IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MYRNA LEE LARSON,

OPINION and ORDER

Plaintiff,

11-cv-818-bbc

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Myrna Lee Larson seeks judicial review under 42 U.S.C. § 405(g) of defendant Michael Astrue's decision denying her application for disability insurance and supplemental security benefits. Plaintiff contends that the administrative law judge erred by failing to properly consider the opinion of her primary care provider, a physician assistant.

I am granting plaintiff's motion for summary judgment. The administrative law judge failed to evaluate the physician assistant's assessment using the factors specified in 20 C.F.R. § 404.1527(c) and instead discounted the assessment solely because the physician assistant is not a medical doctor. Accordingly, the case must be remanded so that the administrative law judge can give appropriate consideration to the assessment.

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

FACTS

A. Background

Plaintiff Myrna Lee Larson applied for disability insurance benefits and supplemental social security income in March 2007, contending that she was disabled by a hemangioma on her left hand (an abnormal growth of blood vessels) and carpal tunnel syndrome in her right hand. She worked from 1984 to 2000 as a hand packer at a bakery, but decided she could no longer work there because of the pain in her hands. At the time she applied for benefits, she had not worked since August 2000.

B. Opinion of Consultative Examiner

Because of her financial circumstances, plaintiff had received only limited medical treatment for her physical problems. In light of this, the Social Security Administration arranged for a consultative examination to be preformed by Dr. Mary Frantz on June 22, 2007.

At the examination, Dr. Frantz noted that plaintiff's "main problems are an extensive hemangioma on the left hand, carpal tunnel syndrome of the right hand, and bilateral knee pain." AR 457. After her examination, Dr. Frantz found that plaintiff had "very little use of her left hand,""slight disability from sensory loss" of the right wrist, knee pain, "possibly traumatic arthritis" and back pain aggravated by obesity. AR 458. Frantz concluded that although plaintiff's impairments were probably permanent in nature, she "might be able to do some form of gainful work" with physical therapy and vocational rehab. Id.

B. Residual Functional Capacity Assessments by Agency Consultants

In July 2007, Dr. Michael Baumblatt, a consulting medical advisor for the Social Security Administration, assessed plaintiff's residual functional capacity on the basis of the medical record and Dr. Frantz's June 17 evaluation of plaintiff. AR 462-472. He concluded, among other things, that plaintiff could perform one-armed "light work," that she could lift or carry 20 pounds occasionally and 10 pounds frequently, could sit or stand six hours in an eight-hour workday and had no limitations on the use of her right hand.

In October 2007, Dr. Dar Muceno, another consulting medical advisor for the agency, assessed plaintiff's residual functional capacity and reached conclusions similar to those of Dr. Baumblatt. AR 473-485. In particular, he concluded that plaintiff could perform tasks falling between a "light" and "sedentary" exertional level. Muceno noted that plaintiff's use of her left hand would be limited and that she should avoid exposure to heights and hazards because of her postural hypotension.

C. Initial Denial of Benefits, Additional Consultant Medical Evaluations and Remand

In April 2008, Administrative Law Judge John Pleuss denied plaintiff's applications, concluding that she could preform a significant number of jobs. AR 149-55.

On October 15, 2008, Dr. Frantz re-examined plaintiff and noted that plaintiff's left hand pain had worsened, her right carpal tunnel syndrome was "about the same" as it had been in June 2007 and that she still suffered from knee pain, back pain and postural hypotension. Frantz's summary stated:

> I don't see this woman as able to tolerate any working situation more demanding than light house work at which she can rest as needed. Sustained use of right hand would undoubtedly cause progression of the [carpal tunnel syndrome]. Use of the left hand would be very unwise with the huge hemangioma. She cannot walk or bear weight for more than brief intervals of the time. It is possible that with intensive rehabilitation efforts she would be able to do some light work.

AR 493.

On October 20, 2008, Dr. Pat Chan completed a residual functional capacity assessment as a consulting medical advisor for the Administration. AR 501-11. Chan found plaintiff limited to "sedentary work" with occasional manipulations of her left hand and non-constant use of her right hand. Chan also found that plaintiff could lift less than 10 pounds frequently, as much as 10 pounds occasionally and that she could stand or walk for two hours and sit for six hours in an eight-hour workday.

In March 2009, the Appeals Council granted plaintiff's request for review, vacated the decision and returned the case to the administrative law judge with instructions to reconsider plaintiff's residual functional capacity and occupational opportunities. AR 157-58.

On April 22, 2009, Dr. Syd Foster completed a residual functional capacity assessment as a consulting medical advisor for the agency, disagreeing with Dr. Frantz's assessment and finding limitations consistent with the findings of Dr. Baumblatt and Dr. Muceno. AR 520-27.

Also in April 2009, plaintiff was evaluated by a state consulting psychologist, Dr. Jean Warrior, who concluded that plaintiff's "concentration, attention and work pace would be

fine, affected only by restrictions due to pain." AR 516.

D. Opinion of Michelle Reisen-Garvey, Physician Assistant

Plaintiff started seeing Michelle Reisen-Garvey, a physician assistant, in 2009 for regular medical appointments. Plaintiff saw Reisen-Garvey for regular appointments on December 14 and 30, 2009 and March 3, 2010. On March 22, 2010, Reisen-Garvey completed a Work Capacity Questionnaire, summarizing her assessment of plaintiff's condition. AR 548-552. According to Reisen-Garvey, plaintiff has carpal tunnel syndrome, a hemangioma on her left hand, dizziness and urinary frequency due to diabetes and knee and back pain from arthritis. She noted that plaintiff's hemangioma and diabetes were permanent disabilities and that her arthritic pain "will progress over time and become more painful causing worsening disability." She also noted that plaintiff's "right carpal tunnel syndrome would likely worsen with repetitive range of motion." She found that plaintiff could walk less than half a block without rest or severe pain and that she could not stand more than five or 10 minutes before needing to sit down or walk around. She made the following conclusions relevant to plaintiff's residual functional capacity if she were to be employed:

- She would frequently have pain that would be severe enough to interfere with attention and concentration;
- She would need unscheduled breaks;
- She could only occasionally lift less than 10 pounds, could rarely lift 10 pounds and could never lift 20 pounds;

- She could rarely twist, stoop, crouch, squat or climb ladders or stairs;
- She would have the ability to manipulate and reach overhead with her right hand 10-20% of the day and manipulate and reach overhead with her left hand less than 10% of the day; and
- She would miss more than four days a month as a result of her impairments.

Id.

E. 2010 Hearings

In April 2010, plaintiff appeared and testified at a hearing before Administrative Law Judge Pleuss. When asked how her impairments affected her ability to work, she stated that her hands hurt "all the time" and that if she used both hands together she could lift approximately 15 pounds. AR 90. She stated that she had back pain, could stand for no more than 30 minutes at a time because of her knee pain and that she could walk about two blocks. AR 94. She told the administrative law judge that she performed some household tasks with difficulty. AR 95.

In August 2010, another hearing was held at which the administrative law judge and plaintiff's counsel posed hypothetical questions to a vocational expert. AR 110-41. The expert testified that an employee with the same age and work history as plaintiff, who could lift 10 pounds frequently and 20 pounds occasionally, could use her left hand for only occasional gross manipulation and who could stand no more than 30 minutes at a time could perform the work of a surveillance system monitor (2,000 to 3,000 sedentary jobs in the state of Wisconsin); gate guard (5,000 light jobs in the state of Wisconsin); and information

clerk (12,500 sedentary jobs in the state of Wisconsin). AR 117-18. In response to questions from plaintiff's attorney, the vocational expert stated that the gate guard job would not be available to a person who could not stand more than two hours in an eight-hour day and who could lift only 10 pounds occasionally. Additionally, the information clerk job could not be performed by an individual who could not frequently lift objects under 10 pounds. All three jobs would likely be unavailable to a person who missed more than one day a month because of physical impairments. AR 132.

F. Administrative Law Judge's Decision

The administrative law judge denied plaintiff's claims. He performed the requisite five-step analysis, 20 C.F.R. § 404.1520, concluding that plaintiff had not engaged in substantial gainful activity since June 15, 2006 and that the hemangioma on her left hand, mild carpal tunnel syndrome in her right hand, postural hypotension, diabetes mellitus and depression constituted severe impairments. AR 15. He concluded that these impairments did not meet or equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1, but that plaintiff's impairments did limit her ability to work. In particular, the administrative law judge found that plaintiff was mildly restricted in activities of daily living and social functioning and had moderate difficulties with regard to concentration, persistence or pace. AR 15-17.

The judge then discussed plaintiff's residual functional capacity. Id. He found that plaintiff was "limited but satisfactory" in her ability to maintain attention and concentration

and that although plaintiff could engage in only occasional gross manipulation and no fine manipulation with her left hand, she was right-hand dominant and could engage in tasks involving unlimited gross and fine manipulation with her right hand. Additionally, although plaintiff could not work at unprotected heights or around dangerous machinery and could not stand for more than 30 continuous minutes, she could work in positions that gave her an option to sit or stand. The judge concluded that plaintiff could perform "light work," as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b). Finally, the administrative law judge concluded that plaintiff was not disabled because she could perform the work of a surveillance system monitor, gate guard or information clerk.

In reaching these conclusions, the administrative law judge stated that he was according "substantial weight" to the assessments of state disability medical consultants Dr. Muceno, Dr. Foster and Dr. Warrior. He gave little or no weight to the opinion of Dr. Chan that plaintiff was limited to sedentary work, stating that Chan's assessment "understates the claimant's functional capacity." AR 20. He also discredited plaintiff's statements regarding the severity of her impairments, stating that her statements concerning the intensity, persistence and limiting effects of her symptoms were "not credible to the extent they [were] inconsistent with" his residual functional capacity assessment, particularly in light of the fact that plaintiff reported that she performed household chores such as cleaning, laundry and cooking. AR 19. Finally, with respect to the assessment by Michelle Reisen-Garvey, the administrative law judge stated,

> Although physician's assistant Michelle Reisen-Garvey completed an assessment of the claimant's functioning, I do not find it persuasive. Pursuant

> to 20 CFR 404.1513, 20 CFR 416.913, and SSR06-03p, physician's assistants are not acceptable medical sources.

AR 20.

The Appeals Council denied plaintiff's request for review of the decision.

OPINION

In reviewing a final decision by the commissioner, the court must find the commissioner's findings of fact "conclusive" so long as they are supported by "substantial evidence," 42 U.S.C. § 405(g), that is, "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).

Plaintiff challenges only one aspect of the administrative law judge's decision denying her benefits. Specifically, she contends that the administrative law judge erred in concluding that plaintiff retains sufficient functional capacity to perform jobs in the state and national economy because he failed to give proper consideration to the assessment of the physician assistant, Michelle Reisen-Garvey, who had treated plaintiff on three occasions. In contrast to Dr. Muceno and Dr. Foster, both of whom testified that plaintiff could perform "light work," Reisen-Garvey found that plaintiff could not lift any amount of weight "frequently,"

would need unscheduled breaks and would likely miss more than four days a month because of her impairments. Some of Reisen-Garvey's opinions were similar to those of Dr. Frantz, who found it unlikely that plaintiff could perform light work without significant rehabilitation, and Dr. Chan, who limited plaintiff to sedentary work. Plaintiff contends that because the administrative law judge failed to consider Reisen-Garvey's assessment, he did not consider the vocational expert's testimony that a person with the limitations described by Reisen-Garvey may not be capable of performing the jobs of surveillance monitor, gate guard or information clerk.

The commissioner has established a regulatory framework that explains how an administrative law judge is to evaluate medical opinions. 20 C.F.R. §§ 404.1527(c), 416.927(c). 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. Id. 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. Id.; Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005). 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(e)(2)(ii); 416.927(e)(2)(ii).

Plaintiff contends that Reisen-Garvey's opinion should have been given greater weight than the opinions of the state consulting doctors because Reisen-Garvey was a treating

source. However, not every provider qualifies as a treating source. Bowman v. Astrue, 511 F.3d 1270, 1274-75, n.2 (10th Cir. 2008). Only "acceptable medical sources," such as licensed physicians, can be characterized as treating sources whose opinions are generally entitled to controlling weight. 20 C.F.R. §§ 404.1513(a), 404.1502. Physician assistants like Reisen-Garvey are considered "other medical sources," 20 C.F.R. § 404.1513(d)(1), and their opinions cannot be used to "establish the existence of a medically determinable impairment." SSR 06–03p.

That being said, opinions from other medical sources such as physician assistants are important and can establish the severity of the impairment and how it affects the claimant's ability to function. As explained in Social Security Ruling 06-03p,

> 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.

See also Barrett v. Barnhart, 355 F.3d 1065, 1067 (7th Cir. 2004) ("Although Barrett is wrong to argue that a physical therapist's report should be given controlling weight, such reports are entitled to consideration."); Lauer v. Apfel, 169 F.3d 489, 494 (7th Cir. 1999) (noting that reports from physical therapists "are helpful when determining functional capacity"); Phillips v. Astrue, 413 Fed. Appx. 878 (7th Cir. 2010) (unpublished) (opinions from other medical sources "should be considered when evaluating key issues such as

impairment severity and functional effects") (citation and quotations marks omitted); Evans v. Astrue, 2012 WL 951489, *14 (N.D. Ind. Mar. 20, 2012) (explaining that administrative law judge is "required to consider the opinions and explain the basis for the weight afforded the opinions" of physical therapist).

Social Security Ruling 06-03p explains 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. These factors are set forth in 20 C.F.R. § 404.1527(c).

The commissioner does not deny that Social Security Ruling 06-03p applies or that the administrative law judge should have applied the factors listed in § 404.1527(c) when considering Reisen-Garvey's opinion. He does not argue that any deficiency in the administrative law judge's decision would be "harmless error" or that a person with the limitations described by Reisen-Garvey could perform a significant number of jobs in the national economy. Instead, he argues, the administrative law judge considered the relevant factors, weighed Reisen-Garvey's assessment against the other evidence and rejected the opinion for legitimate reasons. The commissioner states that Reisen-Garvey's assessment was rejected because, among other reasons: "Reisen-Garvey had known [plaintiff] for only three and one-half months" at the time of her assessment, Dft.'s Br., dkt. #15, at 8; Reisen-Garvey listed plaintiff's hemangioma as a severe impairment even though plaintiff "has

suffered from this conditions since her early childhood and had worked successfully with it," id. at 9; Reisen-Garvey did not rely on any objective tests, id. at 11; and the assessments of other acceptable medical sources in the record were supported by objective medical evidence and were more persuasive. Id. at 9-11.

The problem with the commissioner's arguments is that they are being made for the first time by the commissioner. The administrative law judge did not cite any of these reasons when rejecting Reisen-Garvey's assessment. Both the Supreme Court and the Court of Appeals for the Seventh Circuit has warned the commissioner repeatedly that it is inappropriate to attempt to supplement or rewrite an administrative law judge's decision by providing justifications and rationalizations not articulated by the administrative law judge. SEC v. Chenery Corp., 318 U.S. 80, 93-95 (1943); Spiva v. Astrue, 628 F.3d 346, 353 (7th Cir. 2010); Campbell v. Astrue, 627 F.3d 299, 307 (7th Cir. 2010).

In his decision denying plaintiff's request for benefits, the administrative law judge cited only one flawed reason for finding Reisen-Garvey's assessment to be unpersuasive, stating that "physician's assistants are not acceptable medical sources" under the regulations. This is not a legitimate reason for discounting the opinion completely. Although the administrative law judge was free to give Reisen-Garvey's opinion less weight because she was not an "acceptable medical source," he was still required to evaluate Reisen-Garvey's opinions using the factors set forth in SSR 06-03p and 20 C.F.R. § 404.1527(c).

It may be true that the administrative law judge would have found Reisen-Garvey's assessment to be unpersuasive even if he had given them proper consideration. On the other

hand, he might have reached the conclusion that Reisen-Garvey's assessment was supported in part by the findings of Dr. Frantz and Dr. Chan and plaintiff's own testimony. Regardless, this case must be remanded so that the administrative law judge can give appropriate consideration to the assessment. Bowman, 511 F.3d at 1276 (remanding with instructions that "Commissioner should reconsider [nurse's] opinion in light of SSR 06-03p"); Marling v. Astrue, 2012 WL 2808742, *11 (S.D. Ohio July 10, 2012) (recommending remand in part because administrative law judge discounted counselor's assessment solely because she was not medical source and failed to evaluate counselor's opinion "by reference to the [] factors specified in SSR 06-03p"); Wyatt v. Astrue, 2012 WL 2358149, *7 (S.D. Ind. June 20, 2012) (remanding in part because administrative law judge summarily dismissed clinical social worker's opinion solely because she was not an "acceptable medical source" and instructing administrative law judge to "articulate the weight given to [the social worker's] opinions, considering the factors set out in 20 C.F.R. § 404.1527(c)"); Mason v. Astrue, 2012 WL 1909341, *21 (E.D. Wis. May 25, 2012) (remanding with instructions to administrative law judge to reconsider physical therapist's opinions); Dougherty v. Astrue, 2012 WL 671411, *6 (E.D. Cal. Feb. 29, 2012) (remanding case in which administrative law judge failed to explain why she discredited physical therapist's opinion); Sommer v Astrue, 2010 WL 5883653, *4-5 (E.D. Tenn. Dec. 17, 2010) (holding that administrative law judge erred by failing to "indicate what applicable factors he used when evaluating" nurse practitioner's assessment); Barry v. Astrue, 2010 WL 3168630, *11 (D. Ariz. Aug. 10, 2010) (administrative law judge's "conclusory reference to

the fact that [the nurse practitioner] is not a licensed doctor is clearly an insufficient basis, without further explanation, for entirely disregarding her opinion").

On remand, the administrative law judge should reconsider Reisen-Garvey's assessment using the factors set forth in 20 C.F.R. § 404.1527(c) and explain clearly how much weight he is giving to Reisen-Garvey's opinion and why.

ORDER

IT IS ORDERED that plaintiff Myrna Lee Larson's motion for summary judgment is GRANTED and this case is REMANDED to defendant Commissioner of Social Security, pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 19th day of July, 2012.

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