

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

BRENDA L. SCHAEFER,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant.

OPINION AND ORDER

12-cv-175-bbc

Plaintiff Brenda L. Schaefer has appealed the decision of defendant Commissioner of Social Security denying plaintiff's application for disability insurance benefits. The administrative law judge found that plaintiff suffered from severe impairments related to her back and left hip and that she could no longer perform her past relevant work (farming), but concluded that she was not disabled because she could perform a significant number of other jobs.

Plaintiff says that a remand is required because the administrative law judge made various errors in his decision: (1) he concluded that plaintiff's migraines were not a severe impairment; (2) he failed to give adequate consideration to a treating physician's opinion that plaintiff was limited to sedentary work; (3) his assessment of plaintiff's credibility was patently wrong; and (4) he relied on the opinions of the state agency physicians, even though they had not reviewed all relevant medical evidence. Because I agree with plaintiff regarding

her second and third arguments, I am remanding the case to the commissioner for a new determination.

The following facts are drawn from the administrative record (AR). I will discuss additional facts as they become relevant to the discussion.

BACKGROUND

Plaintiff Brenda L. Schaefer applied for disability benefits in April 2008, claiming that she had been disabled since May 2007. AR 156-59. For the previous 19 years, plaintiff had worked on the farm she shared with her husband. AR 69. She finished high school but had no college education. AR 68-69.

Beginning in 2003, plaintiff received a wide array of treatment for back pain, neck pain, joint pain and migraines, including steroid injections, AR 251, 267, 511, various medications, AR 321-22, 324, 331, 494, 720, nerve blocks, AR 359, 508, 511, laminectomies, facectomies, AR 432, physical therapy, AR 446, 451, 461, 499, and a TENS unit. AR 713. MRIs and other tests showed that plaintiff had progressive stenosis, degenerative disc disease, AR 244, radiculopathy, AR 256-57, 299, 345, 473, a synovial cyst, AR 338, and calcific tendinitis within the gluteous median tendon of the left hip, AR 378.

On July 22, 2010, a hearing was held before Administrative Law Judge Milan Dostal. AR 62-100. Plaintiff was represented by her attorney, Abigail Mayer. AR 64. She was 52 years old at the time of the hearing. AR 68. Her testimony included the following:

- she had pain in her lower back, left hip, left buttocks, shoulders, hands and

fingers, AR 71-72;

- the surgeries she had were not effective in providing relief and her pain medications only “took the edge off,” AR 74, 82;
- she could stand for only 20 to 30 minutes at a time; she could sit for only 10 to 15 minutes, AR 73;
- if she lifted anything heavier than a gallon of milk, she experienced sharp, stabbing pain, AR 83;
- she had trouble sleeping and experienced fatigue regularly, AR 79-80.

In his decision, the administrative law judge considered the following alleged impairments: disorder of back, left hip impairment, migraines, obesity and hypertension. AR 19-20. He found that the first two were severe under 20 C.F.R. § 404.1520(c) but that none of them qualified as automatically disabling under 20 C.F.R. § 404.1520(d). AR 20-21.

The administrative law judge considered the opinion of three treating physicians and two consulting physicians. He gave “little weight” to Dr. Sanjay Rao’s December 2007 opinion that plaintiff could not engage in strenuous activity or lift more than 10 pounds because at the time plaintiff had just had surgery. AR 23. He gave “significant weight” to Dr. Andrew Vo’s February 2008 opinion that plaintiff “was capable of light activities,” AR 25, but rejected Vo’s conclusion that plaintiff was limited in the bending and twisting she could do. AR 26. Again, the administrative law judge relied on the fact that Vo gave his opinion shortly after plaintiff’s laminectomies and facetectomies. Id. The administrative

law judge gave “little weight” to Dr. Deborah Wilson’s March 2008 opinion that plaintiff should be limited to sedentary work. In addition, the administrative law judge gave “significant weight” to the opinion of two medical consultants for the state agency that plaintiff could perform “a full range of light exertional level work.” AR 25.

The administrative law judge concluded that plaintiff could perform “less than a full range of light work” because she is able to lift 20 pounds occasionally and 10 pounds frequently and can sit, stand and walk for six hours of an eight-hour workday so long as the job has a “sit/stand option at her will,” but she should avoid working above shoulder height. AR 20. Although he concluded that plaintiff could not work as a farmer, he relied on the opinion of a vocational expert to conclude that plaintiff could perform the duties of unskilled jobs such as inspector, marker and ticket taker. AR 28.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are “conclusive” so long as they are supported by “substantial evidence.” 42 U.S.C. § 405(g). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U .S. 389, 401 (1971). The decision cannot stand if it lacks evidentiary support or “is so poorly articulated as to prevent meaningful review.” Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies

benefits, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Migraines

Plaintiff challenges the administrative law judge's threshold determination that her migraines are not a "severe impairment," as they must be under 20 C.F.R. § 404.1520(c) to qualify as a disability. In particular, the administrative law judge concluded in his November 12, 2010 decision that "the record is without evidence that [plaintiff's migraines] had more than a minimal effect on the claimant's ability to perform basic work related activities for a continuous period of no less than 12 months." AR 20. Although he acknowledged that plaintiff had "a history of migraines" since 2007, he cited various parts of the record in which plaintiff or her physicians had said that she was controlling her symptoms with medication. AR 321 (note from treating physician Victoria Anderson in May 2007 that plaintiff was reporting migraines "at the most, 1 time every two weeks"); AR 494 (note from treating physician Dana Habash-Bseiso in April 2008 that headaches had returned as of February 2008, but amitriptyline "has helped her significantly"; "[h]er headaches are less frequent" and "she does not have any specific complaints"); AR 504 (note from physical therapist in April 2008 that plaintiff "is no longer getting headaches"); AR 720 (note from treating physician Habash-Bseiso in December 2009 that "her headaches are doing significantly better, are less frequent and are less intense"). In addition, the administrative law judge noted that the medical records did not include any complaints of migraines since

December 2009. He did not consider plaintiff's testimony from the administrative hearing that she "get[s] anywhere from 5 to 12 [migraines] a month." AR 79.

Plaintiff challenges the administrative law judge's finding on several grounds, but none are persuasive. In fact, most of her arguments do not even acknowledge the administrative law judge's reasoning. First, she says that the required showing under 20 C.F.R. § 404.1520(c) is minimal, quoting SSR96-3p for the proposition that "an impairment(s) that is 'not severe' must be a slight abnormality (or a combination of slight abnormalities) that has no more than a minimal effect on the ability to do basic work activities." However, it is not clear what point plaintiff is trying to make because that is the standard the administrative law judge applied.

Second, plaintiff says that the administrative law judge's "rational[e] is flawed" because an impairment may be severe even though "a claimant does not go to the emergency room every time she has a migraine." Plt.'s Br., dkt. #11, at 40. However, plaintiff is attempting to refute an argument the administrative law judge did not make. He did not conclude that plaintiff's migraines were not a severe impairment because she did not seek medical treatment, but because the treatment she sought was effective. Plaintiff cites no authority for the proposition that the administrative law judge may not consider mitigating measures in determining whether an impairment is severe. Under 20 C.F.R. § 416.929(c), the administrative law judge is entitled to consider the effectiveness of medication that the claimant takes to alleviate pain or other symptoms.

Third, plaintiff says that the administrative law judge "[i]n essence" made "a finding

that there is a lack of support for her allegations because they are subjective in nature.” Plt.’s Br., dkt. #11, at 40. Again, that is not accurate. The administrative law judge did not reject this claim because of a lack of objective evidence; rather, he relied on plaintiff’s own reports to her treating physicians to determine that plaintiff’s migraines did not have more than a minimal effect on her ability to work. Although plaintiff does not say so explicitly, she may mean to argue that the administrative law judge improperly rejected her testimony at the hearing that she “get[s] anywhere from 5 to 12 [migraines] a month.” AR 79. The administrative law judge did not consider that testimony in his decision, but it does not matter because the testimony is not contrary to his finding. He did not find that plaintiff did not get migraines, only that when she got them, she was able to treat them effectively with medication. If the medication was no longer effective, plaintiff’s counsel was free to develop that testimony at the hearing. Plaintiff does not argue that the administrative law judge was under any obligation to probe further in light of the evidence in the record that she had her migraines under control.

Fourth, plaintiff says that she did not have to prove that she suffered from migraines “twenty-four hours a day, seven days per week,” Plt.’s Br., dkt. #11, at 40, but this is yet another nonsequitur. The administrative law judge did not rely on the intermittent nature of the migraines to conclude they were not severe.

Fifth, plaintiff says the administrative law judge’s finding was contrary to the opinion of the state agency physicians, but the documents she cites do not seem to support this argument. Although the state agency listed migraines as one plaintiff’s allegations, plaintiff

points to nothing in the documents reflecting a conclusion that her migraines were a severe impairment. AR 605-16.

Finally, plaintiff says that the administrative law judge's finding must be rejected because he was "playing doctor" by relying on "his own interpretation of the medical record." Plt.'s Br., dkt. #11, at 42. However, plaintiff fails to explain why it is "playing doctor" to rely on the claimant's own statements to conclude that an impairment is not severe. Accordingly, I see no reason to disturb the administrative law judge's conclusion on this issue.

B. Opinion of Treating Physician

Plaintiff challenges the administrative law judge's decision to give little weight to treating physician Deborah Wilson's opinion that plaintiff "need[ed] a sedentary job that allowed her to sit and stand intermittently." AR 475. The parties agree that, because plaintiff was over 50 at the time of her hearing, a finding that she was limited to sedentary work would require a finding that she was disabled. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.12.

The administrative law judge provided the following reasons in his decision for giving Wilson's opinion "little weight": (1) Wilson "deferred" to the opinion of another treating physician, Andrew Vo, who found that plaintiff could perform light work; (2) Wilson admitted she was "not in the best position to provide an opinion with regard to the claimant's functional capacity," and (3) the administrative law judge did not know what

Wilson meant by the word “sedentary.” Plaintiff objects to each of these reasons, arguing that the administrative law judge misread the record with respect to the first two reasons and that he failed to explain why Wilson would have been confused about the meaning of “sedentary.”

I agree with plaintiff regarding each reason. In the document the administrative law judge cites to support his first reason, the only mention of Vo is that Wilson “suggested that [plaintiff] discuss also with Dr. Vo what he thinks her work capacity is.” AR 477. That is not “deference” to an opinion because Wilson was not even aware at that time what Vo’s opinion might be. Rather, Wilson is simply making a recommendation to get input from another doctor. In the very same paragraph, Wilson concludes that plaintiff is limited to sedentary duties, so it is clear that Wilson is not deferring to anyone. With respect to the second reason, the administrative law judge again mischaracterized Wilson’s statement. Wilson did not say that she could not give an informed opinion about plaintiff’s functional capacity. This is clear enough from the fact that Wilson offered her opinion. Although she declined to prepare an “extensive functional capacity form,” AR 795, she did not qualify the opinion she gave as a result. Finally, as plaintiff points out, the administrative law judge did not explain why he believed that Wilson would not know what “sedentary” means.

The commissioner does not dispute any of this. In fact, he says that plaintiff “has raised cogent objections to the ALJ’s analysis of Dr. Wilson’s opinion,” Dft.’s Br., dkt. #12, at 9, but he argues that “there is no reason to remand this case to an ALJ for further proceedings as the subsequent decision could rely on Dr. Vo’s opinion and reach the same

result.” Id. However, it is well established that the commissioner cannot avoid a remand simply by arguing that the administrative law judge *could* reach the same result after a second review. Rather, a district court may not find harmless error unless “it is predictable with great confidence that the agency will reinstate its decision on remand because the decision is overwhelmingly supported by the record though the agency's original opinion failed to marshal that support.” Spiva v. Astrue, 628 F.3d 346, 353 (7th Cir. 2010). The commissioner does not even try to meet that standard. Although the administrative law judge might decide not to credit Wilson’s opinion for different reasons on remand, I cannot say it is inevitable that he would do so. Accordingly, a remand is necessary.

C. Credibility Assessment

Generally, an administrative law judge’s determinations regarding credibility are entitled to deference because that judge has the ability to see and hear the testimony, but that deference does not excuse the administrative law judge from explaining his determination. Castile v. Astrue, 617 F.3d 923, 929 (7th Cir. 2010). The general requirement to build an “accurate and logical bridge” between the evidence and the decision still applies. Id.

In this case, the administrative law judge concluded that plaintiff’s “statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the . . . residual functional capacity assessment.” AR 23. As plaintiff points out, the Court of Appeals for the Seventh Circuit has criticized

similar language as “unhelpful” and “meaningless boilerplate” because it “backwardly implies that the ability to work is determined first and is then used to determine the claimant's credibility.” Shauger v. Astrue, 675 F.3d 690, 696 (7th Cir. 2012) (internal quotations omitted). The administrative law judge cannot rely on a template or conclusory statements; he must explain why he found particular allegations not to be credible. Bjornson v. Astrue, 671 F.3d 640, 644-46 (7th Cir. 2012); Punzio v. Astrue, 630 F.3d 704, 709 (7th Cir. 2011); Parker v. Astrue, 597 F.3d 920, 922 (7th Cir. 2010).

A reader of the administrative law judge's decision is given few clues as to why he found any of plaintiff's statements not credible. To begin with, he does not discuss any particular statements, so it is difficult to tell what he credited or discredited. Although specifying particular statements is not an absolute requirement, Shideler v. Astrue, 688 F.3d 306, 312 (7th Cir. 2012); Jens v. Barnhart, 347 F.3d 209, 213 (7th Cir. 2003), if the administrative law judge fails to do so, it must be otherwise clear from the context of the decision why he found the plaintiff lacking in credibility. Doing so is the only way to reconcile cases such as Shiedler and Jens with the well established rule that the administrative law judge must “give specific reasons for the weight given to the individual's statements.” Simila v. Astrue, 573 F.3d 503, 517 (7th Cir. 2009) (internal quotations omitted).

In this case, the administrative law judge's thought process is a mystery. After reciting the boilerplate statement regarding plaintiff's credibility, he simply summarized the objective evidence in the record. To the extent he meant to say that he believed plaintiff was

exaggerating her symptoms because they were not supported by the objective evidence, it is well established that “an ALJ may not discredit testimony of pain solely because there is no objective medical evidence to support it.” Myles v. Astrue, 582 F.3d 672, 676-77 (7th Cir. 2009).

The only analysis of credibility is in one paragraph near the end of the decision, in which the administrative law judge relied on plaintiff’s statements that she was able to babysit on occasion and do light housework. AR 26-27. However, the court of appeals has emphasized the “critical differences” between “activities of daily living” and “activities in a full-time job,” such as “more flexibility in scheduling the former than the latter,” an ability to get help from others and the absence of an employer’s “minimum standard of performance.” Bjornson, 671 F.3d at 647. The court went on to say that the “failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases.” Id. Thus, the only specific reason the administrative law judge gave for questioning plaintiff’s credibility is one that does not support his finding under the law of this circuit.

The commissioner does not develop any argument in defense of the administrative law judge’s credibility determination. He cites Jens for the proposition that “it is possible . . . for a less than perfect credibility finding to be upheld,” Dft.’s Br., dkt. #12, at 11-12, but that truism does not provide a ground for upholding the determination in this case. The commissioner goes on to say that “the record provided enough support for the ALJ’s credibility finding for that finding to be entitled to deference,” id. at 12, but he fails to point

to a single piece of evidence that supports the administrative law judge's finding. Accordingly, I conclude that the administrative law judge's failure to explain his credibility determination is a second and independent reason for requiring a remand in this case.

D. State Agency Findings

Finally, plaintiff challenges the administrative law judge's decision to give "significant weight" to the opinions of the state agency medical consultants, who determined that plaintiff was "capable of a full range of light exertional work." AR 25. In particular, plaintiff says that it was "improper" to rely on those opinions because the consultants gave them in 2008 before the medical record was complete. However, plaintiff cites no authority for the proposition that the administrative law judge may not consider any medical opinion unless it accounts for the plaintiff's entire medical history. The important question is whether the plaintiff's condition changed significantly after the opinion was given. Although plaintiff lists various medical records that were created after 2008, she does not develop an argument that her condition worsened after 2008. In any event, plaintiff will have the opportunity to raise this issue on remand. If she believes that later events render the state agency findings unreliable, she may explain the basis for that belief to the administrative law judge in the first instance.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of

Social Security, denying plaintiff Brenda L. Schaefer's application for Disability Insurance Benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 1st day of October, 2012.

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