

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

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SHIRLEY NEUMANN,

Plaintiff,

OPINION AND ORDER

v.

11-cv-837-wmc

CAROLYN W. COLVIN,  
Acting Commissioner of Social Security,

Defendant.

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Plaintiff Shirley Neumann seeks judicial review of a decision by the Commissioner of the Social Security Administration denying her application for Supplemental Security Income under section 1614(a)(3)(A) of the Social Security Act. Neumann filed a motion for summary judgment, arguing that the Administrative Law Judge (“ALJ”) erred by: (1) formulating a lifting restriction without any medical opinion; (2) making a flawed credibility finding; (3) rejecting the opinion of an examining source; and (4) failing to obtain a waiver of the right to counsel. Because the current record does not indicate that the ALJ properly considered the evidence in assessing Neumann’s residual functional capacity, particularly with respect to the lifting and credibility finding, the court will remand for further proceedings.

FACTS<sup>1</sup>

**A. Background**

Shirley Neumann was born on September 29, 1958, and lives in Independence, Wisconsin. (AR 105-06.) Neumann completed her general equivalency diploma in

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<sup>1</sup> The following facts are drawn from the administrative record (AR).

1977. (AR 126.) Her past relevant work was as a “chicken grower” on a farm. (AR 120.)

On October 5, 2007, Neumann filed an application for supplemental security income (AR 105-109), complaining of back problems and rheumatoid arthritis in both hands. These conditions first interfered with her ability to work on April 1, 2000, and ultimately led to her being unable to work on April 27, 2007. (AR 119.)

From March to October 2007, Neumann was treated by a chiropractor, Patricia Barge, for cervical and lower back pain. (AR 157-61.) On October 1, 2007, Barge completed a form indicating that Neumann would qualify for a crossbow permit because she suffered from weakness in her right shoulder joint and instability in the cervical spine.

(AR 162-63.) Neumann was seen at the Chippewa Valley Free Clinic on October 2, 2007, for chronic lower back pain, stiffness in the hands and swelling of the fingers. Dr. Ken Adler diagnosed Neumann with symmetric stiffness in the hands lasting approximately an hour each morning. His physical examination did not reveal swelling, and tests for carpal tunnel (Tinel’s and Phalen’s) were negative. Adler prescribed Prednisone for two weeks to be followed by Naproxen. (AR 166.) X-rays taken of Neumann’s hands that day showed minimal degenerative changes, suggestive of osteoarthritis. (AR 170-71.)

Neumann saw Dr. Adler again on October 30, 2007 for follow-up and reported that she had swollen and painful hands. At that time, Neumann reported no current neck or back pain. (AR 175.) On December 13, 2007, Adler reviewed Neumann’s

x-rays and ruled out rheumatoid arthritis. He told Neumann to continue taking Naprosyn. (AR 171.)

On January 29, 2008, Neumann was seen by Dr. Robert Dohlman for a consultive examination. X-rays taken of Neumann's cervical spine on January 30, 2008 showed cervicothoracic scoliosis with no significant degenerative disc changes. (AR 178.) A physical examination revealed no swelling in Neumann's fingers or hands, no muscle wasting, a full range of motion and normal strength. Ultimately, Dr. Dohlman diagnosed her with minor degenerative arthritis of the cervical, thoracic and lumbosacral spines. As a result, he found that Neumann would primarily need a sit-down job requiring: lifting of no more than five pounds infrequently; no operation of hand or foot controls; no more than a 20-30 minute drive from her home; and an escalator or elevator if not on the ground floor level. (AR 182, 183.)

On February 20, 2008, state agency physician, Dr. Syd Foster, reviewed the medical record and made a physical residual functional capacity assessment, finding Neumann capable of performing light exertional work: lifting/carrying 20 pounds occasionally and 10 pounds frequently; sitting, standing and walking for a total of 6 hours in an 8-hour work day with normal breaks; and no postural, manipulative or environmental limitations. (AR 184-91.) State agency physician, Dr. Pat Chan, also reviewed the medical record and made a physical residual functional capacity assessment, finding the same limitations as Foster. Dr. Chan went on to state that he placed little weight on Dr. Dohlman's findings because they appeared to be based largely on

Neumann's subjective complaints given there were no significant musculoskeletal or neurological findings and her x-rays showed only minor degenerative changes. (AR 195-202.)

After considering her age, education, and work history, as well as medical records from treating and consulting physicians, the local disability agency denied Neumann's application – initially on February 20, 2008, and again upon reconsideration on November 7, 2008. (AR 58, 59.) Thereafter, Neumann requested a hearing before an administrative law judge.

### **B. Administrative Hearing**

Neumann appeared in person before Administrative Law Judge Sherwin Biesman on May 11, 2010. She was represented by Michael Casper, a “non-attorney representative.” (AR 22.) Neumann testified that she last worked approximately 10 years ago in a chicken coop and had held that job for 10 to 15 years. (AR 44.) In that position, she had to lift chickens weighing up to 25 pounds and routinely changed the heavy motors in the fans in the coop. (AR 56.) Neumann testified that she has unable to work, even part-time, for the past 10 years due to lower back pain extending into her hip and an inability to sit or stand in one spot for four hours. (AR 46-7, 53.)

Neumann explained that she has trouble sleeping and has a back ache every day. On bad days, which occur about three times a week, she mainly lies on the couch. (AR 48-50.) Because Neumann does not have the money to go to a clinic, she has not seen a

doctor in the past two years and only takes Aleve or ibuprofen for pain. (AR 51-2.) Neumann said she is able to go out shopping, but must have help to carry groceries as she tries to not to lift anything over 5 pounds. (AR 53, 55.)

### C. The ALJ's Disability Determination

After considering the documentary evidence and testimony, the ALJ issued a written decision on June 22, 2010, finding that Neumann was not disabled under the sequential, five-step analysis required by the SSA. The ALJ found that Neumann had not engaged in substantial employment since October 2, 2007, and was severely impaired by osteoarthritis of both hands and fingers and degenerative disc disease of the lumbar spine. (AR 24.)

The ALJ nevertheless concluded that Neumann did *not* have an impairment or combination of impairments that met or medically equals any presumptively disabling impairment listed in the government regulations. She also found that Neumann's degenerative disc disease does not involve nerve root compression or sensory and motor deficits required by § 1.04A and that she had not shown a profound inability to perform fine and gross movements effectively as required by § 1.02B.

Based on the available medical records, reports from consulting physicians and the hearing testimony, the ALJ concluded that the limitations imposed by Dr. Dohlman were based on Neumann's subjective complaints and were unsupported by the record. The ALJ further explained that he found Neumann's complaints of chronic and intractable

pain not credible because Neumann takes only over-the-counter medication for pain and is not currently receiving treatment. He also found Neumann's application for a crossbow permit to be inconsistent with total disability. Finally, the ALJ found that Neumann's husband's lack of a steady income as a construction worker "might be part of [her] motivation in seeking benefits, i.e., to obtain supplementary income for the family." (AR 28).

Apparently based on the above, the ALJ went on to conclude that: (1) Neumann had the residual functional capacity to lift/carry 25 pounds occasionally and 20 pounds frequently; and (2) was able to stand/walk and sit for six hours out of an eight-hour work day. As a result, the ALJ determined that Neumann was capable of performing her past relevant work as a chicken farmer as it is actually performed. (AR 24, 28.)

## OPINION

A federal court reviews an administrative disability determination with deference and will uphold a denial of benefits unless the ALJ's decision is not supported by substantial evidence or is based on an error of law. 42 U.S.C. § 405(g); *Terry v. Astrue*, 580 F.3d 471, 475 (7th Cir. 2009). 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). "Where conflicting evidence allows reasonable minds to differ about whether a claimant is disabled, the responsibility for that decision falls on the [C]ommissioner, or the [C]ommissioner's designate, the ALJ." *Herr v. Sullivan*, 912

F.2d 178, 181 (7th Cir. 1990) (quoting *Walker v. Bowen*, 834 F.2d 635, 640 (7th Cir. 1987) (citation omitted). Thus, a reviewing court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the ALJ. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

Even so, a federal court must conduct a “critical review of the evidence” before affirming a decision to deny benefits. *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011) (citing *Lopez ex rel. Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003)). While an ALJ need not address every piece of evidence in his opinion, *Craft v. Astrue*, 539 F.3d 668, 673 (7th Cir. 2008), he must adequately (1) discuss the issues and (2) build “an accurate and logical bridge” between the evidence and his conclusion that the claimant is not disabled. *McKinzey*, 641 F.3d at 889 (citation omitted). 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). Unfortunately, the ALJ’s decision falls short in both of these respects.

### **I. Residual Functional Capacity**

Neumann contends that the ALJ’s conclusion regarding her residual functional capacity to lift 25 pounds occasionally and 20 pounds frequently is without any support in this record. Dr. Foster and Dr. Chan both found that Neumann was limited to lifting 20 pounds occasionally and 10 pounds frequently, and Dr. Dohlman found that Neumann could lift no more than 5 pounds infrequently. In addition to these medical

opinions, Neumann also testified that she could not lift more than 5 pounds. Although the ALJ rejected Dohlman's more restrictive opinion, as well as Neumann's subjective self-report, he gave *no* reason for finding affirmatively that Neumann could lift more than the 20 pounds found by both Drs. Foster and Chan. As important, nothing in the record explains this discrepancy.

When an ALJ denies benefits, he may not "play doctor" by arriving at his own lay opinions to fill evidentiary gaps in the medical record. *Myles v. Astrue*, 582 F.3d 672, 677 (7th Cir. 2009). As Neumann notes, the ALJ's finding in this respect appears to be result-orientated: by finding that Neumann could lift 25 pounds occasionally, the ALJ was able to conclude that the claimant could perform her past relevant work.

Without more, it is impossible to trace the path between the evidence and the ALJ's conclusion that Neumann could lift 25 pounds occasionally and, therefore, perform her past work. On remand, therefore, the ALJ must build a "logical bridge" from his recitation of the medical evidence to his findings concerning Neumann's residual functional capacity or revise his findings. *Clifford*, 227 F.3d at 872. As an aside, the court notes that given Neumann's birthdate, she is fast approaching the age of 55. At this age with a high school education, a history of unskilled work and a limitation of light work, Neumann would likely be deemed disabled under the Medical-Vocational Guidelines, 20 C.F.R. 404, Subpt. P, App. 2 § 202.04.<sup>2</sup>

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<sup>2</sup> These guidelines or "grids" are a series of tables broken into rules that classify a claimant as disabled or not based on the claimant's physical capacity, age, education and work experience. *Id.*, § 200.00(a) ("Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a

## II. Credibility Finding

The ALJ found that Neumann’s testimony “concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.” (AR 28.) Neumann objects that this finding is conclusory, citing the Seventh Circuit’s admonitions about using “boilerplate language” that is “meaningless” and “unhelpful.” *Schauger v. Astrue*, 674 F.3d 690, 696 (7th Cir. 2012); *Bjornson v. Astrue*, 671 F.3d 640, 644-45 (7th Cir. 2012); *Parker v. Astrue*, 597 F.3d 920, 921-22 (7th Cir. 2010).

While the ALJ’s ultimate credibility determination may be accurately characterized as “boilerplate,” the ALJ also offered reasons for his decision. He explained that Neumann’s complaints of chronic and intractable pain were not credible given she takes only over-the-counter medication for pain and is not currently receiving treatment. The ALJ also found Neumann’s application for a crossbow permit in the treatment records of her chiropractor inconsistent with her claim of total disability. Finally, he pointed to Neumann’s possible motivation for seeking benefits -- her husband was a construction worker without a steady income.

Still, as Neumann argues, the ALJ’s reasoning is flawed. As an initial matter, the ALJ reached his conclusion about her motivation without developing the record with respect to her husband’s financial situation. For example, Neumann’s husband may have received unemployment benefits during his layoff period, making their family’s financial

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particular rule, the rule directs a conclusion as to whether the individual is or is not

situation less dire. The ALJ also ignored the fact that an individual has to be disabled in order to obtain a crossbow permit in Wisconsin, a fact that arguably supports her claim. See <http://dnr.wi.gov/files/pdf/pubs/WM0352.pdf> (visited June 25, 2013). In addition, there is no evidence in the record that Neumann ever went hunting, and despite viewing this to be an important fact, the ALJ failed to ask her about this activity. Most persuasive, the ALJ failed to consider Neumann's possible reasons for not receiving medical care before drawing a negative inference.

The Seventh Circuit has repeatedly cautioned that “[a]lthough a history of sporadic treatment or the failure to follow a treatment plan can undermine a claimant's credibility, an ALJ must first explore the claimant's reasons for the lack of medical care before drawing a negative inference.” *Shauger v. Astrue*, 675 F.3d 690, 696 (7th Cir. 2012) (citing S.S.R. 96–7p, 1996 WL 374186, at \*7; *Moss v. Astrue*, 555 F.3d 556, 562 (7th Cir. 2009); *Craft*, 539 F.3d at 679). While Neumann's representative explained at the hearing that Neumann had not sought medical treatment or prescription medication because she did not have health insurance and could not afford to pay for it out of pocket, the ALJ failed to consider this in his decision. See S.S.R. 96–7p, 1996 WL 374186, at \*7-8 (inability to afford treatment is good reason for not seeking medical treatment); *Roddy v. Astrue*, 705 F.3d 631, \*7 (7th Cir. 2013) (claimant's loss of medical insurance and inability to afford medical procedures is a valid explanation for failure to seek treatment).

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disabled.”); *Haynes v. Barnhart*, 416 F.3d 621, 627 (7th Cir. 2005).

Given this deficiency in particular, the court cannot affirm the ALJ's credibility finding. On remand, the ALJ must build a more accurate and logical bridge between the evidence and his credibility finding. *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2000). The ALJ should take care to develop the record properly with respect to Neumann's (1) financial status and activities; and (2) reasons for not seeking medical treatment or using more expensive prescription medication.

### III. Consultive Examiner's Opinion

Neumann also contends that the ALJ erred in rejecting the opinion of Dr. Dohlman, the consultive medical examiner. She asserts correctly that a contradictory opinion of a non-examining physician is not sufficient evidence, at least by itself, to reject an examining physician's opinion. *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003). However, the ALJ did not simply adopt the opinions of non-examining physicians, Chan and Foster, over that of Dohlman. The ALJ explained that he gave more weight to the opinions of the state agency physicians because they were more consistent with the evidence before him in the record, including the clinical findings. The ALJ agreed with Dr. Chan, who found Dohlman's findings upon examination not especially significant because there was no apparent loss of strength, range or motion or muscle wasting. The ALJ also agreed with Chan that Dohlman's five-pound lifting restriction and standing, walking and stair climbing restrictions were based primarily on Neumann's subjective complaints. Neumann attempts to argue that the sedentary work restriction was also based on her positive straight-leg test, but Dohlman did not attribute that restriction to

the results of any particular test, instead appearing to focus on Neumann's description of her daily activities and pain.

Although it may not have been unreasonable for the ALJ to question the reliability of Dohlman's opinion, given the lack of any apparent clinical findings, the ALJ nevertheless bases his rejection of Dohlman's opinion in part upon a flawed finding regarding the credibility of Neumann's subjective complaints. Therefore, the ALJ should reconsider on remand the weight given to Dohlman's opinion in light of any changes to his credibility finding.<sup>3</sup>

#### ORDER

IT IS ORDERED that the decision of defendant Carolyn W. Colvin, Acting Commissioner of Social Security, is REVERSED and REMANDED 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 26th day of March, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY  
District Judge

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<sup>3</sup> Because Neumann was represented by a non-attorney representative at the hearing, she argues that it was reversible error for the ALJ not to advise her of her right to counsel, obtain a valid waiver of that right and inquire into the representative's qualifications. Since this case is being remanded for further proceedings consistent with this opinion, and Neumann now has a lawyer representing her, the court need not decide this claim.