

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

ERIC STUBS,

Plaintiff,

OPINION AND ORDER

v.

15-cv-442-wmc

NANCY A. BERRYHILL, Acting Commissioner
of Social Security,

Defendant.

Pursuant to 42 U.S.C. § 405(g), plaintiff Eric Stubs seeks judicial review of a final decision of defendant Nancy A. Berryhill, the Acting Commissioner of Social Security, denying his application for Social Security Disability Insurance Benefits and Supplemental Security Income.¹ On December 19, 2016, the court heard oral argument on plaintiff's contention that the ALJ erred by failing to give proper weight to Stubs' medical provider, physician assistant Brad Ingraham. For the reasons provided below, the court will affirm the Commissioner's determination.

BACKGROUND

A. Overview of Claimant

Stubs was 36-years-old at the alleged onset date and 38-years-old at the time of the hearing. He has at least a high school education, is able to communicate in English, and has past work experience as a welder. At his hearing, Stubs testified that he worked as a welder from 1998 to 2012, but had to leave his job because of he was "falling asleep standing up" and had "horrible pain 90 percent of the time." (AR 60.) He claims to be

¹ It appears claimant's last name is spelled Stubbs, but given that the case was filed as Stubs (one "b"), the court continues that spelling in its opinion.

disabled by fibromyalgia, osteoarthritis, type 2 diabetes, sleep apnea, chronic fatigue syndrome, pvs and depression. (AR 82.)

B. Medical Record

The medical record contains a number of treatment notes from Brad Ingraham, Physician Assistant - Certified (“PA-C”) starting in April 2011 and ending in October 2013. An April 2011 treatment note shows that Stubs established care with the clinic for type 2 diabetes, originally diagnosed in 2009. It also notes that Stubs “over the last year has had fairly persistent myalgias [muscle pain] and arthralgias [joint pain] of uncertain etiology,” suggesting fibromyalgia. Stubs also reported “chronic daytime somnolence and fatigue,” sleep apnea and a CPAP for three years, the latter of which he felt was “working fine.” Finally, Stubs complained of migraines, but noted that they were “typically only with sleep impairment.” (AR 291-93.)

A May 2011 treatment note from PA-C Ingraham describes complaints of daytime somnolence, though “admits that he was better after he started his CPAP and feels like the CPAP is working well.” Stubs also complained of “diffuse myalgias and arthralgias,” and “does not feel like the Neurontin has helped at all.” (AR 288-89.)

An August 2011 treatment note from Ingraham again includes complaints of falling asleep at work “even if [Stubs] is standing or working.” Still, Stubs reported continued use of his CPAP machine, which he “believe[d] is working well for him otherwise and has noticed benefit. If he does not use it[,] he gets a headache.” (AR 286-87.) Similarly, another August 2011 note described Stubs’ “biggest issues” as “full body myalgias [muscle pains] and daytime somnolence,” but notes “negative rheumatologic

evaluation,” and that he “fits clinical picture for having fibromyalgia.” Ingraham prescribed medication for sleep to take at night to achieve restorative sleep, and also gave samples of pain medication for myalgias. (AR 284.)

By April 2012, a treatment note from PA-C Ingraham described Stubs as suffering from uncontrolled fibromyalgia with “pain all over body; tired all the time, missing a lot of work and risk for losing his job.” Again, Stubs described his sleep apnea as “controlled,” but noted that he gets headaches if the mask falls off. The note also describes migraines of one to three times per month of moderate intensity. Ingraham referred Stubs to rheumatology to confirm fibromyalgia diagnosis and possible chronic fatigue syndrome diagnosis. (AR 280-83.) Consistent with that referral, an April 2012 note from Janet J Bahr, Advanced Practice Nurse Prescriber (“APNP”), describes Stubs complaints as “long-standing history of problems dating back several years” with “a lot of pain (all of the time)” and “pretty much constant fatigue,” though “feels that [his recent use of CPAP machine] has improved some fatigue.” She also noted that Stubs experiences “some nausea . . . pretty much 24 hours a day,” and “his muscles feel weak over his whole body.” While he denied depression, Bahr also noted that Stubs “does feel like he has got some anxiety but is fairly well controlled.” Bahr’s impression was that Stubs has “5/5 myofascial pain with possible fibromyalgia” and “maybe some early osteoarthritis.” She ordered x-rays of both feet and tests to check his vitamin D level. (AR 263-65.) While foot x-rays were normal, the lab results showed low vitamin D levels. (AR 266.)

A June 2012 treatment note from PA-C Ingraham described Stubs’ fibromyalgia as getting worse, and he specifically noted that he tried medications without much benefit.

Ingraham also noted that CPAP has been “optimized,” but that excessive fatigue and somnolence continue to trouble him. (AR 270-73.) A September 2012 treatment note from Ingraham describes Stubs as presenting with fatigue and diffuse body pain, but also notes that he is coping better now that he is no longer working. (AR 330.) Similarly, an October 2012 treatment note from Ingraham describes continued chronic fatigue, even with successful use of his CPAP, while noting that fibromyalgia is “stable,” and that his migraines have improved with use of CPAP. (AR 324.) For all of these appointments, Stubs’ diabetes was noted as controlled.

By February 2013, Ingraham notes that Stubs has his “usual fibromyalgia pain,” which has not improved, and he “has had intolerance to multiple agents in the past.” Ingraham further notes that Adderall initially improved Stubs’ chronic fatigue, and he is interested in increasing his dose. Still, Stubs’ biggest problem remained fatigue, despite that CPAP working well. Ingraham also noted that migraines are controlled without any new concerns. (AR 310.)

A May 2013 treatment note from Ingraham again notes that Adderall has been helping with fatigue, prompting Stubs to seek an increased dose. (AR 370.) By June, having “tried multiple medications,” Ingraham describes Stubs’ current medication regimen as “probably the best he’s been on so far,” but he still has “constant full body pain.” Stubs also noted that his daytime somnolence is a “little bit better with Adderall but he still falls asleep about 3-5 times during the day.” (AR 365.)

An October 2013 treatment note from Ingraham notes that Stubs still experiences full body pain due to fibromyalgia, but feels that keeping active overall is helpful. Stubs’

chronic fatigue continued to be a problem, and he asked to increase again his Adderall dosage. Stubs further reported sleeping great at night with use of CPAP. (AR 360.)

C. Medical Reports

Material to the ALJ's decision, PA-C Ingraham completed two reports, describing Stubs' functional limitations. In a report dated November 12, 2013, Ingraham's describes the following physical limitations:

- Lift 30 pounds occasionally; 10 pounds frequently
- Sit 60 minutes; stand 30 minutes
- Sit about 4 hours in 8-hour day; stand/walk about 2 hours in 8-hour day
- Will need 4-6 unscheduled breaks for 10-15 minutes each in 8-hour day
- Would except Stubs to be absent from work more than 2 days per month

(AR 357-58.) Ingraham's December 15, 2013, report describes substantially the same limitations, with some improvements:

- Lift 30 pounds occasionally; 20 pounds frequently
- Sit 90 minutes; stand 45 minutes;
- Sit at least 6 hours in 8-hour day; stand/walk about 2 hours in 8-hour day
- Will need 4-6 unscheduled breaks for 10-15 minutes each in 8-hour day
- Would except Stubs to be absent from work more than 2 days per month

(AR 374-75.) To address any confusion caused by differences in the restrictions, Ingraham reiterated the lesser December restrictions in an April 2014 letter to the ALJ. (AR 378.)

Two state agency physicians also reviewed Stubs' medical record. In a report dated 9/4/2012, Dr. Chan limited Stubs to 10 pounds lifting/ carrying occasionally and less than 10 pounds frequently; standing and/or walking for 2 hours in an 8-hour day; sitting for about 6 hours in an 8-hour day; unlimited pushing and pulling; and limited to sedentary work. (AR 86-87.) In a record review dated 4/29/13, Syd Foster, D.O., limited

Stubs to lifting/ carrying 20 pounds occasionally, 10 pounds frequently; standing and/or walking 2 hours in an 8-hour day; sitting for 6 hours; and found no manipulative limitations. (AR 102-03.)

Finally, Edmund Musholt, Ph.D., completed a psychiatric record review and a report dated 4/25/13. Musholt found (1) no restrictions of activities of daily living, (2) no difficulties in maintaining social functioning, (3) no repeated episodes of decompensation, and (4) only mild difficulties in maintaining concentration, persistent and pace. Dr. Musholt noted “[Stubs] has MDI [medically determinable impairment] that is more than not severe, however does not result in more than mild limitations in his ability to maintain CPP. Diff w/ ADLS [activities of daily living] not due to his mh diff [mental health difficulties] but at most are mild as well.” (AR 100-01.)

D. ALJ’s Decision

The ALJ found that Stubs has the following severe impairments: obesity, fibromyalgia, osteoarthritis, chronic fatigue and headaches. (AR 21.) The ALJ also concluded that Stubs’ depression was not a severe impairment. (AR 22-23.) As a result, the ALJ found that Stubs does not have an impairment or combination of impairments that medically equals the severity of one of the listed impairments. (AR 23.) Finally, the ALJ found that Stubs has the residual functional capacity to perform sedentary work with additional limitations of: no climbing ladders, ropes or scaffolds; occasionally climbing ramps and stairs; no work at heights; must avoid even moderate exposure to hazardous machinery; a sit/stand option; frequent, but not constant activity with hands, fingers and

arms; and being off task up to 10 percent of the workday, in addition to regular breaks. (AR 23.)

Critical to Stubs' challenge, the ALJ discounted the opinion of PA-C Ingraham and, in particular, the two reports he provided in November and December 2013. The ALJ noted that "a PA is not an acceptable medical source, but his opinions must be considered and weighed in light of all other record evidence." (AR 24.) In discounting his opinion, the ALJ noted inconsistencies between the two reports, issued less than one month apart. Specifically, the ALJ gave little weight to Ingraham's opinion that he would need 4-6 breaks per day for 10-15 minutes each and be absent more than 2 days per month, explaining "these conclusions are without explanation; appear to be based primarily on the claimant's self-reports and, as discussed below, are not supported by medical treatment notes or objective findings." (AR 25.)

In discounting the treatment notes, and in particular, Stubs' self-reports of pain and fatigue, the ALJ noted that Stubs' physical examinations have been benign, and he never appeared to be in distress. While some medications failed, other medications Stubs was given but refused to take. Moreover, Stubs has never required emergency care; Stubs' x-rays were normal; and Stubs failed to take the advice of medical providers to exercise, lose weight and stop smoking. (AR 25.) The ALJ also gave reasons for discounting Stubs' credibility as to pain and fatigue, including that he reported that his symptoms were better after he stopped working (which required him to stand 10 hours per day); any impairment was taken into consideration in limiting him to sedentary exertion work with additional restrictions; he reported that his headaches were better after using the CPAP; his testimony about hand and arm cramping is not supported by

the medical record, nor by his testimony about driving, smoking and using his cellphone and computer; and in light of successful use of CPAP, his fatigue is not as bad as he reports. (AR 25-26.)

Finally, the ALJ concluded that Stubs is unable to perform any past relevant work, but could perform production jobs, bench operations, order clerk and general officer clerk. (AR 26-27.)

OPINION

Plaintiff's only challenge is to the ALJ's treatment of PA-C Ingraham's opinion, and in particular, Ingraham's opinion that Stubs needs to take 4-6 breaks per day of 10-15 minutes in length and miss work more than 2 days per month. As plaintiff explains, if the ALJ had credited this opinion, then Stubs would have been deemed disabled.

I. Treatment of PAs' Opinions Generally

As an initial issue, an M.D. or a D.O. also signed each of Ingraham's treatment notes. Following oral argument before this court, both sides were allowed to submit additional briefing as to whether this endorsement of Ingraham's treatment notes would alter Ingraham's status as a non-acceptable medical source. In response, plaintiff directs the court to Wisconsin statutory provisions and materials from the Wisconsin Medical Society and Wisconsin Academy of Physician Assistants describing the roles of physician assistants and the responsibilities of physicians. (Pl.'s Sur-Reply (dkt. #16).) While physician assistants are required to operate under the direct supervision of physicians, however, plaintiff was unable to direct the court to any case law holding that this supervision impacts Ingraham's *status* as a non-acceptable treatment provider.

In response, the commissioner relies on regulations requiring the opinion of an acceptable treatment source to establish a medical impairment, arguing “[t]he fact that a physician generally supervises a physician’s assistant does not transfer the physician assistant’s opinion into that of the physician.” (Def.’s Resp. (dkt. #17) 3.) Plaintiff does not suggest that Wisconsin’s requirement for supervision of physician assistants is unlike that of other jurisdictions. Regardless, the social security administration still identifies physician assistants as being non-acceptable medical sources. *See* 20 C.F.R. § 404.1513(a); SSR 06-3p, 2006 WL 2329939, at *2. Plaintiff has failed to direct the court to any legal basis for crafting an exception for Ingraham.

Plaintiff alternatively contends that the ALJ failed to consider Ingraham’s opinion in compliance with SSR 06-3p, which governs consideration of opinions from medical sources who are not technically acceptable medical sources. In pertinent part, SSR 06-3p states that “[o]pinions from these medical sources [including physician assistants], who are not technically deemed ‘acceptable medical sources’ under our rules, are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.” Contrary to plaintiff’s assertions, however, the ALJ plainly considered Ingraham’s opinions. (AR 24.) Still, as the Commissioner points out, those opinions are not entitled to *controlling* weight. 20 C.F.R. § 404.1527(c). Critically, only an *acceptable* medical source can provide a diagnosis of a medically-determinable impairment. *See* 20 C.F.R. § 416.913 (describing “medical opinion” as including whether a claimant has an impairment, as compared to “other medical evidence,” which can describe the nature and intensity of an impairment).

II. ALJ's Treatment of PA-C Ingraham's Opinions

With those broader comments aside, plaintiff raises three challenges to the ALJ's treatment of Ingraham's opinion. *First*, he contends that the ALJ erred in finding Ingraham's opinion unsupported by the record. In doing so, plaintiff points generally to the diagnoses of fibromyalgia, obstructive sleep apnea, and daytime somnolence, among other diagnoses, but fails to explain how the medical record supports Ingraham's conclusion that Stubs will need multiple, daily breaks and miss more than two days of work per month, especially in light of the ALJ's RFC limiting plaintiff to sedentary work with additional limitations. One could argue that Ingraham's diagnoses are consistent with these limitations, but Ingraham is the *only* medical professional to offer them, and in light of his position as a non-acceptable medical source, he cannot provide a medically-determinable diagnosis.²

Second, plaintiff takes issue with the ALJ's criticism of Ingraham's lack of explanation, citing to case law holding that a medical expert is not required to provide a "detailed explanation." (Pl.'s Opening Br. (dkt. #10) 14.) Here, however, Ingraham failed to provide *any* explanation tying Stubs' complaints of pain and fatigue to the need for frequent breaks and missing of work. Again, absent a diagnosis from an *acceptable* medical source, there is no basis to tie Ingraham's limitations to Stubs' impairments. More critically, given the ALJ's discounting of Stubs' credibility -- which plaintiff does

² As part of this challenge, plaintiff also contends that the ALJ failed to give "specific reasons" in evaluating Stubs' complaints of pain as required by SSR 96-7p. To the contrary, the ALJ gave specific, detailed reasons for discounting Stubs' complaints of pain. (*See* AR 25-26 (and summarized above).)

not challenge on appeal -- there seems to be no basis for Ingraham's conclusion that he needs frequent breaks and will miss work more than two times per month.

Third, plaintiff complains that the ALJ's conclusion that Ingraham's opinion on unscheduled breaks "appears" to be based on Stubs' self-report implicates the prohibition against the ALJ "playing doctor." (Pl.'s Opening Br. (dkt. #10) 15.) The ALJ's conclusion that Ingraham's opinion on unscheduled breaks is based on Stubs' self-reports also appears consistent with the medical record -- there is no other bases for the pain and fatigue other than his self-reports. Moreover, the ALJ provided a detailed and reasonable explanation for discounting Stubs' credibility on that front.

Ultimately, plaintiff's complaints about the ALJ's treatment of Ingraham's opinions in this case is not that they are unreasonable or even inadequately explained. Instead, plaintiff is arguing that Ingraham's opinion were deserving of controlling status. As a physician's assistant, the law simply fails to support that view.

ORDER

Accordingly, IT IS ORDERED that the decision of defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying plaintiff Eric Stubs' application for disability benefits is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 16th day of May, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge