

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

RAELYNNE TORREY KOCH,

Plaintiff,

v.

MICHAEL ASTRUE,

Defendant.

OPINION AND ORDER

12-cv-41-bbc

Plaintiff Raelynne Torrey Koch is seeking review of a decision by the Commissioner of Social Security denying her claim for Supplemental Security Income under the Social Security Act. 42 U.S.C. § 405(g). Plaintiff contends that the administrative law judge erred in three respects: (1) he ignored plaintiff's bilateral shoulder impingement; (2) he discounted the treating psychiatrist's opinion about plaintiff's mental limitations; and (3) he assessed plaintiff's credibility improperly.

After reviewing the record, I conclude that the administrative law judge did not err when he failed to consider plaintiff's shoulder impingements, because she never raised this ailment before the agency and, even on appeal, has identified no evidence that it limited her abilities. The administrative law judge's decision to discount the opinion of plaintiff's treating psychiatrist was reasonable and his assessment of plaintiff's credibility was not patently wrong. Therefore, I will affirm his decision.

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

RECORD FACTS

A. Background

Plaintiff Raelynne Torrey Koch was born on July 23, 1966. AR 72. She dropped out of school in the eighth grade and has not completed her GED. She last worked for a short period of time in 2002 as a line worker in the food industry. AR 76.

Plaintiff filed an application for supplemental security income on September 8, 2005, alleging disability as of April 20, 2005. AR 53, 72. She later amended the onset date to be her application date. AR 735. After plaintiff's claim was denied initially, on reconsideration and by an administrative law judge, plaintiff filed an action in district court. Koch v. Astrue, case no. 09-cv-348-bbc (W.D. Wis.). The court granted the commissioner a voluntary remand with instructions to update the record and to consider plaintiff's obesity, her alleged drug and alcohol abuse and any new evidence. Id., dkt. # 18. On remand, administrative law John H. Pleuss held an administrative hearing on September 11, 2011, during which plaintiff and a vocational expert testified. AR 732-766. The administrative law judge issued a decision on November 17, 2011, finding plaintiff not disabled. AR 333-44.

B. Physical Records

Plaintiff has an established history of asthma and respiratory problems. AR 187, 282-83, 287, 268. She has also experienced difficulties with pain in both shoulders. On

December 11, 2009, a magnetic resonance image revealed a left shoulder impingement. AR 435. On March 2, 2010, she had a left shoulder arthroscopy, subacromial decompression and acromial joint resection. AR 441. Her post operative diagnosis was impingement syndrome and AC joint degenerative changes. During a followup visit on December 15, her treating physician John McDonough, M.D., noted her post operative symptoms were 80% better and she had “no pain or discomfort with daily activities.” AR 582. He instructed her to continue home exercises and his prognosis was “expect improvement.”

On January 7, 2011, plaintiff sought treatment for pain in her left shoulder. At the time, she rated her shoulder’s functioning as seven out of ten, with ten representing normal functioning. AR 577. On January 12, 2011, an MRI was performed on her right shoulder. AR 488-89. On January 31, 2011, a preoperative physical noted that plaintiff had right shoulder impingement syndrome and osteoarthritis, AR 494, and surgery was performed on February 16. AR 502. Her post operative diagnosis was “right shoulder impingement, symptomatic acromioclavicular joint osteoarthritis/degenerative joint disease, [and] fraying and shagginess of the anterior labrum.” Id.

On April 5, 2011, Dr. McDonough found that plaintiff was experiencing only 70 percent of her preoperative symptoms and her rotator cuff strength was improving. AR 565. On June 17, 2011, McDonough found that she was experiencing 55 percent of her preoperative symptoms, in part because she had fallen and landed with her arms outstretched. AR 563.

C. Psychological Records

Plaintiff first sought mental health treatment in October 2003, a month after her husband died. Mary Readel, M.S., diagnosed depressive disorder, not otherwise specified, and alcohol abuse. AR 258-60. During counseling sessions with Readel that fall and winter, plaintiff was often tearful, pressured and overwhelmed. AR 260, 255, 253.

In March 2004, plaintiff had a psychiatric consultation with her treating psychiatrist, Dr. Steven Andrews, M.D., who diagnosed depressive disorder, not otherwise specified, bereavement, alcohol abuse in remission and longstanding dysthymia. AR 249-50. In May, Andrews described plaintiff as “moderately depressed and anxious” and prescribed BuSpar for anxiety. AR 247. Thereafter, plaintiff canceled and missed several psychiatric and psychotherapy appointments. AR 239, 240, 244, 245. Nevertheless, in May and August, Readel reported that plaintiff was improving. AR 242, 241, 238. Readel closed the case in January 2005 because plaintiff had missed her September 2004 appointments and never rescheduled. AR 238.

Plaintiff received no further mental health treatment until March 2005, when she returned to the clinic reporting increased depression, suicidal thoughts and an alcohol relapse. AR 235-37. After performing another intake evaluation, Readel gave plaintiff a diagnosis of dysthymic disorder and alcohol abuse and assessed her Global Assessment of Functioning score as 54. AR 237. In April, Andrews performed another psychiatric consultation, concluding that plaintiff suffered from depressive disorder, NOS, probable mood disorder, NOS, alcohol abuse and bereavement, and assessing her GAF score as 50.

AR 232-33. He noted that she “presented as depressed and anxious” and was “tearful during the intake and spoke in hopeless and helpless terms.” AR 236.

In the next few months, plaintiff attended most of her psychotherapy sessions with Readel but canceled her psychiatric followup appointments throughout that spring and summer. AR 227, 223, 219, 215. On May 9, 2005, plaintiff “described herself as hiding out” by spending time on errands and window shopping. AR 228. However, on May 25, plaintiff reported that her medications were working effectively and Readel noted that her mood was “much improved.” AR 226. By August 2005, Readel reported that plaintiff appeared calm and happy. AR 221.

In September 2005, plaintiff had a separate evaluation performed by Anthony Waisbrot, MSW, BCD. AR 191. He diagnosed adjustment disorder with depressed mood and nicotine dependence. He assessed plaintiff’s GAF at 55 and referred her back to Readel.

During an October 2005 psychiatric followup with Andrews, plaintiff reported that she felt overwhelmed by stress. Andrews noted that her mood was “mildly depressed.” AR 213. Over the next four months, plaintiff missed all of her psychotherapy and psychiatric appointments. AR 208-13. Because plaintiff had not participated in psychotherapy since September 2005, Readel transferred her therapy to Andrews in January 2006. AR 209. Plaintiff never resumed psychological counseling. AR 747.

Plaintiff did not see Andrews again until April 2006. AR 206. At that time, she reported that her medication was controlling her anger but her mood still fluctuated. Andrews observed that her “mood today was level.” In September, Andrews saw plaintiff

for another thirty-minute followup and noted again that her “mood today was level.” AR 203. Plaintiff skipped appointments in December 2006 and June 2007. AR 202, 199.

On July 17, 2007, plaintiff saw Andrews for half an hour. AR 197. She reported having been “more depressed” and angry over the previous few months, including screaming in her bedroom and punching the bed. She reported having suicidal thoughts, but Andrews’s notes include no details. He increased her medication and directed her to call with a progress report in a month. He also noted that “I see her as not being able to work at this point,” but offered no explanation for his opinion. On September 13, he filled out a medical examination and capacity report to that effect. He wrote, “as of July 17, 2007, I did not see her as able to work because of her low frustration tolerance and mood fluctuations.” AR 17, 197. He checked boxes indicating that she had low tolerance for frustration, difficulty controlling anger, socially inappropriate responses to situations and difficulty with decision making.

On November 29, 2007, Andrews called in a refill of her medications and noted that plaintiff was moving to Minnesota with her new boyfriend. She went without treatment for the next eight months. She returned to Wisconsin in July 2008. She visited Andrews again on August 18, 2008, two days before her first disability review hearing. After seeing plaintiff for half an hour, Andrews reported that she was experiencing moderate “depression and fluctuation of mood consistent with a mood disorder.” AR 9. In October, plaintiff reported that she was not “as depressed all the time” on her medication, but Andrews noted that her mood remained “mildly to moderately depressed.” AR 731. By November, plaintiff

reported to Andrews that she was “staying at home and not able to venture out, pretty much isolated.” AR 730. He noted again that “she is not able to work at this time.”

Plaintiff missed her appointment with Andrews in December 2008, AR 728, and June and July 2009. AR 724, 723. She again went without treatment until September 2009, when she saw Andrews for a followup visit. AR 721. He noted that her mood was “mildly depressed.” The next medical record shows a half hour visit with Andrews on April 29, 2010. He noted that she was doing well, appeared more happy, calm and content and her mood was level. AR 473. At her next followup in December 2010, Andrews noted that “overall her life is going very well at this point.” AR 470.

D. State Agency Physician

State agency physician Mina Khorsidi, M.D., completed a residual functional capacity assessment on October 6, 2005, listing plaintiff’s diagnosis as asthma. AR 165-72. She found no exertional or postural limitations but noted that plaintiff should “avoid concentrated exposure” to “humidity” or “fumes, odors, dusts, gases, poor ventilation, etc.” AR 169. State agency physician Pat Chan, M.D., performed a second assessment on February 3, 2006, listing plaintiff’s diagnoses as obesity, asthma and sleep apnea. AR 157-161. Chan found that plaintiff was limited to medium exertional work and should “avoid even moderate exposure” to “fumes, odors, dusts, gases, poor ventilation, etc.” AR 158, 161. Neither doctor mentioned plaintiff’s shoulder impingements.

D. State Agency Psychologist

The state agency psychological consultant, Frances Culbertson, Ph.D., completed a psychological review technique form on October 10, 2005. AR 139. She found that plaintiff had a 12.04 Affective Disorder, dysthymic and depressive disorder, and a 12.09 Substance Abuse Disorder, history of polysubstance abuse. She concluded that plaintiff had no limitations in performing daily activities, had no episodes of decompensation, only mild limitations in maintaining social functioning and moderate limitations in maintaining concentration, persistence and pace. Culbertson also completed a mental residual functional capacity assessment, in which she concluded that plaintiff was moderately limited in her ability to understand, remember and carry out detailed instructions but had no other significant limitations. AR 153-54.

E. Administrative Hearing

Plaintiff's counsel submitted a written statement prior to the hearing, listing her severe impairments as asthma, anxiety disorder and depressive disorder. AR 383. She did not mention her shoulder impingements.

At the hearing, plaintiff testified that she left school in the eighth grade and did not have a GED. AR 738. She claimed she was unable to work because of "bipolar [disorder], severe depression, anxiety, panic attacks, gout and bone spurs." AR 741. Again, she made no mention of her shoulder impingement.

According to plaintiff, she was "depressed all the time," AR 745, and in a "constant

state of crying, hopelessness.” AR 741. She planned to commit suicide by overdose in 2004 and 2011, and each time was stopped only by someone walking in on her. AR 744-45. In 2005, she had problems drawing up the energy to get out of bed and this occurred “every day but one maybe.” AR 747. Since then, her condition has been sometimes better and sometimes worse. Id.

Plaintiff also testified that she had difficulty managing her anger, and “the slightest thing can trigger [her] mind to blurt out and be very aggressive.” AR 742. She said she dealt with frustration by hiding in her room and avoiding society. AR 742. She testified that anxiety about being in crowds or about something happening to her prevents her from leaving the house “very often.” AR 746. She would go outside with her dog but otherwise stayed in the house and even sent her children to get the mail. Id. By her estimate, she had left the house five or six times in the last 30 days. Id. She reported experiencing panic attacks around five times a month and crying spells on a “daily basis” that “last[ed] from two to five hours or all day.” AR 748. She said that in 2005, she experienced periods in which she could not stop crying and would stay in bed. Id.

F. Administrative Law Judge’s Decision

In reaching the conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. At step one, he found that plaintiff had not engaged in substantial gainful activity since her alleged onset date. AR 335.

At step two, the administrative law judge found that plaintiff had the severe impairments of asthma, mood disorder and anxiety disorder but her remaining alleged impairments were not severe. AR 335-36. He found that her alleged fibromyalgia was not a medically determinable impairment because her medical record contained no diagnosis or treatment for fibromyalgia and her pain symptoms were controlled with medication. AR 335-36. Although she struggled with obesity during the relevant period, she had not alleged any specific limitations from obesity and had lost 145 pounds through lifestyle changes. AR 336. Her sleep apnea and foot problems were controlled with treatment. AR 336-37. Last, although she had a longstanding history of alcohol and drug abuse, her use during the relevant period was episodic, she generally maintained sobriety and her use did not affect her ability to perform basic work activities. AR 337. The administrative law judge did not mention plaintiff's shoulder impingements.

At step three, the administrative law judge found that plaintiff's impairments, alone or in combination, did not meet or medically equal any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. He compared her impairments to listings 3.03, Asthma, 12.04, Affective Disorders and 12.06, Anxiety Related Disorders. With respect to the mental health listings, he found that the "paragraph B" criteria were not satisfied. AR 338. He rejected plaintiff's testimony about her difficulty getting along with others, panic attacks, anxiety and social isolation, observing that she was able to socialize with friends and family, maintain relationships with significant others, attend appointments, go to church, shop and take her children to school. Her examining sources did not document complaints about

persistent panic attacks and neither the examining nor treating sources had difficulty interacting with her during appointments.

The administrative law judge also rejected plaintiff's subjective testimony about difficulty with memory, concentration, following instructions, adapting to change and handling stress. He found that plaintiff remained able to care for her children and obtain housing assistance; her symptoms improved when she was compliant with her treatment; and her treatment records did not document any objective findings of limitations in this area. He concluded that plaintiff had mild limitations of daily living, moderate difficulties in maintaining social functioning and moderate difficulties in maintaining concentration, persistence or pace. She had no extended episodes of decompensation and no evidence of "paragraph C" criteria.

In his residual functional capacity assessment, the administrative law judge concluded that plaintiff was able to perform "medium work" with additional physical and mental limitations. AR 339. Her asthma precluded her from "work exposing her to concentrated dust, fumes, smoke, chemicals, noxious gases, or excess humidity." In addition, she was "seriously limited but not precluded with regard to her ability to: relate to co-workers, deal with the public; deal with work stresses; and understand, remember, and carry out detailed instructions." She was also "limited but satisfactory with regard to her ability to: maintain attention and concentration, behave in an emotionally stable manner, demonstrate reliability in time and attendance, respond appropriately to changes in the work setting, and complete a normal workday and workweek without interruptions from psychologically based

symptoms or an unreasonable rest period.”

With respect to physical symptoms, the administrative law judge noted that plaintiff’s asthma generally was well controlled. Her symptoms occasionally worsened, but these episodes were resolved with treatment and she had had no emergency treatments or admissions since her onset date. He did not mention her shoulder impingements. With respect to plaintiff’s mental limitations, he surveyed her medical history and concluded that her allegations about her symptoms and limitations were “not entirely consistent with the objective medical evidence.” AR 341. In his treatment summary, he emphasized the frequent gaps in plaintiff’s treatment and the lack of documentation of severe symptoms. Prior to her alleged onset date, her symptoms had improved despite her frequent cancellations and after her alleged onset date, there was limited evidence of her mental health care and symptoms. AR 340. He noted that she was calmer and happier in August 2005, only mildly depressed in October and then went six months without treatment. In April and September 2006, she had a level mood and was doing reasonably well. After another ten month gap in treatment, she returned to the clinic in July 2007 reporting increased depression, anger and hostility. This visit was followed by another significant gap in treatment when she moved to Minnesota. She returned to the clinic in July 2008 complaining of mood fluctuation and depression. The administrative law judge noted that she was started on new medication and reported improvements, although he also noted that she reported being socially isolated in November 2008. After this visit, she received treatment only in September 2009, April 2010 and December 2010. The administrative law

judge observed that she was doing well and in a stable mood on both 2010 visits.

In his review of the medical opinion evidence, the administrative law judge gave “little weight” to the opinion of Dr. Andrews. AR 342. He offered several reasons for discounting Andrews’s opinion. First, although Andrews was plaintiff’s treating psychiatrist, “he had only seen [plaintiff] on five occasions since her alleged onset date and even then only for brief sessions primarily related to medication management.” *Id.* Second, the administrative law judge noted that subsequent records from Andrews showed that plaintiff had improved with treatment and Andrews had made no statements after September 2007 indicating ongoing limitations. Third, with respect to Andrews’s opinion that plaintiff was “unable to work,” the administrative law judge stated that this conclusion was reserved for the Social Security Administration. Last, he noted that Andrews had checked boxes on the form without support or explanation. On this last point, he found that even if one accepted Andrews’s conclusions in the checked boxes, the limitations included in his own residual functional capacity assessment accommodated those difficulties.

The administrative law judge gave “some weight” to Culbertson’s opinions but also noted that medical records written after her reports provided support for additional limitations, which the administrative law judge said were included in his residual functional capacity determination.

At step four, the administrative law judge concluded that plaintiff had no past relevant work. AR 343. At step five, relying on the vocational expert’s testimony, he concluded that a person capable of performing medium work with plaintiff’s physical and

mental limitations would be able to work at a significant number of occupations in the national economy, including representative occupations such as assembler, industrial inspector, housekeeper/cleaner and hand packager. AR 344.

OPINION

A. Shoulder Impairment

Plaintiff first argues that the administrative law judge erred by ignoring her shoulder impingement. Because social security hearings are non-adversarial, an administrative law judge has an independent obligation to develop a full and fair record. Sims v. Apfel, 530 U.S. 103, 110–11 (2000); Thompson v. Sullivan, 933 F.2d 581, 585 (7th Cir.1991). However, a claimant has the “duty, under 20 C.F.R. § 404.1512(a), to bring to the [administrative law judge’s] attention everything that shows that he is disabled . . . [and] that the [administrative law judge] can use to reach conclusions about his medical impairment and its effect on his ability to work on a sustained basis.” Luna v. Shalala, 22 F.3d 687, 693 (7th Cir. 1994). An administrative law judge is “entitled to assume that a claimant represented by counsel “is making his strongest case for benefits.” Glenn v. Secretary of Health and Human Services, 814 F.2d 387, 391 (7th Cir.1987).

In her hearing testimony, plaintiff never mentioned shoulder problems, despite being asked open-ended questions about her physical abilities and her ability to lift objects. AR 741. Her counsel filed a written memorandum before the hearing and an objection to the vocational expert’s testimony after the hearing without mentioning shoulder problems in

either filing.

Even now, plaintiff has not spelled out what limitations were imposed by her shoulder problems. She cites numerous medical records documenting her shoulder condition and surgeries, but she offers no explanation of what these conditions mean or what limitations they place on her abilities. The mere fact that plaintiff has a physical ailment, even one that involved surgery, is not sufficient to show that her physical abilities were limited. Plaintiff admits that it is unclear what limitations existed after the surgery, Plt.'s Br., dkt. #15, at 17, but it is also unclear what limitations, if any, existed before it. In reviewing the record, I found no medical opinions explaining the limitations caused by her shoulder impingement (excluding recovery from the surgery itself) and only one subjective estimate in which she said her right shoulder was a 7 out of 10, with ten being normal, and that estimate was before her surgery.

The court of appeals has held that a claimant may waive an argument by not raising it before the administrative law judge. Brewer v. Chater, 103 F.3d 1384, 1393 (7th Cir. 1997), overruled in part by Johnson v. Apfel, 189 F.3d 561, 562-63 (7th Cir. 1999) (holding that claimant may raise in district court errors not asserted before the appeal council). Plaintiff was represented by counsel. She had numerous chances to raise the alleged shoulder limitation. It would be unreasonable to fault the administrative law judge for not addressing a medical condition that plaintiff never claimed limited her abilities.

B. Treating Physician Rule

Next, plaintiff argues that it was inappropriate for the administrative law judge to discount the opinion of her treating psychiatrist that her mental health limitations rendered her unable to work in July 2007. Plaintiff does not contest the administrative law judge's determination that her anxiety and mood disorder do not meet or exceed a listed impairment; she contests only his residual functional capacity determination and subsequent analysis.

First, plaintiff argues that the administrative law judge erred by rejecting Andrews's opinion that she was "unable to work" simply because it went to the ultimate question. On the contrary, the administrative law judge's treatment of this opinion was consistent with 20 C.F.R. § 404.1527(d) and Social Security Ruling 96-5P. Whether a claimant is able to work is a determination reserved for the commissioner. 20 C.F.R. § 404.1527(d)(1). A treating physician's opinion about issues reserved for the commissioner is "never entitled to controlling weight or special significance," though it must not be ignored and must be evaluated under the applicable factors in 20 C.F.R. § 404.1527© and 416.927©.

In this case, the administrative law judge noted that plaintiff's ability to work was an issue reserved for the commissioner, but he did not dismiss Andrews's opinion on that basis alone. He considered the depth of Andrews's recent sessions with plaintiff and the support for his opinion. Andrews checked off several limitations, but he offered no opinion about the severity of those limitations and he never explained what he meant when he said plaintiff was "unable to work." The administrative law judge concluded reasonably that Andrews's

ipse dixit was entitled to little weight.

Whether the administrative law judge gave adequate weight to Andrews's opinions about plaintiff's specific limitations presents a closer question. Andrews wrote that plaintiff had low tolerance for frustration, difficulty controlling anger appropriately, socially inappropriate responses to situations and difficulty with decision making. A treating physician's opinion about the nature and severity of his patient's symptoms is a medical opinion entitled to controlling weight, if two conditions are met: (1) the opinion "is well-supported by medically acceptable clinical and laboratory diagnostic techniques" and (2) the opinion "is not inconsistent with substantial evidence in [the] case record." 20 C.F.R. § 404.1527(c)(2). See also Schaaf v. Astrue, 602 F.3d 869, 875 (7th Cir. 2010). When an administrative law judge does not give controlling weight to a treating physician's opinion, he must explain what weight he gave it and provide "a sound explanation" for that decision in light of "the length, nature, and extent of the treatment relationship, frequency of examination, the physician's specialty, the types of tests performed, and the consistency and supportability of the physician's opinion." Moss v. Astrue, 555 F.3d 556, 561 (7th Cir. 2009) (citing 20 C.F.R. § 404.1527©).

In this case, Andrews's failure to provide any explanation for his opinion supports the administrative law judge's decision not to give controlling weight to those opinions. It does not appear that his opinions were supported by clinical or diagnostic evidence. Schaaf, 602 F.3d at 875; Jelinek v. Astrue, 662 F.3d 805, 811 (7th Cir. 2011) (surveying record to determine whether cursory opinion had evidentiary support). After concluding in 2003 and

2004 that plaintiff suffered from depression and a mood disorder, Andrews's subsequent experience with plaintiff was limited to thirty-minute sessions for medication adjustments. Andrews said nothing in his treatment to explain why he believed plaintiff's limitations were severe enough to prevent her from working. Except for plaintiff's report on July 17, 2007 that she had screamed in her bedroom, Andrews's notes contain little evidence that plaintiff had severe difficulties with anger control.

The administrative law judge explained that he gave "little weight" to Andrews's opinion and offered several sound reasons for that decision. As explained above, Andrews never offered an opinion about the severity of plaintiff's symptoms and even his limited opinions were not well supported by his previous treatment notes. Moreover, Andrews's notes after July 2007 contain few mentions of similar limitations. Plaintiff argues that an administrative law judge "has a duty to solicit additional information to flesh out an opinion for which the medical support is not readily discernable." Barnett v. Barnhart, 381 F.3d 664, 669 (7th Cir. 2004) (citing 20 C.F.R. § 404.1527(c)(3)). However, the problem was not that the administrative law judge lacked the relevant medical records. It is that the relevant records Andrews supplied contained few statements suggesting that plaintiff's abilities were limited in the ways he listed in July 2007, much less that the limitations were of such severity that they would prevent her from working.

On the other hand, two of the administrative law judge's reasons for discounting Andrews's opinions are questionable. First, he said that Andrews's records after July 2007 showed that plaintiff's mental health improved when she followed her treatment. Although

Andrews did report in April and December 2010 that plaintiff's life was going well, she was happier and her mood was level, he also reported several times between August 2007 and September 2009 that she had had mood fluctuations, was afraid to leave the house and was mildly or moderately depressed. The administrative law judge was not qualified to offer a medical opinion about whether this record showed that plaintiff's anxiety and mood disorder had improved. Scott v. Astrue, 647 F.3d 734, 740 (7th Cir. 2011); Green v. Apfel, 204 F.3d 780, 782 (7th Cir. 2001). Moreover, even if plaintiff's mental illness no longer limited her ability to work in 2010, that says nothing about her mental abilities from 2005 until 2010.

Second, the administrative law judge observed that Andrews saw plaintiff for only five brief sessions in the two years between her alleged onset date and when he offered his opinion in July 2007. This statement is factually correct but its relevance is unclear. In that time, Andrews saw plaintiff five times and four of the five visits lasted thirty minutes. AR 232, 213, 206, 203, 197. If, as plaintiff argues, the statement is meant to describe the length and nature of their treatment relationship, then this time restriction was arbitrary. Andrews began treating plaintiff in October 2003. He could draw on that entire treatment history when evaluating her symptoms in 2007. AR 258. On the other hand, the limited number and length of plaintiff's recent sessions with Andrews suggests that his opinion about her abilities in July 2007 had a limited basis. From the administrative law judge's opinion, I cannot determine whether he relied upon the former unsound or latter sound reasoning. Nevertheless, despite the administrative law judge's somewhat questionable analysis of Andrews's opinions, I conclude that he offered enough sound arguments for

giving Andrews's specific opinions little weight.

In addition, even if the administrative law judge discounted Andrews's opinion without adequate justification, I agree with the commissioner that this mistake was harmless because the administrative law judge's residual functional capacity assessment incorporated the limitations identified by Andrews. The administrative law judge observed as much. AR 342. He took into account Andrews's opinion that plaintiff had low tolerance for frustration, difficulty controlling her anger and was likely to make socially inappropriate responses when he found that she was severely limited in her ability to deal with work stressors, relate to coworkers and deal with the public and limited in her ability to behave in an emotionally stable manner and respond to changes in the work setting. Andrews's opinion that plaintiff had difficulty with decision making were taken into account reasonably well by the finding that she was seriously limited in her ability to understand basic tasks and limited in her ability to maintain concentration and attention.

In response, plaintiff argues that these functional limitations are not Andrews's findings, but the administrative law judge's "interpretation" of those findings. I find this response confusing. What else would the administrative law judge do? Plaintiff does not explain how the administrative law judge's "interpretation" of plaintiff's residual functional capacity conflicts with Andrews's findings. In summary, I find no error in the administrative law judge's decision to give Andrews's opinions little weight and even if it was error, it was harmless because it did not affect the residual functional capacity assessment.

C. Credibility

Plaintiff argues that the administrative law judge erred by discrediting her testimony about the severity of her mental limitations because he (1) focused only on “good days” in her medical record and ignored the contrary evidence and (2) relied on the gaps in plaintiff’s treatment without investigating the reasons for her lack of treatment. An administrative law judge’s credibility determinations are “afforded special deference because the administrative law judge is in the best position to see and hear the witness and determine credibility.” Eichstadt v. Astrue, 534 F.3d 663, 667-68 (7th Cir. 2008) (quotation omitted). Courts may overturn an administrative law judge’s credibility determinations only if they are “patently wrong.” Id. This means that the administrative law judge’s reasoning need not be “flawless.” Simila v. Astrue, 573 F.3d 503, 517 (7th Cir. 2009). In this case, plaintiff alleged at the hearing that she suffered from debilitating mental health symptoms, including severe social anxiety, frequent panic attacks and lengthy crying spells. The administrative law judge rejected her testimony about the severity of her symptoms because her treatment record did not contain reports of similar symptoms. AR 341. The record supports his assessment.

Plaintiff argues that the administrative law judge’s recitation of her treatment history “cherry-picks” good days from her medical record to diminish the significance of her symptoms. However, plaintiff cites only three medical records from her period of alleged disability that the administrative law judge allegedly ignored. In September 2005, Anthony Waisbrot had diagnosed adjustment disorder with depressed mood and assessed plaintiff’s GAF at 55. In July 2007, she reported suicidal thoughts and was “more depressed” than in

the previous months, and in July 2008, she was “moderately depressed” and reported staying in the house most of the time. Contrary to plaintiff’s contention, the judge recounted these periods of increased symptoms. AR 340. In any case, these notes do not support the type of debilitating symptoms that plaintiff alleged at the hearing.

Second, plaintiff argues that the administrative law judge ignored various treatment notes prior to her alleged onset date. She had a diagnosis of depressive disorder, NOS, following the death of her husband in 2003. In that fall and the following winter, she was tearful, pressured and overwhelmed during sessions with Readel. In May 2004, she was “moderately depressed and anxious” and Andrews prescribed BuSpar for anxiety. In the second round of intake appointments in March and April 2005, Andrews reported that plaintiff was depressed and moderately tearful and had frequent suicidal thoughts. Readel noted that she was speaking in hopeless and helpless terms during the session.

These records do not confirm plaintiff’s testimony. Andrews and Readel observed that she was tearful during their sessions, but the only time that either noted that she had extensive crying spells outside the sessions was in January and December 2003, eighteen months before the alleged onset of her disability. In contrast, plaintiff testified that she has crying spells for hours on a daily basis and that in 2005 she was unable to get out of bed. The treatment notes do not mention severe anxiety or frequent panic attacks, although plaintiff claims she experienced five panic attacks a month. The administrative law judge concluded reasonably that the treatment documentation did not support symptoms of the severity that plaintiff claimed.

The administrative law judge also found that the numerous lengthy periods in which plaintiff went without treatment suggested that her symptoms were not as severe as she alleged. Plaintiff received treatment from March until October 2005 but did not seek treatment again for five months. Her mood was level in April and September 2006 and she went without treatment for the next ten months. She reported increased symptoms in July 2007 but went without treatment again for thirteen months. After reporting depression and fluctuating moods again in August and November 2008, she went without treatment for ten months until September 2009. Her next sessions were in April and December 2010, and in both of these appointments she reported that her life was going well.

Plaintiff argues that the administrative law judge should not have drawn a negative inference from these gaps in her treatment without investigating her reasons for missing treatment. “Although a history of sporadic treatment or the failure to follow a treatment plan can undermine a claimant’s credibility, an [administrative law judge] 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 v. Astrue, 539 F.3d 668, 679 (7th Cir. 2008)). An administrative law judge should question the claimant to determine whether she had good reason not to pursue treatment, such as an “inability to afford treatment, ineffectiveness of further treatment, or intolerable side effects.” Id. Moreover, a failure to attend treatment regularly may be a symptom of a mental illness and contribute to limitations like absenteeism. Punzio v. Astrue, 630 F.3d 704, 711 (7th Cir.

2011).

Plaintiff is correct that administrative law judge drew a negative inference without asking her about the reasons for her treatment gaps. However, this mistake is less troubling in this case than in the cases cited by plaintiff, because in those cases the record suggested a potential reason. In Shauger, 675 F.3d at 696, the court noted that the reason for the gaps in treatment was “obvious,” because the claimant’s condition, “by definition, may wax and wane.” Moreover, the gaps in treatment occurred before the claimant’s alleged onset date, when he was still trying to cope, work and otherwise live a normal life. Id. In Craft, 539 F.3d at 679, a “number” of the claimant’s medical records reported that he did not take his medication or seek regular treatment because he was unable to pay. Similarly, in Moss, 555 F.3d at 562, the claimant offered testimony and evidence that she could not obtain one of the treatments for lack of insurance and had avoided her prescribed pain medication because of its side effects.

Plaintiff has offered a reason to explain one of the gaps in treatment after her alleged onset date: she moved to Minnesota for a period of time beginning in November 2007. The administrative law judge noted this explanation in his summary. However, she offered no explanation for the other gaps in her treatment, even on appeal. The treatment notes do not suggest an explanation. Occasionally, she offered legitimate excuses for the cancellations, AR 214, but Andrews and Readel noted often that she offered no excuse. AR 728, 723, 223, 222, 212, 208, 202. She testified that the county paid for her treatment, AR 309, and nothing in the record suggests that an inability to pay contributed to her frequent

cancellations or no shows. Moreover, nothing in the record suggests that her mental health symptoms caused limitations related to absenteeism. (She testified that she was let go from a previous jobs because of absenteeism caused by her asthma. AR 740.) The administrative law judge relied too readily on her inconsistent treatment history without investigating her reasons, but this error was harmless because the inconsistency between her testimony and treatment notes provided an adequate alternative basis for his credibility assessment.

Last, plaintiff objects to the inclusion in the opinion of a boilerplate sentence that the Court of Appeals for the Seventh Circuit has criticized repeatedly as “opaque,” “meaningless” and, worst of all, as getting the law completely backward. Bjornson v. Astrue, 671 F.3d 640, 645 (7th Cir. 2012). The administrative law judge wrote:

After careful consideration of the evidence, I find that the claimant’s medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant’s statements 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 339. I cannot imagine why the agency continues to instruct administrative law judges to use this template. Nevertheless, its inclusion in this case does not alter the fact that the administrative law judge concluded reasonably that the claimant’s testimony about the severity of her symptoms was inconsistent with the medical notes. The administrative law judge’s credibility assessment is not flawless, but it is not patently wrong.

ORDER

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

Social Security, denying plaintiff Raelynne Torrey Koch's application for supplemental disability insurance is AFFIRMED.

Entered this 25th day of February, 2013.

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