IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AMY MARCHEL,

OPINION AND ORDER

Plaintiff,

12-cv-47-bbc

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Pursuant to 42 U.S.C. § 405(g), plaintiff Amy Marchel is challenging defendant Michael Astrue's decision to deny plaintiff's application for disability insurance benefits. The administrative law judge found that plaintiff suffered from bipolar disorder and generalized anxiety disorder but that she was not disabled because she could still perform various unskilled jobs. In her motion for summary judgment, plaintiff argues that a remand is required because the administrative law judge found that plaintiff had "moderate difficulties" with "concentration, persistence or pace," but he did not incorporate that limitation into the hypothetical questions he posed to the vocational expert. Because it is well established that the administrative law judge must include all relevant limitations into his hypothetical questions, I am granting plaintiff's motion and remanding the case.

OPINION

Plaintiff's challenge relies on the following finding of the administrative law judge:

> With regard to concentration, persistence or pace, the claimant has moderate difficulties. The claimant reported that she does not have much energy or stamina and that it takes awhile for her to complete tasks. She often needs reminders for things she does everyday, like take her medication. She indicated her ability to pay attention is variable. She stated that she has to read written instructions and ask for repetition of spoken instructions. She avoids stressful situations and worries about change.

AR 20. The administrative law judge's finding is consistent with that of the state agency psychologist (Roger Rattan) and the medical expert (Larry Larrabee). Rattan found that plaintiff was "moderately limited" in her "ability to carry out detailed instructions," her "ability to maintain attention and concentration for extended periods" and her "ability to complete a normal workday and workweek without interruptions from psychology based symptoms and to perform at a consistence pace without an unreasonable number and length of rest periods." AR 383-84. Larrabee found that plaintiff had "mild to moderate" limitations in concentration, persistence and pace. AR 127.

Plaintiff says that a remand is required because the administrative law judge did not ask the vocational expert (Karl Botterbusch) to consider limitations related to concentration, persistence and pace when identifying the jobs a person in plaintiff's situation could perform. Instead, he asked the expert to consider a person who has "no exertional limitations," is "only available for simple, routine and repetitive work, . . . is able to . . . understand, carryout and remember simple instructions. She is able to respond appropriately to supervisors, coworkers and the public, she is able to adjust to routine changes in the work

setting." AR 138-39.

With those limitations, the vocational expert concluded that a person could perform plaintiff's past relevant work of institutional cleaner, waitress and clothing sorter. AR 139. In addition, the expert concluded that plaintiff could work as a hand packager, a cook's helper or house cleaner. Id.

Plaintiff cites several cases in which the Court of Appeals for the Seventh Circuit has held that the administrative law judge must include all relevant limitations when asking a vocational expert to give an opinion on the jobs a claimant can perform, unless it is otherwise clear that the expert was aware of those limitations and considered them. O'Connor-Spinner v. Astrue, 627 F.3d 614, 618-19 (7th Cir. 2010) ("Our cases generally have required the ALJ to orient the VE to the totality of a claimant's limitations."); Craft v. Astrue, 539 F.3d 668, 677 (7th Cir. 2008) (residual functional capacity assessment and hypothetical questions to vocational expert inadequate because they did not include mental limitations); Young v. Barnhart, 362 F.3d 995, 1002 (7th Cir. 2004) ("Ordinarily, a hypothetical question to the vocational expert must include all limitations supported by medical evidence in the record."). See also Jelinek v. Astrue, 662 F.3d 805, 813-14 (7th Cir. 2011) ("We have stated repeatedly that ALJs must provide vocational experts with a complete picture of a claimant's residual functional capacity, and vocational experts must consider deficiencies of concentration, persistence, and pace.") (internal quotations omitted). The reasoning for this rule is obvious: if the vocational expert does not have all relevant information, then his opinion may not be reliable.

Of the cases cited above, O'Connor-Spinner, 627 F.3d 614, is the most similar to this case. The state examiner and the administrative law judge concluded that the plaintiff had moderate limitations in concentration, persistence and pace because of her depression, but the administrative law judge did not ask the vocational expert to consider those limitations. Instead, he said that "the hypothetical worker was restricted to routine, repetitive tasks with simple instructions." Id. at 617. The court of appeals rejected the commissioner's argument that the limitation to routine and repetitive tasks "implicitly incorporated" the limitations for concentration, persistence and pace in part because "[t]he ability to stick with a given task over a sustained period is not the same as the ability to learn how to do tasks of a given complexity." Id. at 620. As a result, the court remanded the case for additional proceedings.

The commissioner offers several reasons for distinguishing O'Connor-Spinner and the other cases, but none are persuasive. First, he says that "it can be argued" that plaintiff waived an argument that the administrative law judge erred in finding that she could perform her past relevant work. This portion of the commissioner's brief is not easily summarized, so I will repeat it here:

> Ms. Marchel has focused her challenge to the ALJ's decision on the hypothetical question that the ALJ posed to the vocational expert. See Plaintiff's Brief at 13. There is, however, no requirement that a vocational expert assist the ALJ in making a step four finding. Even Ms. Marchel acknowledges this, as she has observed that step four requires that the claimant's residual functional capacity be determined and compared with the demands of the claimant's past relevant work. Plaintiff's Brief at 13, ftn. 1. A vocational expert is needed at step five because, at that step, the burden shifts to the Commissioner, not to demonstrate that the claimant is not disabled, but to demonstrate that jobs exist that the claimant can perform. See Liskowitz v. Astrue, 559 F.3d 736, 743 (7th Cir. 2009) ("The Commissioner typically uses a vocational expert ("VE") to assess whether there are a

> significant number of jobs in the national economy that the claimant can do."). Thus, Ms. Marchel has submitted a brief that challenges the ALJ's step five finding, in a case where the ALJ (albeit with an alternative step five finding), stopped the sequential analysis at step four. At that step, the claimant still has the burden of showing that she cannot perform her past relevant work. See Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987) (claimant retains burden of proof through step four). By focusing not only on a step five concept, the hypothetical question, but on an even more restrictive concept, one of the specific factors in the hypothetical questions posed to the vocational expert, Ms. Marchel has failed to challenge the ALJ's step four finding that she is not disabled because she can perform three of her past relevant jobs (Tr. 25-26). Because Ms. Marchel had not challenged the ALJ's step four finding, she has waived any future challenge to this finding, and the Commissioner should have summary judgment.

Dft.'s Br., dkt. #18, at 6-7.

The commissioner's argument makes little sense. Plaintiff's appeal is not limited to the administrative law judge's step five finding that she can perform other jobs besides those she performed in the past; it is clear that she is challenging his determination that she can perform *any* job, so she did not waive that issue. The commissioner's argument seems to be that the administrative law judge's reliance on the vocational expert cannot be a ground for reversal because: (1) an administrative law judge does not need to rely on a vocational expert to make a finding whether the claimant is able to perform past relevant work; and (2) plaintiff had the burden to show that she could not perform her past relevant work. That argument is a nonstarter because, in this case, the administrative law judge *did* rely on the vocational expert. Regardless whether plaintiff had the burden of proof or which step was involved, the administrative law judge must build a logical bridge between the evidence and his conclusion. Scott v. Astrue, 647 F.3d 734, 740 (7th Cir. 2011). In other words, "[a]lthough the claimant has the burden at step four to establish that he cannot return to his

past relevant work, the ALJ still must make factual findings that support his conclusion." Getch v. Astrue, 539 F.3d 473, 480 (7th Cir. 2008).

Because the administrative law judge concluded that plaintiff could perform her past relevant work as well as other jobs without accounting for her limitations in concentration, persistence and pace, he failed to build a logical bridge between the evidence and his conclusion. The administrative law judge did not conclude that plaintiff had failed to adduce evidence that she was unable to perform her past work and the commissioner does not argue that the decision should be affirmed because it is inevitable that the administrative law judge will make that finding upon remand. Spiva v. Astrue, 628 F.3d 346, 353 (7th Cir. 2010) (in social security context, error is not harmless 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").

The commissioner's second argument focuses on the administrative law judge's use of the disjunctive "or" rather than the conjunctive "and" in his conclusion that, "[w]ith regard to concentration, persistence or pace, the claimant has moderate difficulties." However, the administrative law judge did not place any importance on the word choice and the commissioner does not explain how he believes it is relevant to the analysis. To the extent the commissioner means to argue that the administrative law judge believed that plaintiff was limited in only one of these three areas, that is contradicted by the administrative law judge's subsequent discussion, which includes specific limitations for

concentration ("She often needs reminders for things"; "her ability to pay attention is variable"; "she has to read written instructions and ask for repetition of spoken instructions"), persistence ("she does not have much energy or stamina") *and* pace ("it takes awhile for her to complete tasks"). This is consistent with the state agency psychologist's conclusion that plaintiff was limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and her ability to perform at a consistent pace without an unreasonable number and length of rest periods.

Third, the commissioner says that the administrative law judge's hypothetical was "more specific" than in the cases plaintiff cites. The commissioner is correct that the administrative law judge provided more information than in O'Connor-Spinner. In addition to limiting plaintiff to "simple, routine and repetitive work," the administrative law judge stated that plaintiff was "able to . . . understand, carry out and remember simple instructions. She is able to respond appropriately to supervisors, coworkers and the public, she is able to adjust to routine changes in the work setting." However, the commissioner fails to explain how this additional information helps his position. That information explains what plaintiff *can* do, not what she cannot do. In any event, although some of the information might address limitations in concentration, the commissioner does not point to any facts that address limitations in persistence or pace. As the court pointed out in O'Connor-Spinner, 627 F.3d at 620, "[t]he ability to stick with a given task over a sustained period is not the same as the ability to learn how to do tasks of a given complexity."

Finally, the commissioner says that the administrative law judge did not need to

include limitations in his hypothetical about concentration, persistence or pace because the state agency psychologist had found that plaintiff was "capable of basic unskilled work" despite her limitations. AR 385. However, the psychologist's role is to determine the plaintiff's limitations, not to give an opinion about a class of jobs she can perform, which is the province of the vocational expert. E.g., Denton v. Astrue, 596 F.3d 419, 426 (7th Cir. 2010); Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005); Dixon v. Massanari, 270 F.3d 1171, 1177 (7th Cir. 2001). Even if the psychologist were qualified to give that opinion, any reliance on it by the administrative law judge would be problematic because the psychologist did not attempt to reconcile his opinion about plaintiff's limitations with his opinion about plaintiff's ability to work. Further, he did not explain what he meant by "basic unskilled work" or if, by "capable," he meant that plaintiff could be employed full time in a particular job.

The commissioner cites Johansen v. Barnhart, 314 F.3d 283, 289 (7th Cir. 2002), in which the court concluded that it was sufficient for the administrative law judge to include a limitation of "repetitive, low stress" work in his hypothetical question to the vocational expert without referring to a limitation in concentration, persistence and pace. However, the court of appeals has explained that the hypothetical question was appropriate in Johansen because "it was manifest that the ALJ's alternative phrasing specifically excluded those tasks that someone with the claimant's limitations would be unable to perform." O'Connor-Spinner, 627 F.3d at 619. In other words, the medical expert's opinion was that the plaintiff's limitations in concentration, persistence and pace were caused by stress, so

including a "low stress" limitation was sufficient. As discussed above, in this case the hypothetical question does not address all the limitations found by the psychologist, the medical expert and the administrative law judge. Accordingly, Johansen is not instructive and a remand is required.

ORDER

IT IS ORDERED that plaintiff Amy Marchel's motion for summary judgment, dkt. #13, is GRANTED. The decision denying plaintiff benefits is REVERSED and REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment in favor of plaintiff and close this case.

Entered this 16th day of November, 2012.

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