

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

WALTER REESE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commission of Social Security,

Defendant.

OPINION AND ORDER

12-cv-172-bbc

Plaintiff Walter Reese is seeking judicial review of the final decision of the Commissioner of Social Security denying his application for supplemental security income. Plaintiff alleged disability from December 10, 2007, as a result of seizures, back pain and leg pain. He asks for a remand of the case to the commissioner for a new determination, contending that the administrative law judge who heard his appeal erred in three respects: (1) he ignored the state psychologists' findings that plaintiff had moderate limitations in concentration, persistence and pace; (2) he improperly discounted the conclusion of plaintiff's treating physician that plaintiff may need four 15-minute, unscheduled breaks a day; and (3) he failed to call a vocational expert.

I agree with plaintiff that the administrative law judge ignored the state agency psychologists' conclusions that plaintiff had mental impairments and moderate limitations in concentration, persistence and pace, and I cannot determine on the basis of the record

that this error was harmless. Therefore, I must remand this case to the commissioner for further consideration of plaintiff's mental limitations. Although I also agree that the administrative law judge explained his reasons for discounting the treating physician's opinion inadequately, I decline to hold that this error alone is reversible. Last, I find that the administrative law judge did not err by choosing not to call a vocational expert.

RECORD FACTS

A. Background

Plaintiff Walter Reese was born on December 18, 1976. He completed the eleventh grade before dropping out, though he later completed his GED. AR 253. Plaintiff filed for Supplemental Security Income in December 2007, alleging that he was disabled by recurrent seizures. AR 169. Plaintiff has a history of alcohol, cocaine and heroin abuse, which are in remission. AR 257. He lives with his fiancée, who is paraplegic, and her minor child. He cares for his personal needs independently but needs reminders, takes care of his fiancée and her minor child, walks and feeds the dogs and helps with cleaning, laundry, cooking and shopping. AR 183-87.

B. Seizure Treatment History

Plaintiff first reported experiencing shaking spells and episodes of unconsciousness during a visit with Gregory Pupillo, M.D., at Franciscan-Skemp Healthcare in December 2007. AR 271. He said that the episodes began in February and occurred a couple of times

a month. Pupillo ordered an MRI of plaintiff's brain, the results of which came back normal. A video-EEG showed no "clinical seizures or electrographic seizures" or "epileptic activity," though they did show some generalized slowing. AR 285, 270. On January 24, Pupillo observed that plaintiff had "tremors of the legs on his EEG," but "[t]here was no epileptic activity with them. I think it is probably a behavioral phenomenon more than anything else. . . . It makes me wonder if we are not perhaps dealing with a component of malingering here." AR 270. "Thinking there may be a component of anxiety," Pupillo started plaintiff on Clonazepam, which is used to control seizures and panic attacks, National Institute of Health, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/drug-info/meds/a682279.html>., and continued Carbamazepine, which is used to control seizures and manic episodes. Id., <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682237.html>.

On September 1, 2008, plaintiff injured his hand during a seizure. X-rays taken at Tomah Memorial Hospital were negative for fractures, but his hand was splinted. At a follow up visit, Pupillo diagnosed seizures of unclear origin but noted that the seizures had improved on Keppra. R267. Keppra is used to treat certain types of seizures in people with epilepsy. National Institute of Health, Medicine Plus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a699059.html>. (It is not clear when plaintiff was prescribed Keppra.)

In November 2008, Pupillo diagnosed "seizures, question of pseudoseizures." AR 296. He noted that the seizures were triggered by stress and "wonder[ed] if these are not pseudoseizures." He suggested an ambulatory EEG and recommended a treatment plan with

a therapist.

On August 10, 2009, plaintiff received a neuropsychological evaluation by Linda Dunaway, Ph.D. AR 431. In her behavioral observations, she noted that plaintiff “displayed overtly adequate cognitive, behavioral and emotion[al] stability for the purpose of completing this evaluation” and “during testing, he required no significant assistance, repetition or redirection to understand or complete tasks.” AR 432.

Dunaway administered “five separate measures of effort,” and plaintiff failed to produce acceptable scores on any of them. Id. His failure “to produce acceptable scores indicat[ed] intention to feign or exaggerate neuropsychological dysfunction for the purpose of internal or external secondary gains to above a 90th percentile confidence level.” Id. She concluded that “these findings make this an invalid profile, due to patient noncooperation, from which no diagnostic impressions or recommendations can be made.” Id. Dr. Kevin Fitzgerald (who was seeing plaintiff for other reasons) reviewed Dunaway’s report with plaintiff, noting her conclusions that he was likely feigning or exaggerating his memory dysfunctions during the test for direct or secondary gain.

On October 7, 2009, plaintiff saw Pupillo, complaining about ongoing seizures triggered by stress and severe anxiety. AR 419. In his patient history, Pupillo noted that plaintiff had experienced “recurrent spells with loss of consciousness and loss of memory.” He also noted that plaintiff said the spells continued and occurred “up to three times a week,” even though plaintiff had been prescribed “multiple anticonvulsants.” Pupillo’s “impression” was that plaintiff was having “seizures versus pseudoseizures” and

recommended that plaintiff be admitted for EEG monitoring.

C. Treatment History for Thrombosis

Plaintiff has a history of chronic anticoagulation secondary to deep vein thrombosis, which is a form of blood clot in a vein deep in the body. From at least May 2009 until May 2010, plaintiff received treatment for his anticoagulation, left leg pain and obesity from physicians at Franciscan Skemp Healthcare Clinic, including Fitzgerald and Tim Hanson, M.D. AR 378-427.

On April 19, 2010, plaintiff saw Hanson for a followup and to obtain verification of his restrictions for the disability application. AR 388. Hanson noted that plaintiff had a history of chronic back pain, chronic anticoagulation and had recently had left leg vein stripping surgery, which resulted in a numb pain sensation radiating from the right buttock. Hanson told plaintiff that he did not offer opinions for SSI disability and plaintiff would need evaluation through “Occupational Health” for testing regarding restrictions. Hanson noted that “at this junction, I do not have him on any work restrictions other than those that would be applicable to his seizure disorder through Dr. Pupillo.”

On May 24, 2010, plaintiff saw Fitzgerald, who filled out a form provided by plaintiff’s attorney. AR 443. Although the majority of plaintiff’s visits appear to have been with Hanson, Fitzgerald saw plaintiff at least six times prior to this visit. Fitzgerald concluded that plaintiff:

- “is restricted to lifting 25 pounds occasionally infrequently”;

- “is limited to sitting no longer than 1 to 1.5 hours, standing no longer than one hour”;
- “can stand for approximately two hours per eight-hour shift and sit six hours per eight-hour shift”;
- “may need to take unscheduled breaks to stretch. He is allowed four breaks, 15 minutes each.”

AR 382. Fitzgerald also stated that these “limitations are felt to be permanent.” Id. He did not explain in either the medical record or the form the medical bases for these conclusions.

D. State Agency Psychological Evaluations

The Disability Determination Bureau referred plaintiff to Charles Moore, Psy.D., for a comprehensive psychological evaluation of his depression and anxiety. AR 251. Moore wrote a disability report on April 18, 2008. in which he noted that plaintiff had partial complex seizure disorder with tremors and fatigue, presumed osteoarthritis in both knees, a history of obesity and a history of drug and alcohol abuse. Moore also noted Pupillo’s concern that plaintiff’s seizures may be malingering. Moore found that plaintiff had a Global Assessment of Functioning score of 58. AR 257.

In his “statement of work capacity,” Moore concluded:

At the present time it is felt that the claimant would be able to generally understand, remember, and carry out simple work related instructions. The assessment anticipates that the claimant would be able to respond generally satisfactory [sic] in a very basic social context.

It is unclear as to if he would be able to withstand routine work stressors at the present time due to his expressed concerns about seizure activity, despite the lack of a clear etiology. With more complex demands there would likely be a need for some accommodation and support.

AR 258-59.

On February 24, 2009, Colette Cullen, Psy.D., performed a second consultative examination to evaluate plaintiff's "depression, anxiety and a possible behavioral component to his seizures." AR 298. Cullen issued her report on April 18, 2009. She diagnosed "Axis I: 304.80 Polysubstance Dependence (alcohol, cocaine, heroin), in reportedly sustained full remission; Axis II: Borderline Intellectual Functioning, 301.9 Personality Disorder with Antisocial Dependent Features; Axis III: non-epileptic seizure disorder." AR 304. She assigned plaintiff a Global Assessment of Functioning score of 70. Id.

Cullen also noted that she "did not see a significant decline in [defendant's] cognitive or social functioning as compared with his functioning prior to the seizures" and that "[h]is fiancé indicated that he is higher functioning than what he reported." AR 303. With respect to concentration, persistence and pace, Cullen wrote that he played games with his family for 1-2 hours at a time and "[t]here was no evidence that he has trouble concentrating when doing tasks and can sustain them for as long as he needs to." AR 302.

With respect to plaintiff's seizures, Cullen observed that they are "nonepileptic seizures of unknown etiology" and that "[i]t would not be a stretch of the imagination to assume that his heavy alcohol, cocaine and heroine abuse led to this type of cognitive dysfunction and might have done irreparable damage." AR 304.

In her statement of work capacity, Cullen found:

[Plaintiff] might be moderately impaired understanding and remembering simple instructions, particularly if he is not interested in doing so. He is able to carry out simple instructions without difficulty. He would have no problems responding appropriately to coworkers and supervisors. Concentration,

attention, and work pace could be maintained for several hours at a time especially in a low stress, routine environment. Routine work stresses might lead to “seizure” activity in [plaintiff] if he perceives them as particularly stressful. [Plaintiff] would be most successful in adapting to changes if he had the opportunity to discuss them with his fiancée and make a plan first.

AR 305.

On March 23, 2009, the state agency psychologist Kyla King, Psy.D., completed a Psychiatric Review Technique form, AR 318, and a Mental Residual Functional Capacity form. AR 313. In the checklist summary for the psychiatric review, she found that plaintiff had the following mental impairments: 12.05, Mental Retardation; 12.08, Personality Disorder; and 12.09, Substance Abuse Disorder. She also concluded that plaintiff would have moderate difficulty in maintaining concentration, persistence or pace and mild limitations in the activities of daily living and social functioning. AR 328. On the mental residual functional capacity form, she found that plaintiff was moderately limited in his ability to understand, remember and carry out simple instructions and in his ability to respond appropriately to changes in work settings. AR 314-15.

King’s conclusions about plaintiff’s mental limitations rested primarily on Cullen’s report, but in the narrative section she criticized Cullen’s evaluation heavily. AR 316. She found that “there is no correlating evidence to support [Cullen’s] diagnosis of Borderline Intellectual Functioning.” She noted that Cullen failed to test plaintiff’s immediate memory or perform IQ testing and that plaintiff performed adequately on the tests that Cullen did complete. King further pointed out that Cullen concluded that plaintiff was able to carry out simple instructions without difficulty and to “maintain[] concentration, attention, and

work pace for several hours at a time in a low stress, routine environment.”

E. State Agency Physical Evaluations

On April 18, 2009, Ward Jenkins, M.D., completed a physical examination of plaintiff. AR 248. Jenkins found that plaintiff had received “distant bilateral knee arthroscopies” and suffered from “bilateral knee complaints, particularly with kneeling or squatting” but with “no current limits in range of motion, crepitus or effusion on exam”; “chronic activity-dependent mechanical lower back pain” but with “no lower extremity nerve root damage on history or physical exam”; and bilateral flat arches.

On March 20, 2009, the state agency physician Mina Khorishidi found that plaintiff is “capable of work with no exertional limitations, but should avoid concentrated exposure to dust” because of his history of asthma and allergies and “should avoid all exposure to heights and hazards” to himself and others because of his history of seizures. AR 310, 313.

F. Administrative Law Judge’s Hearing and Decision

On July 6, 2010, an administrative law judge held a hearing. AR 69-87. Plaintiff was represented by counsel. Plaintiff and his fiancée testified. The administrative law judge did not call a vocational expert.

The administrative law judge issued his opinion on November 24, 2010, denying plaintiff’s application after concluding that plaintiff was not disabled. AR 9-17. At the first step, he found that plaintiff had not engaged in substantial gainful activity since his

application date of August 15, 2008. AR 11. At the second step, he found that plaintiff had the following severe impairments: “chronic thrombophlebitis, obesity and a history of seizure disorder but without confirmation of their frequency or severity.” Id. At the third step, he concluded that none of these impairments or their combination were medically equal to one of the listed impairments in 20 C.F.R. 404, Subpart P, Appendix 1. AR 12.

The administrative law judge concluded that plaintiff had “the residual functional capacity to perform light work as defined in 20 C.F.R. 416.967(b) except he must avoid hazardous conditions such as machinery and unprotected heights.” Id. At step four, he concluded that plaintiff did not have any past relevant work. AR 15. At step five, the administrative law judge concluded that plaintiff’s restrictions related to machinery and unprotected heights did not significantly limit his ability to perform unskilled jobs and he could perform a significant number of jobs in the national economy. AR 16.

The Appeals Council denied plaintiff’s request for review on February 1, 2012, making the administrative law judge’s decision the final decision.

OPINION

A. Consideration of the Consulting Psychologist Opinions

Plaintiff contends that the administrative law judge erred by ignoring the conclusions of the state agency psychologists that plaintiff had mental impairments. When listing plaintiff’s impairments at step two, the administrative law judge did not list any mental impairments or discuss any of plaintiff’s psychological evaluations. The opinion includes no

citation to King's reports and does not discuss her findings that plaintiff had mental retardation and a personality disorder, AR 318; moderate difficulty in maintaining concentration, persistence or pace and mild limitations in the activities of daily living, AR 328; and moderate limitations in his ability to understand, remember and carry out simple instructions and his ability to respond appropriately to changes in work settings.

When evaluating plaintiff's residual functional capacity, the administrative law judge did mention Cullen's and Dunaway's examinations. AR 13. With respect to Cullen's report, he noted that she had found no evidence the seizures had diminished plaintiff's cognitive functioning and that her interview with plaintiff's fiancée suggested that he functioned at a higher level than he had self-reported. The administrative law judge did not mention that Cullen had found that plaintiff had borderline intellectual functioning or a Global Assessment of Functioning of 70. With respect to Dunaway's report, he noted that she had found plaintiff had "overtly adequate cognitive, behavioral and emotional stability; he required no significant assistance, repetition or redirection to understand and complete the testing;" and that plaintiff was likely malingering during her tests. Id.

Plaintiff argues the administrative law judge violated 20 C.F.R. § 404.157(f)(2)(I) and Social Security Ruling 96-6p by ignoring King's report entirely and ignoring Cullen's conclusion that he had borderline intellectual functioning. Although administrative law judges are "not bound by any findings made by State agency medical or psychological consultants," the judges "must consider findings and other opinions of State agency medical and psychological consultants." 20 C.F.R. § 404.157(f)(2)(i). A consultant's "findings of

fact . . . regarding the nature and severity of an individual's impairment(s) must be treated as expert opinion evidence of nonexamining sources" and "administrative law judges . . . may not ignore these opinions and must explain the weight given to these opinions in their decisions." S.S.R. 96-6P, 1996 WL 374180, 1. The administrative law judge erred by not mentioning King's report at all and by failing to explain the weight he gave to Cullen's finding that plaintiff had borderline intellectual functioning.

Defendant argues that the administrative law judge did consider part of Cullen's evaluation and that the record does not support King's conclusion that plaintiff had moderate difficulties in concentration, persistence or pace. Although defendant does not cite any harmless error cases, his argument relies implicitly on that doctrine. A violation of S.S.R. 96-6P does not require an automatic remand if, after a review of the record, the court can "predict with great confidence what the result on remand will be." McKinzey v. Astrue, 641 F.3d 884, 892 (7th Cir. 2011) (internal quotation and citation omitted); Spiva v. Astrue, 628 F.3d 346, 353 (7th Cir. 2010) (remand is unnecessary if agency's "decision is overwhelmingly supported by the record though the agency's original opinion failed to marshal that support").

Although I agree with defendant that substantial evidence supports the conclusion that plaintiff's mental limitations do not prevent him from engaging in light work, I cannot conclude that "no reasonable ALJ would reach a contrary decision on remand." McKinzey, 641 F.3d at 892-93. It is difficult to know what to make of King's report. She did conclude that plaintiff has mental retardation, but she relied for that conclusion on Cullen's finding

that plaintiff had “borderline intellectual function” and she criticized Cullen’s evaluation severely. In her summary, King found that plaintiff had moderate limitations in memory, concentration and persistence, but in the narrative section she criticized all of the evidence that might support these conclusions. AR 316.

The import of Dunaway’s evaluation is also unclear. As the administrative law judge observed, Dunaway noted in her “behavioral observations” that plaintiff’s mental abilities were “adequate . . . for the purpose of completing this evaluation” and that “during testing” he did not require “significant assistance.” However, Dunaway never concluded that plaintiff had no mental limitations. Because he was malingering during the tests, her final conclusion was that “this is an invalid profile . . . from which no diagnostic impressions or recommendations can be made.” It is not clear whether the fact that plaintiff malingered during Dunaway’s tests undermines the reports of Cullen and King from months earlier.

I cannot determine with certainty whether on remand the administrative law judge will find that plaintiff suffered from mental impairments that alter the findings at step 3 or whether those mental impairments will alter the administrative law judge’s determinations regarding plaintiff’s residual functional capacity. These questions are best left for defendant to consider in the first instance. Therefore, I must remand the case for reconsideration.

B. Plaintiff’s Physical Residual Functional Capacity

Plaintiff also argues that the administrative law judge erred by discounting the opinion of his treating physician that plaintiff needed four unscheduled 15-minute breaks

each day. A treating physician's opinion is entitled to "controlling weight" if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. § 404.1572(c)(2). An administrative law judge must offer "good reasons" for discounting the treating physician's opinion. Campbell v. Astrue, 627 F.3d 299, 306 (7th Cir. 2010). If he does discount the opinion, he must decide what weight to give it in light of the factors listed in 20 C.F.R. §§ 404.1572(c)(2). Larson v. Astrue, 615 F.3d 744, 751 (7th Cir. 2010). The opinion should contain enough detail to allow the reviewing court to trace the administrative law judge's reasoning. Scott v. Barnhart, 297 F.3d 589, 595 (7th Cir. 2002).

With respect to breaks, the administrative law judge stated:

Although, some of [Fitzgerald's] opinion, such as the need for extra 15-minute breaks or missed days of work, is not very persuasive as it is not consistent with the substantial evidence of record nor with the physician's clinical and objective findings, the opinion indicates the claimant is capable of work activity and is therefore assigned some weight insofar as it is consistent with the above-stated residual functional capacity.

AR 13. Later, the administrative law judge stated:

the substantial medical evidence does not support the requirement for four 15 minute stretch breaks nor is this restriction in anyway supported by the doctor's clinical and objective findings but appears to be based predominantly upon the subjective complaints of the claimant.

AR 14.

The administrative law judge was correct that Fitzgerald's report did not support his finding that plaintiff needed additional breaks with clinical and objective evidence. That much is evident from the face of the report. However, the administrative law judge did not

explain what evidence in the record was inconsistent with Fitzgerald's finding. The record does contain evidence that plaintiff had difficulty with fatigue related to his seizures and his mental health medications, which *might* require unscheduled breaks. The general platitude that Fitzgerald's finding was inconsistent with the record as a whole is insufficient explanation to permit meaningful review. Moreover, the administrative law judge also failed to tie the factors in 20 C.F.R. §§ 404.1572(c)(2) to his explanation for giving portions of the opinion some weight and other portions no weight.

In light of the findings cited above, I need not decide whether these errors alone would have required remand. Nevertheless, on remand, the administrative law judge should explain in greater detail what evidence was inconsistent with Fitzgerald's findings and why he discounted Fitzgerald's conclusion that plaintiff needed additional unscheduled breaks.

C. Vocational Expert

Last, plaintiff argues that the administrative law judge erred by failing to call a vocational expert despite finding that plaintiff's seizures required him to avoid hazardous machinery and unprotected heights. AR 12. Instead, the judge found that plaintiff was not disabled because his residual functional capacity permitted him to perform the full range of light work and plaintiff's "additional limitations have little or no effect on the occupational base of unskilled light work." AR 16.

Defendant argues that a vocational expert is necessary only "where a non-exertional limitation might substantially reduce a range of work an individual can perform," Luna v.

Shalala, 22 F.3d 687, 691 (7th Cir. 1994), and the judge determined that a limitation to avoid hazardous machinery and unprotected heights does not substantially reduce the available range of work. I agree with defendant. The administrative law judge was permitted to conclude that these two specific limitations did not significantly limit the number of unskilled jobs that plaintiff could perform in the national economy. To illustrate when vocational testimony is unnecessary, Social Security Ruling 85-15 uses an example nearly identical to plaintiff's situation, stating "A person with a seizure disorder who is restricted only from being on unprotected elevations and near dangerous moving machinery is an example of someone whose environmental restriction does not have a significant effect on work that exists at all exertional levels." Id., 1985 WL 56857, 8.

However, because I have ordered a redetermination of plaintiff's mental limitations and residual functional capacity, I cannot state conclusively whether the administrative law judge will need to solicit expert vocational testimony on remand. Zurawski v. Halter, 245 F.3d 881, 889-90 (7th Cir. 2001).

ORDER

IT IS ORDERED that plaintiff Walter Reese's motion for summary judgment is GRANTED and the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Walter Reese's application for Supplemental Security Income 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 11th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge