

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

SAGE GEDDES, on behalf of
ANN GEDDES,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

15-cv-534-bbc

Plaintiff Sage Geddes, on behalf of Ann Geddes, has filed this action seeking judicial review of the social security commission's denial of Ann's application for disability benefits and supplemental social security income. Plaintiff contends that the commissioner erred in two respects when denying Ann's application: (1) the administrative law judge failed to fully account for plaintiff's moderate limitations in concentration, persistence and pace in her residual functional capacity assessment and the hypothetical question she posed to the vocational expert; and (2) the administrative law judge relied on the vocational expert's testimony in concluding that Ann could transition to other work, but that testimony lacked a proper foundation. Plaintiff seeks reversal of the commissioner's decision and an award of benefits.

After reviewing the parties' briefs and the record before the administrative law judge, I am reversing the commissioner's denial of plaintiff's application for benefits and am

remanding for further proceedings. I agree with plaintiff that having found that Ann suffered from “moderate limitations” in concentration, persistence or pace, the administrative law judge was required to orient the vocational expert to these limitations. By failing to do so, the vocational expert’s testimony was rendered unreliable and insufficient to support her step five finding that Ann could transition to other work. As for plaintiff’s alternative argument that the vocational expert’s testimony lacked foundation, this argument was waived by counsel’s failure to interpose an appropriate objection at the hearing.

RECORD FACTS

A. Background

On September 30, 2010 and November 18, 2010, Ann Geddes applied for disability insurance benefits and supplemental social security income, respectively. In both applications, she alleged that her disability began on June 1, 2010. Her applications were denied initially on February 18, 2011, were subsequently reconsidered, and then denied again on September 9, 2011. Geddes requested a hearing, which was held on November 8, 2011. On December 11, 2012, administrative law judge Roger W. Thomas issued a decision that plaintiff was not disabled and the Appeals Council declined to review Thomas’s decision.

On March 22, 2013, Ann Geddes committed suicide. Her son, Sage Geddes, filed an appeal in this court on Ann’s behalf. In that suit, Geddes ex rel. Geddes v. Colvin, 13-cv-312-bbc, 2014 WL 1671490 (W.D. Wis. April 23, 2014), I remanded the case to the

commission for further proceedings on the grounds that the administrative law judge failed to give proper consideration to Ann's testimony, failed to accord appropriate weight to the opinion offered by her treating physician and failed to consider the possibility that she was abusing methamphetamine and other stimulants because of her mental disorders. A second hearing was held in May 2015. On June 8, 2015, a new administrative law judge, Mary Kunz, issued a decision that addressed the errors identified by the court in the first case, but nevertheless denied the application. On August 24, 2015, plaintiff filed this appeal attacking various aspects of the denial of the application on remand.

B. Medical Evidence

The medical records before the administrative law judge indicate that Ann Geddes suffered from a variety of conditions, most of which related to her mental health. Most notably, in late 2004 she was admitted to Cumberland Behavioral Health for suicidal ideation and paranoia. After she was discharged from Cumberland, she continued to see mental health professionals, who eventually diagnosed bipolar disorder in 2005. In addition to this diagnosis, in 2010 she was given a diagnosis of an "adjustment disorder" and generalized anxiety disorder. Her mental health providers consistently noted that she was depressed, unable to sleep and having trouble concentrating.

On November 5, 2012, in connection with Ann Geddes's application for social security benefits, her psychiatrist, Kent G. Brockman, noted that she had "marked" impairments in her ability to make judgments on work-related decisions, understand and

remember complex instructions, carry out complex instructions and make judgments on complex work-related decisions. Brockman also noted that Ann had “marked” limitations when it came to interacting appropriately with supervisors and co-workers and “marked” limitations when it came to responding to usual work situations and changes in a routine work setting. Brockman attributed these limitations at least in part to her abuse of methamphetamine and “synthetic stimulants.”

C. Hearing Testimony

Administrative law judge Mary Kunz conducted a hearing on May 20, 2015 in Minneapolis, Minnesota. Plaintiff was represented by counsel at the hearing. Maureen Geddes, plaintiff’s mother, appeared and testified in support of the application. A vocational expert also appeared and offered testimony regarding Ann’s ability to find suitable work. Ann’s mother testified that her daughter was employed until 2010 when she lost her job for reasons unrelated to her alleged disability. After she lost her job, she could not find a new one because her bipolar disorder was no longer being treated. According to her mother, Ann was capable of working when she was able to obtain treatment and medication for her bipolar condition. In 2012, she began to experience paranoid delusions, including a fear that she was under surveillance by the government. Her mother testified that these delusions and her daughter’s erratic behavior were attributable to her drug use and her lack of treatment for her bipolar disorder. Ann’s condition continued to deteriorate until she committed suicide in March 2013.

The administrative law judge took testimony from Kenneth Ogren, a vocational expert. The administrative law judge asked Ogren to give an opinion on the jobs available to an individual who (1) could perform only “medium work” exertionally; (2) could perform only “routine, simple, repetitive work”; (3) required a “low stress” job, defined as “not rapidly paced” and not having “high production standards”; (4) could not interact with the public; (5) could interact with coworkers or supervisors on only a “brief and superficial” basis; and (6) required a drug and alcohol-free environment. Ogren testified that an individual with those limitations and functional capacity could work as a rack room worker or a laundry worker.

On examination by plaintiff’s counsel, Ogren noted that “brief and superficial” contact required a “people rating” of no lower than a six. With this lower people rating, Ann would not be able to work as a rack room worker or a laundry worker, but Ogren testified that she could work as a night cleaner. Plaintiff’s counsel then further qualified the administrative law judge’s hypothetical by asking Ogren to assume that approximately 10 percent of the time the individual would be unable to (1) maintain attention and concentration; (2) maintain a regular schedule; (3) stay on task; or (4) maintain a normal work pace relative to their co-workers. Ogren testified that if these limitations were added to the administrative law judge’s hypothetical, the individual would be unable to find any suitable employment.

D. The Administrative Law Judge's Decision

In her decision, the administrative law judge performed the required five-step sequential analysis set forth in 20 C.F.R. 404.1520. At step one, she determined that Ann Geddes had not engaged in substantial gainful activity since June 1, 2010, the alleged onset date of her disability. At step two, she determined that Ann suffered from migraine headaches, a lumbar disc protrusion, bipolar affective disorder, generalized anxiety disorder and a history of polysubstance dependence. The administrative law judge determined that these impairments were "severe" for purposes of the Social Security Act because they significantly interfered with Ann's ability to engage in basic work activities. However, at step three, she determined that although plaintiff's impairments were severe, they did not qualify as, or medically equal, any impairment listed in 20 C.F.R. 404, Subpart P, Appendix I.

Because Ann's impairments did not meet or equal the impairments set forth in Subpart P, Appendix I, the administrative law judge was required to ascertain Ann's "residual functional capacity." At this step, the administrative law judge found that Ann had the capacity to perform "medium work," as defined in 20 C.F.R. 404.1567(c) and 416.967(c). Ann was further limited to "routine, repetitive, simple work" that was "low stress," which the administrative law judge defined as "not rapidly paced and not requiring any high production standards." This work could not involve contact with the public and could not involve more than brief and superficial contacts with coworkers and supervisors. Finally, Ann's work environment had to be both drug- and alcohol-free.

At the fourth and fifth steps, the administrative law judge concluded that Ann did not

have the capacity to perform her past relevant work as an information clerk. However, she concluded from the testimony offered by the impartial vocational expert that Ann had the ability to make an adjustment to other jobs that existed in significant numbers in the national economy. Specifically, plaintiff's residual functional capacity enabled her to work as a laundry worker and a night cleaner. Accordingly, the administrative law judge concluded that Ann had not been "disabled" for purposes of obtaining social security benefits.

OPINION

Plaintiff's two main arguments on appeal are both directed at the administrative law judge's step five finding that there were a sufficient number of jobs available for someone with Ann's residual functional capacity. First, plaintiff argues that the vocational expert's testimony was unreliable and could not support a finding that there were a sufficient number of jobs available for Ann because the testimony was offered in response to a hypothetical question that did not accurately reflect her capabilities and limitations. Second, plaintiff argues that the vocational expert's testimony regarding the number of jobs available to Ann lacked a foundation because the data in the Dictionary of Occupational Titles is flawed and does not include many of the limitations the vocational expert considered. Because I agree that the administrative law judge did not properly orient the vocational expert to Ann's limitations, I am again remanding for further proceedings.

At the last step of the five step framework for evaluating whether a claimant is

disabled, the administrative law judge must consider whether the claimant's residual functional capacity is such that they are able to make an adjustment to other work. In making this determination, administrative law judges often rely on vocational experts' opinions regarding the type of jobs suitable for the claimant and whether there are a sufficient number of such jobs in the claimant's state. However, in order for the vocational expert's opinion to be credible evidence of the claimant's ability to perform other work, the vocational expert must take into account all of the claimant's limitations, Simila v. Astrue, 573 F.3d 503, 520-21 (7th Cir. 2009), including his or her limitations with respect to "concentration, persistence and pace." O'Connor-Spinner v. Astrue, 627 F.3d 614, 620-21 (7th Cir. 2010) ("[T]he [administrative law judge] should refer expressly to limitations on concentration, persistence and pace in the hypothetical in order to the focus the [vocational expert's] attention on these limitations and assure reviewing courts that the [vocational expert's] testimony constitutes substantial evidence of the jobs a claimant can do.").

In this case, the administrative law judge found at step three of the five step sequential evaluation process that Ann Geddes suffered from "moderate difficulties" with regard to concentration, persistence or pace as shown by her self-reported difficulty with "memory, completing tasks, concentrating, understanding and following instructions" and her "variable attention span." However, the closest the hypothetical question came to accounting for these difficulties with concentration, persistence or pace is the administrative law judge's limitation to "routine, repetitive, simple work" that is "low stress" and "not rapidly paced." The Court of Appeals for the Seventh Circuit has consistently held that

these type of general restrictions are not sufficient to account for all forms of concentration, persistence and pace limitations. Yurt v. Colvin, 758 F.3d 850, 858-59 (7th Cir. 2014) (“[W]e have repeatedly rejected the notion that a hypothetical like the one here confining the claimant to simple, routine tasks and limited interactions with others adequately captures temperamental deficiencies and limitations in concentration, persistence, and pace.”). Most notably, the administrative law judge’s hypothetical failed to account for Ann’s difficulties with concentration and completing tasks. Having accepted that Ann suffered from these limitations and relied on them in finding that Ann had moderate difficulties with concentration, persistence or pace, the administrative law judge was required to account for them in her residual functional capacity assessment and the hypothetical question she posed to the vocational expert. Id. (“Beyond stating that [plaintiff] could perform ‘unskilled task[s] without special considerations,’ the hypothetical [did] nothing to ensure that the [vocational expert] eliminated from her responses those positions that would prove too difficult for someone with [plaintiff]’s depression and psychotic disorder.”).

Defendant responds to plaintiff’s argument by pointing out that there is no requirement that the administrative law judge describe all of the claimant’s deficiencies or limitations. Instead, defendant argues, it is sufficient simply to describe the claimant’s residual functional capacity. Although defendant is technically correct, this argument is only valid to the extent that the residual functional capacity assessment accurately reflects and accounts for the credited limitations. See, e.g., Yurt, 758 F.3d 850, 857 (“As a general rule, *both the hypothetical posed to the VE and the ALJ’s RFC assessment* must incorporate all of the

claimant's limitations supported by the medical record.") (emphasis added). If the residual functional capacity overstates a claimant's abilities because it is not properly qualified so as to account for all of the credited limitations, such as Ann's difficulty concentrating, then it cannot be used to elicit reliable testimony from a vocational expert. On remand, the administrative law judge would be well-served to orient any vocational expert (assuming he chooses to elicit an opinion from one) to both Ann's residual functional capacity and her mental limitations. Alternatively, the administrative law judge should explain how her limitations led to the specific residual functional capacity identified.

Plaintiff's alternative argument is that the vocational expert's testimony lacked a proper foundation because he relied on an assumption that plaintiff suffered from disabilities and work limitations not explicitly set forth in the Dictionary of Occupational Titles. However, this argument comes too late. Plaintiff's counsel should have raised any such objections related to the foundation for the vocational expert's testimony at the administrative hearing. Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002) ("When no one questions the vocational expert's foundation or reasoning, an [administrative law judge] is entitled to accept the vocational expert's conclusion[.]"). Plaintiff's argument that she was not required to raise an objection because the vocational expert's testimony conflicted with the Dictionary of Occupational Titles is unavailing; plaintiff does not identify any specific conflict between the vocational expert's testimony and the Dictionary and a vocational expert's testimony does not conflict with the Dictionary simply by relying on limitations not set forth therein. Overman v. Astrue, 546 F.3d 456, 463 (7th Cir. 2008)

(requiring the administrative law judge to seek clarification from a vocational expert only when there is an “obvious” conflict between the expert’s testimony and the Dictionary of Occupational Titles).

Finally, although plaintiff requests entry of an order awarding benefits outright rather than remanding the case again, I am denying this request. Notwithstanding the aforementioned errors, it is not clear from the record that plaintiff was disabled. A district court may reverse and award benefits outright only if all factual issues have been resolved and the record supports a finding of disability. Briscoe ex rel. Taylor v. Barnhart, 425 F.3d 345, 356-67 (7th Cir. 2005). Here, the record does not support such a finding because it is unclear whether Ann Geddes’s limitations with respect to concentration, persistence or pace would have any effect on her ability to transition to other work.

ORDER

IT IS ORDERED that plaintiff Sage Geddes’s motion for summary judgment, dkt. #10, is GRANTED. Defendant Commissioner of Social Security’s 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 18th day of August, 2016.

BY THE COURT

/s/

BARBARA B. CRABB

District Judge