IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LYNN M. DOORNBOSCH,

Plaintiff,

v.

CAROLYN COLVIN,
Acting Social Security Commissioner,[1]

Defendant.

OPINION AND ORDER

12-cv-504-bbc

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Plaintiff Lynn Doornbosch, now Lynn Shackleford, brought this suit for judicial review of the final administrative decision of the Commissioner of Social Security, denying her application for disability insurance benefits. This is not her first suit for benefits; she filed an application in 2001, alleging a lumbar impairment; after that application was denied, she filed a second application on the same ground, which was denied by an administrative law judge who found that plaintiff was capable of light work and could perform her past relevant work as a TIG welder soldering PC computer boards. (TIG welding refers to tungsten inert gas welding. http://en.wikipedia.org/wiki/Gas_tungsten_arc_welding, visited Apr. 4, 2013). Also in 2003, plaintiff protectively filed a Title II application for a period

[1] Carolyn Colvin became the Acting Social Security Commissioner on February 14, 2013. Pursuant to Fed. R. Civ. P. 25(d)(1), she has been substituted for Commissioner Michael J. Astrue as the defendant in this suit.

of disability. In this third application, added a claim that her memory was impaired as a result of carbon monoxide poisoning in 1980, when she was 22. This application was denied in 2009 by an administrative law judge, who held both an initial hearing and a supplemental hearing. Plaintiff then asked for a review of the decision by the Appeals Council, which remanded the case to a new administrative law judge to obtain further evidence from a vocational expert about the ability of a worker to perform jobs in small assembly if she were limited in overhead reaching. After a hearing on May 25, 2011 on the remanded case, a new administrative law denied plaintiff's application for benefits on August 12, 2011.

Before the Appeals Council, plaintiff contended that two errors in the 2011 decision required yet another remand to the commissioner for a new hearing, but the council disagreed. Plaintiff then brought this case, seeking judicial review of the two alleged errors: (1) the administrative law judge's failure to take into account plaintiff's limitations in concentration, persistence and pace; and (2) his failure to obtain a reasonable explanation from the vocational expert why the expert's assessment of the requirements of particular jobs as related to reaching differs from that of the Dictionary of Occupational Titles. I conclude that neither of the two alleged errors requires another remand.

RECORD EVIDENCE

A. Plaintiff

Plaintiff Lynn Dornbosch was born in 1958. She did not finish high school. In 1980, she was found in her family's garage overcome by carbon monoxide and was hospitalized.

After that, on her father's advice, she held primarily factory jobs involving repetitive tasks.

In 2000, plaintiff experienced back pain and left her job as a TIG welder with a plastics company in Illinois. She later moved to Wisconsin. For a short time, she received workers' compensation benefits.

B. Medical Evidence

1. Mental evaluations

In her first application for disability insurance benefits, plaintiff alleged that her back problems prevented her from working at any time after January 13, 2000, her alleged onset date, and before December 31, 2005, the last date on which she was insured. She mentioned in her application that she had been exposed to carbon monoxide poisoning in 1980 and switched to factory work as a result. The agency found that she had no medically determinable mental impairment. She omitted any mention of any mental impairment in her second application, but focused on it in her third application.

The social security agency referred plaintiff to a licensed clinical psychologist, Lynn Pallen, for an evaluation. Pallen found that plaintiff had a history of carbon monoxide poisoning and ongoing use of marijuana that would be expected to affect her memory function, and that her performance on a Mental Status Exam indicated that her cognitive functioning was within the mild impairment range of functioning. AR 698. She was functioning within the low average range intellectually and had a poor memory. Id. Pallen found plaintiff's prognosis poor because plaintiff did not seem to recognize the impact of her

marijuana use on her memory. She found that plaintiff had limited ability to understand, remember and carry out simple instructions, that she would respond appropriately to supervisors and coworkers, that she had rather poor ability to maintain concentration, attention and an adequate work pace but that she had the ability to withstand routine work stresses and adapt to change. Id.

In September 2008, psychologist Craig Rath reviewed plaintiff's file. In his opinion, plaintiff's marijuana use was not a major factor in her memory impairment, she had mild restriction in activities of daily living, mild difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence and pace and no repeated episodes of decompensation. AR 686. He noted that plaintiff had worked for many years after her carbon monoxide poisoning and that, although there was mention of depression in the medical record, it appeared to be "non-severe." AR 682.

In a psychiatric review technique form dated August 9, 2005, covering the period January 13, 2000 to August 2005, Keith Bauer, Ph.D., assessed plaintiff as having mild limitations in activities of daily living, in maintaining social functioning and in maintaining concentration, persistence and pace and no repeated episodes of decompensation. AR 488.

Ward Jankus, M.D., saw plaintiff in August 2006 for an evaluation. Plaintiff told him about her carbon monoxide poisoning in 1980 and reported that her main concern was her memory, which required her to write things down so that she can remember dates and groceries she needs. AR 688. She said that she had been able to get back into the work force after the carbon monoxide incident and that she had done welding in a workplace for about

ten years and then worked at a plastics company until she was injured. She told Jankus that her back limited her more than any physical problems related to the carbon monoxide. AR 689.

2. Musculoskeletal impairments

None of the doctors who treated plaintiff or examined her on referral from a treating physician found any evidence of significant paraspinal weakness, true radicular signs on straight leg raising tests or significant motor or sensory deficits of the lower extremities. AR 737 (Kohn); 751-52 (Butterfield); 779 (Peterson); 802 (Ahmad) (also noting full range of motion in plaintiff's shoulders, hips and knees.). Dr. Butterfield submitted a December 2010 report in which he said that plaintiff had chronic low back pain that rendered her unemployable at that time, but he added that she had not exhausted all her treatment options. AR 760-64. He did not explain how his assessment of plaintiff's pain correlated to the lack of any apparent determinable cause of the pain.

C. Administrative Hearings

At the first of the two hearings held on plaintiff's application in 2009, Dr. Sami Nafoosi testified as a non-treating medical expert that during the period from October 22, 2004 to December 31, 2005, plaintiff had a severe low back impairment, arthritis in both hips, disorder of the cervical spine and degenerative disc disease. AR 1015. In his opinion these problems did not meet or equal a listing and plaintiff could perform light work,

working occasionally above her shoulders with either arm. He would limit plaintiff to sitting or standing or walking for no more than an hour without changing positions briefly for one to three minutes each hour. AR 1019.

At the 2011 hearing, plaintiff testified about three jobs at which she had worked before 2000. In one, she had worked a ten-hour a day shift three days a week and was on her feet all of the work day. AR 1061. It took her "a couple months" to learn the job fully; she made mistakes "all the time," but was never written up for any of them. AR1061-62. In another job, she did assembly and TIG welding, which took her six months to learn. In still another job, she did soldering for computer keyboards. AR 1064. She testified that her back pain prevented her from going back to work after 2000. AR 1064-65.

Plaintiff also testified that she had memory problems, that she had limited ability to add and subtract but that she could balance her checkbook with a calculator. AR 1070. She said she "can read okay," but does not always remember what she has read. Id. She also watches television but does not remember much of what she watches. AR 1070-71. She said she suffered from depression, for which she had taken medication, but was not taking any at the time. AR 1071-72.

James Armentrout, a licensed psychologist, testified as a medical expert at the 2011 hearing. He noted that the record did not include objective demonstration of memory impairment related to plaintiff's carbon monoxide poisoning and it showed affirmatively that plaintiff had functioned independently and worked for many years after the incident. AR 1080. He noted also that the record included only one diagnosis of major depressive

disorder and that was by a marriage and family therapist intern. AR 1081. In his opinion, depressive disorder not otherwise specified would be a more accurate diagnosis than major depressive disorder, particularly because plaintiff had told one of the therapists she was seeing that she was not feeling so depressed and did not need any more treatment. AR 1082. Armentrout thought that plaintiff's marijuana use would not have impaired her functioning in and of itself. AR 1084. In his opinion, plaintiff had mild restrictions of activities of daily living, moderate restrictions on social functioning and in maintaining concentration, persistence and pace, so long as her job demands were in keeping with her limitations, and no decompensation. AR 1084-86. He explained his assessment of plaintiff's moderate limitations of concentration, persistence and pace, saying that if plaintiff

> were to be faced with a task that did involve complex, many-step instructions or close coordination with other workers in a complex task or high performance demands and time schedules, those types of pressures, I think would be further discouraging and, in effect, would undermine the adjustment she has now. So, in that type of demanding difficult task, I think she would show marked limitations. But . . . within the context of a relatively routine, repetitive type of task that can be learned in a short period of time, that one can become familiar with and not experience frequent unexpected changes or other modifications, she would not have more than moderate limitations.

AR 1088.

Karl F. Botterbusch testified at the hearing as a vocational expert and was present to hear all of the testimony. He said that he was familiar with the contents of all the exhibits in the case. AR 1089, 1090. (Plaintiff says that there is no evidence in the record that the vocational expert had reviewed all of plaintiff's medical records or heard specific testimony about plaintiff's limitations in concentration, persistence and pace, Plt.'s Br., dkt. #14, at

13, but the record of the hearing refutes his statement.)

Reviewing plaintiff's job history, Botterbusch said that her positions as injection molder, drill press operator and gas welding machine operator were classified as semi-skilled or skilled medium work. AR 1092-93. Her previous jobs as assembler on a production line and as solderer on a production line would be classified as unskilled light work. Id.

The administrative law judge posed a hypothetical question to the vocational expert, assuming a person who could lift 20 pounds occasionally, 10 pounds frequently, sit and stand six hours out of an eight-hour day, with occasional stooping, kneeling, crouching, crawling, squatting and lifting above her shoulder level. In addition, the hypothetical person could understand, carry out and remember simple instructions, respond appropriately to supervisors, coworkers and the public and adjust to routine changes in the work setting. AR 1093-94. He did not make a specific reference to "moderate limitations of concentration, persistence or pace."

The vocational expert said that such a person could do plaintiff's past relevant work as a line-by-line solderer, but would not be able to do any of the other assembly line jobs plaintiff had performed in the past. AR 1094. In addition, such a person could work as a subassembler, a sales attendant or as a photocopy machine operator, all of which are light, unskilled jobs. AR 1095.

The administrative law judge then asked the expert whether any of the jobs he had listed would require frequent reaching in all directions. When the expert answered "no," the administrative law judge pressed him, saying that the Dictionary of Occupational Titles

indicates that the jobs he had identified required frequent reaching in all directions. AR 1096. The administrative law judge asked him, "in your experience as a [vocational expert], again, would you cite these same jobs, both the past relevant work, the solder[er], production line, and the work in the economy, subassembly, sales attendant, photocopy machine, in the numbers as you've indicated previously?" and he responded "yes." Id. In response to another question from the administrative law judge, the vocational expert testified that a person needing to alternate positions for five minutes out of each hour would not be able to perform the production line soldering job but could perform the photocopy machine job and could also work as a mail clerk or officer helper. AR 1096-97.

D. Administrative Law Judge's Opinion

The administrative law judge issued his decision on August 12, 2011, finding plaintiff not disabled during the period between January 13, 2000 and December 31, 2005. He found that plaintiff had no severe impairments that met or medically equaled a listed impairment in the social security regulations: she had no evidence of nerve root compression or positive straight leg raising test, as required to meet listing 1.04A and no inability to ambulate effectively, as required to meet listing 1.04C. AR 21. He found as well that plaintiff had no mental impairment that met or equaled a listing; she had either mild or moderate restrictions, not the two marked restrictions necessary to meet the criteria. Id.

In the administrative law judge's opinion, plaintiff had the residual functional capacity to perform light work, with additional limitations. In forming this opinion, he

relied on the testimony of Dr. Sami Nafoosi at a prior administrative hearing, because it was the most restrictive assessment of plaintiff's physical restrictions offered by any medical source and "consistent with the medical evidence of record leading up to the claimant's date last insured." AR 25. (He also observed that Dr. Nafoosi submitted answers to a set of interrogatories sent him by the agency and that in those answers, he found plaintiff capable of a greater residual functional capacity than that outlined in his testimony, but the administrative law judge chose to disregard the written answers. Id.) He found from Nafoosi's testimony that plaintiff could lift 20 pounds occasionally, 10 pounds frequently, sit, walk or stand six hours out of an eight-hour day, with occasional stooping, kneeling, crouching, crawling, squatting and work above her shoulder level. She could do only occasional work requiring the use of bilateral foot controls and would have to be able to alternate positions every hour.

The administrative law judge rejected an opinion by a Dr. Kohn in which Kohn described the restrictions she had placed on plaintiff and said that they were "permanent," because Kohn had treated plaintiff only during 2001 and had then released her to work at her occupation. AR 26.

As for mental impairments, the administrative law judge found that plaintiff was limited to simple, routine and repetitive work; she could understand, remember and carry out simple instructions; she could respond appropriately to supervisors, coworkers and the public; and she could adjust to routine changes in the work setting. AR 24. The administrative law judge based his determination of plaintiff's mental capacity primarily on

Dr. Rath's opinions and only slightly on Dr. Pallen's, explaining that he did so because Dr. Rath had had the opportunity to review the entire record, whereas Dr. Pallen did not indicate that she had reviewed any records other than Dr. Jankus's report of August 26, 2006. He thought that Dr. Pallen's concerns about plaintiff's limitations in work capacity were influenced by plaintiff's ongoing substance abuse at the time of the examination and by Pallen's unawareness of plaintiff's long and steady history of work. AR 29. In addition, he noted that Dr. Pallen referred several times to the effect of plaintiff's lumbar impairment upon her ability to function, although she is not a medical doctor, and her comments about plaintiff in the mental status examination were quite positive. Pallen found plaintiff's thought process adequate and intact; plaintiff had adequate ability to maintain concentration on tasks such as Serial 7's; she showed fairly adequate practical judgment; her level of independence was appropriate; she could sustain daily activities with relative ease; she could handle her own money; and she had a healthy social functioning environment. Id.

The administrative law judge said that he was not giving weight to Pallen's opinion to support plaintiff's contention that she had limited ability or inability to understand, remember and carry out simple instructions and maintain concentration, attention and an adequate work pace. AR 28. Plaintiff had focused on the claimed effects of the carbon monoxide poisoning but Pallen had not given plaintiff a specific Axis 1 diagnosis relating to a deficit in memory or cognitive functioning. By contrast, Dr. Rath had noted plaintiff's several decade work history, which came after her carbon monoxide poisoning, and lack of any treatment for any claimed memory problems. Id.

As for plaintiff's alleged spine problems, the administrative law judge found that plaintiff had adduced no evidence that her physical condition had rendered her unable to work before the date on which she was last insured. He pointed out that when plaintiff had a consultative examination by Dr. Dalia Suliene in August 2005, the doctor had not documented any objective signs of neurological dysfunction, loss of strength or other dysfunction that would support a more reduced residual functional capacity than that found by the administrative law judge who decided plaintiff's application in 2009.

At step four, the administrative law judge found that plaintiff was capable of performing her past relevant work as an assembler as it was actually performed by her and as it is generally performed in the economy. AR 35. He then went on to find that she could perform other jobs in the national economy (photocopy machine operator, office helper and mail clerk), all of which are jobs that exist in Wisconsin and nationally. In doing so, he relied upon the vocational expert's testimony that in his experience, those jobs would not require more than occasional overhead reaching. AR 36. Accordingly, he found that plaintiff had not been under a disability as defined in the Social Security Act from January 13, 2000 through the date of his decision on August 12, 2011.

OPINION

This appeal raises two questions: (1) did the administrative law judge err when he asked the vocational expert about plaintiff's ability to do substantial gainful work, without asking explicitly about her ability to maintain "concentration, persistence and pace?" and

(2) did he comply with the Appeals Council's directive to resolve an apparent conflict between the Dictionary of Occupational Titles and the vocational expert on the frequency of overhead reaching in the jobs the vocational expert believed that plaintiff could perform?

A. Consistence, Persistence and Pace

The Court of Appeals for the Seventh Circuit has held in a number of cases that when the administrative law judge is questioning a vocational expert about a claimant's ability to work despite his or her limitations of concentration, persistence and pace, it is not enough to ask the expert whether the claimant can handle "simple, routine and repetitive tasks." The latter phrase is rarely an adequate translation of the former. Instead, the administrative law judge must "orient the [vocational expert] to the totality of a claimant's limitations," including "limitations of concentration, persistence and pace." O'Connor-Spinner v. Astrue, 627 F.3d 614, 619 (7th Cir. 2010). See also Stewart v. Astrue, 561 F.3d 679, 684 (7th Cir. 2009) (restricting inquiry to "simple routine tasks that do not require constant interactions with coworkers or general public" insufficient to account for plaintiff's limitations of concentration, persistence and pace); Craft v. Astrue, 539 F.3d 668, 675-76 (7th Cir. 2008) (administrative law judge must consider all medically determinable impairments, physical and mental, severe or not, when determining residual functional capacity and must include all relevant limitations when asking vocational expert to give opinion on jobs claimant can perform).

In O'Connor-Spinner, 627 F.3d at 619-21, the court of appeals recognized exceptions

to the general rule requiring the administrative law judge to ask specifically about the claimant's limitations of concentration, persistence and pace. One applies to a situation in which the vocational expert "independently reviewed the medical record or heard testimony directly addressing those limitations," unless the administrative law judge poses a series of hypothetical questions that do not include the limitations. Id. at 619. "[I]n such cases we infer that the [vocational expert's] attention is focused on the hypotheticals and not on the record." Id. at 619. A second applies when it is clear that the administrative law judge's questions specifically excluded tasks that a person with the claimant's limitations could not perform. Id.

This case presents still another exception, one in which plaintiff's past work showed that, despite her moderate limitations of concentration, persistence and pace, she was capable of performing assembly line work for at least 12 years, until she was injured in 2000. Neither her carbon monoxide poisoning in 1980 nor her low intellectual functioning had prevented her from doing this work and nothing in the record indicated any other reason why her limitations of concentration, persistence and pace would have worsened since 2000. This case is not like O'Connor-Spinner, 627 F.3d 614, in which the claimant had problems other than memory and intellectual deficiencies, such as an inability to respond appropriately to supervisors, difficulty in receiving instruction and a tendency to meet rudeness with rudeness, but the administrative law judge did not ask specifically about her limitations of concentration, persistence and pace. Neither is it like Young v. Barnhart, 362 F.3d 995, 1002 (7th Cir. 2004), in which the administrative law judge asked the vocational

expert only whether the claimant could perform the nonexertional requirements of simple, routine, repetitive, low stress work with limited contact with coworkers and the public. Although the administrative law judge had found the claimant severely impaired by an adjustment disorder that blunted his insight and judgment and left him with decreased mood and functioning, increased irritability and moderate limitations in carrying out detailed instructions, interacting appropriately with the public, setting realistic goals and responding to criticism from superiors, he failed to ask about any of these specific mental impairments. Id. at 1002. The court of appeals found this questioning inadequate because it failed to account for the claimant's inability to accept instruction, respond appropriately to criticism, think independently and set realistic goals. Id.

In this case, the vocational expert was present at the hearing to hear the full extent of plaintiff's limitations of concentration, persistence and pace, which were attributable to her memory problems, her lack of education and her slowness in learning new tasks. He heard the medical expert explain plaintiff's limitations and how they would affect her ability to work. He was also present when plaintiff testified to her past work history, which included years of assembly line work after her carbon monoxide poisoning and he knew that although plaintiff was of relatively low intelligence and had only a limited education, neither these deficits nor any consequences of inhaling carbon monoxide had kept her from working at assembly line jobs for 12 years or longer.

This is one of the rare instances in which saying only "simple, routine and repetitive work" in a hypothetical question adequately conveys a claimant's limitations of

concentration, persistence and pace. For this particular case, the phrase encapsulated exactly how plaintiff's limitations played out in the workplace. The administrative law judge did not need to elaborate on plaintiff's mental limitations because plaintiff had demonstrated her ability to accept instructions, respond appropriately to supervisors and coworkers, withstand workplace stress and adapt to change. The significant point is that she had performed simple, routine and repetitive work successfully in the past and nothing that had happened to her since then gave the vocational expert or the administrative law judge reason to believe that she would be unable to meet the mental demands of similar work in the future.

To the extent that Dr. Pallen had concerns about plaintiff's ability to function successfully, the administrative law judge explained convincingly why he did not agree with those concerns: Pallen's lack of access to plaintiff's work record, her apparent belief that plaintiff's lumbar impairment would prevent her from working and Pallen's emphasis on plaintiff's substance abuse. On the other hand, as the administrative law judge noted, Pallen found that plaintiff's thought processes were adequate and intact, she had adequate ability to maintain concentration on tasks such as serial 7's and she could handle her own money.

B. Overhead Reaching

Plaintiff's second objection goes to the adequacy of the administrative law judge's exploration of the vocational expert's reasons for thinking that plaintiff had the physical ability to perform the jobs he had identified. In asking the vocational expert whether the jobs he had identified required frequent overhead reaching, the administrative law judge

pointed out that the Dictionary indicated that they did and then asked the expert,

> [i]n your experience as the VE, again, would you cite the same jobs, both the past relevant work, the solder[er], production line and the work in the economy, subassembly, sales attendant, photocopy machine, in the numbers as you've indicated previously?

AR 1096.

This is not a model exploration of the expert's reasons for assessing the requirements of the jobs differently from the Dictionary, but it suffices. The administrative law judge asked whether the expert based his answer on his experience and on plaintiff's past relevant work; the expert said he did. The administrative law judge could have pinned down the issue more precisely with just a few more questions, but the result would be no different. Plaintiff did not indicate in her testimony that her last job as a solderer on a production line involved frequent overhead reaching, and there is no reason to think that any problems she has today with overhead reaching would keep her from performing that job or a similar one again.

Plaintiff has not objected to the administrative law judge's failure to find that plaintiff's spine problems rendered her unable to work, so it is not necessary to discuss this point. For the sake of completeness, I note that he explained in detail why he placed no weight on plaintiff's complaints about her spine and alleged inability to walk without a cane. He discussed the lack of any indication in Dr. Jankus's 2006 report of a need for a cane and the results of Dr. Suliene's consultative examination, which showed that plaintiff did not exhibit objective signs of neurological dysfunction, loss of strength or other dysfunction that would tend to support a more reduced functional capacity than what had been documented by the administrative law judge in the previous decision.

ORDER

IT IS ORDERED that the decision of defendant Carolyn Colvin, Acting Commissioner of Social Security, denying plaintiff Lynn Doornbosch's application for disability insurance benefits is AFFIRMED. FURTHER, IT IS ORDERED that plaintiff Lynn M. Doornbosch's motion for summary judgment, dkt. #13, is DENIED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 16th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge