IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TRUDY BJORNSON,

Plaintiff,

v.

CAROLYN COLVIN, Acting Commissioner of Social Security,[1]

Defendant.

OPINION AND ORDER

12-cv-511-bbc

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Plaintiff Trudy Bjornson is seeking judicial review of the final decision of the Commissioner of Social Security denying her application for social security disability benefits based on her claims of lumbar decompression, attention deficit disorder and depression. She argues that the administrative law judge made a mistake when he concluded that she would be off-task no more than 10% of the workday despite her moderate limitations with respect to concentration, persistence and pace and when he relied on the testimony of the vocational expert without resolving a conflict between the testimony and the Dictionary of Occupational Titles.

Plaintiff has not shown that the administrative law judge erred when he translated her moderate limitations in concentration, persistence and pace into the residual functional

[1] Carolyn Colvin is now the acting Commissioner of Social Security, replacing Michael J. Astrue.

capacity assessment. However, she is correct that he erred by not resolving the conflict between the vocational expert and the Dictionary of Occupational Titles. Because I cannot determine the appropriate resolution of this conflict from the record, I must remand this case to the commissioner for further consideration.

RELEVANT BACKGROUND

Administrative law judge Brent C. Bedwell held a video hearing on plaintiff's application and heard testimony from plaintiff and an impartial vocational expert, Leslie Goldsmith. The administrative law judge asked the vocational expert a series of hypothetical questions with increasingly restrictive limitations. He began by asking what jobs were available for a person limited to sedentary, unskilled work, with physical limitations to accommodate a back injury such as plaintiff's and being off task 10% of the day. AR 62. The vocational expert testified that the person could work in assembly jobs, unskilled packing jobs, as an unskilled office helper, as a food preparation worker or as a home companion.

The administrative law judge then asked what jobs would remain available if the person was also unable to perform fast paced production work. AR 64. The expert testified that the person would be able to work as an office helper or a home companion. On his own initiative, the vocational expert noted that the home companion and office assistant jobs "are actually classified in the DOT as light but in my experience over the past number of years those jobs also are sedentary." AR 63. The administrative law judge did not ask why the

expert believed these jobs were classified incorrectly in the dictionary.

The administrative law judge then asked the vocational expert to "further assume that because of a combination of mental impairments and/or physical impairment that . . . this hypothetical individual . . . is not going to be able to sustain the sufficient concentration, persistence and pace to maintain and stay on task such that they're off task greater than 10% of the day." AR 63-64. The vocational expert answered that there would be no jobs available for such an individual.

The administrative law judge entered his decision denying plaintiff's application on February 24, 2012. He determined that plaintiff had severe impairments of a status-post revision lumbar decompression at the L3-L4 level, attention deficit disorder and depression, but he found that these impairments did not meet or equal a listed impairment. Relying on the medical records of plaintiff's treating psychologist, he found that plaintiff had "moderate difficulties" with regard to concentration persistence and pace because she "has displayed some difficulties with concentration, attention and memory." AR 12 (citing Ex. 8F, Therapeutic Psychotherapy Records of Stoughton Family Counseling, AR 605-34). He found that plaintiff's mental limitations did not meet the paragraph B criteria because she did not have marked limitations and she met none of the paragraph C criteria.

The administrative law judge then found that plaintiff had the residual functional capacity to perform sedentary, unskilled work that was compatible with the physical restrictions imposed by her back injury, did not require fast-paced production and would allow her to be off task for 10% of the day. Id. at 13. With that residual functional

capacity, he concluded that plaintiff could not return to her past relevant work but could perform a significant number of other jobs. This conclusion rested entirely on the vocational expert's testimony that a person with plaintiff's residual functional capacity would be able to perform representative occupations such as office assistant/helper and home companion. The administrative law judge wrote that "[p]ursuant to SSR 00-4p, the undersigned has determined that the vocational expert's testimony is consistent with the information contained in the Dictionary of Occupational titles." AR 16.

OPINION

A. Concentration, Persistence and Pace

Plaintiff argues that the administrative law judge's determination that she had moderate limitations of concentration, persistence and pace is internally inconsistent with his determination that she would be off-task at most 10% of the day. (Plaintiff has not explained why she believes that substantial evidence did not support the administrative law judge's decision that she would be off-task no more than 10% of the workday.) However, plaintiff does not cite any medical evidence showing that a person with moderate limitations in concentration, persistence and pace would be off task for more than 10% of the day and she does not cite any portion of the record suggesting that she would likely be off task more than 10% of the workday as a result of her specific conditions.

Instead, plaintiff relies on one district court opinion in which the court mentioned that a vocational expert had testified that the claimant would be unable to work if his

moderate limitations of concentration and pace meant that he would be off-task 20% of the time. Ball v. Commissioner of Social Security, 1:09-CV-684, 2011 WL 765978, *4 (S.D. Ohio Feb. 25, 2011). In Ball, the court did not say, as plaintiff implies, that a person with moderate limitations will be off-task 20% of the time. Rather, the court held that the administrative law judge erred because he disregarded the treating physician's statement that included limitations of concentration and pace, failed to include in the hypothetical question *any* restriction on the claimant's ability to sustain work and ignored the possibility noted by the vocational expert that the claimant may be unable to work because she would be off-task too frequently. In this case, the administrative law judge did not ignore the possibility that plaintiff would be off-task too frequently; he simply decided that plaintiff would not be off-task more than 10% of the time. Moreover, another district court has held that it was reasonable for an administrative law judge to conclude that a claimant's moderate limitations in concentration, persistence and pace would lead him to be off-task for 5% of the workday. Sayles v. Astrue, No. 12CV0446, 2012 WL 5877417 (N.D. Ohio Nov. 20, 2012).

In her reply brief, plaintiff argues that the administrative law judge's decision was inconsistent with the agency's regulations. The agency rates the degree of a claimant's limitations on "the following five point scale: None, mild, moderate, marked, and extreme." 20 C.F.R. § 404.1520a. The "extreme" rating represents "a degree of limitation that is incompatible with the ability to do any gainful activity." Id. Plaintiff argues that because "moderate" is the third or middle rating, it was unreasonable for the administrative law judge to conclude that her moderate limitation was equivalent to being off-task at most 10% of the

time. Plaintiff waived this argument by not raising it in her opening brief. Even if she had not, the argument is undeveloped and unconvincing. She offers no argument for this interpretation based on the text of the regulation or the nature of employment. She assumes that an extreme limitation in the ability to concentrate would translate into being off-task 100% of the time, but perhaps being off-task 30% of the time is incompatible with the ability to do any gainful activity. In any case, this dispute is beside the point. Whether plaintiff would be off-task more than 10% of the time depends on the nature of her attention deficit disorder and depression, not the definition of "moderate" limitations of concentration, persistence and pace.

Plaintiff has identified no basis on which the court could conclude that the administrative law judge's conclusion that she experienced moderate limitations in concentration, persistence and pace was inconsistent with his determination that she would be off-task for no more than 10% of the workday. Therefore, she has not established that the administrative law judge erred in his determination of her residual functional capacity.

B. Vocational Evidence

Plaintiff also argues that the administrative law judge erred by relying on the vocational expert's testimony without resolving the conflict between it and the Dictionary of Occupational Titles. An administrative law judge is entitled to rely on the testimony of a vocational expert, even if it conflicts with the dictionary, but in doing so, he must "obtain a reasonable explanation of the apparent conflict" from the vocational expert, "resolve this

conflict before relying on the [vocational expert] evidence" and "explain in the determination or decision how he or she resolved the conflict." SSR 00-4P, 2000 WL 1898704, *4 (Dec. 4, 2000).

At the hearing, the vocational expert testified that the Dictionary of Occupational Titles listed the jobs of office assistant and home companion as light work but in his experience these jobs were sedentary. The administrative law judge erred by not following up on the vocational expert's testimony to determine why he believed the jobs were classified incorrectly in the dictionary. The administrative law judge made a second mistake when he stated in his written opinion that the expert's testimony was consistent with the dictionary.

The commissioner argues that these errors were harmless because the vocational expert explained at the hearing why his testimony conflicted with the dictionary. However, I cannot determine from the opinion whether the administrative law judge believed the expert or, if he did, why he resolved the conflict in favor of the expert. Moreover, the expert's explanation that "in his experience" the job of home companion and office assistant are sedentary jobs would not provide a reasonable basis for crediting his testimony. The expert did not explain what experience he had with these jobs or why he believed the Dictionary of Occupational Titles was incorrect. Furthermore, he did not explain how he concluded that the same number of office assistant or home companion jobs would exist at the sedentary level as at the light exertional level described in the dictionary. Because I cannot conclude that the administrative law judge's error was harmless, I must remand for further consideration of whether plaintiff is capable of performing a significant number of

jobs in the national economy.

ORDER

IT IS ORDERED that the decision of defendant Carolyn Colvin, Acting Commissioner of Social Security, denying plaintiff Trudy Bjornson's application for Supplemental Security disability 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 10th day of May, 2013.

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