering the medical evidence and plaintiff's activities that included hunting and working on his car, the administrative law judge did not find credible plaintiff's testimony that he was physically unable to do more than sit with his feet elevated. However, he found it credible that plaintiff could not stand or walk for significant periods of time. Also, the administrative law judge considered plaintiff's testimony that his medication made him drowsy and found this testimony not credible because it was not supported by any objective medical evidence. The administrative law judge concluded that plaintiff's testimony was not credible to the extent that it was inconsistent with his assessment that plaintiff could perform unskilled sedentary work.

At step four, the administrative law judge found that plaintiff's restrictions would keep him from performing his past work (general hardware salesperson). AR 18. At step five, he used the Medical-Vocational Guidelines to find that for persons of plaintiff's age,

education, work experience and residual functional capacity, jobs existed in significant numbers in the national economy that plaintiff could perform. Therefore, he found plaintiff not disabled without relying on the testimony of the vocational expert.

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. Residual Functional Capacity

1. Consideration of all plaintiff's impairments

Plaintiff contends that the administrative law judge did not properly consider all of

his impairments when determining that he retained the residual functional capacity to perform sedentary work. However, in the decision the administrative law judge articulated his consideration of each impairment and why it did not limit plaintiff's ability to perform work activities. AR 11-13. He then found that plaintiff did not have an impairment or combination of impairments that met or medically equaled any listed impairment.

2. Weighing the opinions of treating physicians

Next, plaintiff argues that in making his determination that plaintiff retained the residual functional capacity to perform sedentary work, the administrative law judge did not properly weigh the opinions of the treating physicians. Although an administrative law judge must consider all medical opinions of record, he 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.” Hofslie 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 his decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999).

In this case, the administrative law judge did not reject the opinion of plaintiff's treating nephrologist, Dr. Schwochau, but rather agreed with his opinion that plaintiff's impairments precluded him from extensive physical exertion. The administrative law judge discounted Dr. Yoon's opinion that plaintiff requires regular elevation of his feet because it was contrary to the objective medical evidence. Specifically, the administrative law judge found that the treatment notes indicate that the swelling in plaintiff's feet had subsided and the circulation, sensation and motion in his feet were intact. Further, he noted that in September 2009, Yoon recommend orthotics but did not mention elevation of the feet.

The record contains substantial evidence to support the administrative law judge's conclusion that plaintiff had no need to elevate his feet. Several examination records indicate that plaintiff had minimal to no edema in his extremities in the summer of 2009 and plaintiff's doctors did not instruct him to elevate his feet. The administrative law judge concluded that although plaintiff's foot pain could be expected to limit his ability to ambulate for prolonged periods of time, it was not necessary for him to elevate his feet regularly because of swelling and decreased circulation in his legs.

In sum, the administrative law judge provided good reasons, supported by substantial evidence in the record, for not giving controlling weight to Yoon's opinion. Hofslie, 439 F.3d at 377 (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 Yoon's opinion that plaintiff was disabled.

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 the 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 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.” Martinez v. Astrue, 630 F.3d 693, 694 (7th Cir. 2011). As the court noted, assessments like these fail to identify which statements are not credible and what exactly “not entirely” is meant to signify. Id.

In this case, however, the administrative law judge considered the various statements individually. He credited plaintiff’s testimony that he was precluded from walking or standing for significant periods of time at one stretch. However, he did not credit plaintiff’s testimony that he was required to elevate his legs regularly because it was not supported by the medical evidence. The administrative law judge addressed possible side effects of plaintiff’s medications but found that this testimony was not credible.

I am persuaded that the administrative law judge built an accurate and logical bridge from the evidence to his conclusion that plaintiff’s subjective complaints about his pain were not worthy of belief. Shramek, 226 F.3d at 811 (7th Cir. 2000).

D. Step Five

The last issue to be considered is whether the administrative law judge erred when he relied on the Medical-Vocational Guidelines. At the last step of the sequential evaluation process, the administrative law judge can satisfy the commissioner’s burden by relying on one of the Medical-Vocational Guidelines found in 20 C.F.R., Subpart P, App. 2. Caldarulo v. Bowen, 857 F.2d 410, 413 (7th Cir. 1988). These rules take administrative notice of the

numbers of unskilled jobs that exist throughout the national economy at the various functional levels (sedentary, light, medium, heavy and very heavy), taking into account the other vocational factors of age, education and work experience. 20 C.F.R., Subpart P, App. 2, § 200.00(b). Because the rules account only for limitations that affect the person's ability to meet the exertional requirements of jobs, they are dispositive only when the person's limitations are exertional in nature (e.g., limitations on sitting, standing, amount of weight lifted). 20 C.F.R., Subpart P, App. 2, § 200.00(e). When a person has additional non-exertional limitations (such as limitations on the ability to balance, manipulate objects, hear, see, perform mental tasks or tolerate environmental conditions such as heat, cold, dust and fumes), the guidelines can be used only as a "framework for consideration" and the administrative law judge must cite other evidence for her conclusion that significant numbers of jobs exist in the economy that the claimant can perform. Id.

The commissioner's regulations recognize that in some cases, a person's non-exertional limitations may be so insignificant that it is obvious they would not diminish the relevant job base and the relevant Medical-Vocational Guideline may still be applied. Soc. Sec. Ruling 83-14. In "more complex" cases, however, the administrative law judge may need the assistance of a vocational expert. Id. The Court of Appeals for the Seventh Circuit has said that a vocational expert is not required if there is "reliable evidence of some kind that would persuade a reasonable person that the limitations in question do not significantly

diminish the employment opportunities otherwise available.” Warmoth v. Bowen, 798 F.2d 1109, 1112 (7th Cir. 1986).

In this case, the administrative law judge did not need to consider the testimony of the vocational expert because there was no reliable evidence that plaintiff’s limitations significantly diminished the available employment opportunities. Although plaintiff argues that because of his fatigue, drowsiness and inability to walk, the administrative law judge should not have relied on the guideline, there is no substantial evidence to support plaintiff’s claim that he was unable to stand or walk for two hours in an eight hour work day. Further, to the extent that fatigue or drowsiness may be considered non-exertional limitations, the administrative law judge properly found that plaintiff’s testimony concerning these limitations was not credible because there was no medical evidence that plaintiff’s medications would cause such fatigue. Therefore, these limitations did not preclude the administrative law judge from applying the Medical Vocational Guidelines. Howell v. Sullivan, 950 F.3d 343, 349 (7th Cir. 1991) (application of grids is appropriate where ALJ found plaintiff had no significant non-exertional limitations.)

ORDER

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

Entered this 2d day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge