IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS MATTHEW ROYBAL,

Plaintiff,

v.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

16-cv-503-bbc

Plaintiff Thomas Roybal is seeking review of a final decision by defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying his claim for disability insurance benefits under the Social Security Act. 42 U.S.C. § 405(g). Dkt. #3. Plaintiff applied for benefits on July 30, 2012, alleging that he was disabled as result of a number of upper extremity and cervical spine impairments resulting in part from injuries he sustained when he fell off his employer's deck on December 17, 2011, while he was trying to free a mop frozen to the deck. AR 42-43.

Following an administrative hearing on January 13, 2015, Administrative Law Judge Richard Staples issued a written decision on January 29, 2015, in which he found that plaintiff was not disabled at any time between his alleged onset date and the date of the decision. Admin. Rec. (AR) 19-30. Although the administrative law judge found that plaintiff was severely impaired by chronic pain, bilateral rotator cuff injuries and tendinitis, left upper extremity carpal tunnel syndrome and ulnar neuropathy, lipoma in the left shoulder, osteoarthritis in the left elbow, mild degenerative disc disease of the cervical spine

and obesity, he determined that plaintiff retained the residual functional capacity to perform light work limited by no overhead reaching bilaterally and only occasional power gripping with his non-dominant hand. AR 21-23. In his current appeal of that decision, plaintiff argues that he is entitled to an award of benefits because the administrative law judge erred in the following ways: (1) he failed to give proper weight to the opinions of two treating physicians and did not adopt the upper extremity limitations that one of the physicians assessed for plaintiff; (2) he did not consider whether plaintiff was disabled for at least the period between December 17, 2011 and August 22, 2013, when he was undergoing his surgeries and recovering from them; and (3) he made an erroneous credibility determination, particularly because he based it on incorrect findings about plaintiff's abilities to perform housekeeping and personal hygiene activities. Dkt. #10.

For the reasons explained below, I am remanding this case so the administrative law judge can consider the opinions of both treating physicians and provide good reasons for the weight that he decides to give them. Because I am remanding the case on other grounds, it is unnecessary to address plaintiff's remaining challenges related to a closed period of disability and the administrative law judge's credibility determination. However, the administrative law judge should take care on remand to support his credibility determination with evidence in the record and not give undue weight to plaintiff's ability to perform routine daily activities and light housekeeping.

BACKGROUND FACTS

Although plaintiff was injured in December 2011, he could not get medical attention until about a month later because he did not have insurance and his worker's compensation claims was denied. AR 44-46. In the first half of 2012, x-rays and a magnetic imaging studies of his shoulders and cervical spine showed tendinitis in his right shoulder; a small, full-thickness tear in his right rotator cuff; a surface tear in his left rotator cuff; a small paralabral cyst in his left shoulder; degenerative fraying in his left shoulder; small protrusions at C5-6, C6-7 and T1-2 vertebrae with some tearing at C5-6; and a questionable, minimal compression fracture of uncertain age in his C5 vertebrae. AR 410-15, 432-38, 655-56 and 719-20. A September 17, 2012 electromyogram test showed that plaintiff had moderate left carpal tunnel syndrome and moderate ulnar neuropathy in his left wrist that were unrelated to his fall. AR 439-41.

Plaintiff's conditions were diagnosed around the same time period, but he received separate treatment from different providers for each shoulder and his carpal tunnel syndrome:

Right shoulder

- Dr. Mary Anderson began treating plaintiff's right rotator cuff tear on June 2, 2012. AR 799-800.

- On March 6, 2012, plaintiff saw Dr. Joshua Rother, an orthopedic specialist, who told plaintiff that he needed surgery on his right shoulder but that he would not be permanently disabled. AR 759-60.

- Dr. Rother examined plaintiff's right shoulder again on October 5, 2012, noting that plaintiff had pain with impingement testing and mild weakness. AR 372-74. He noted that a magnetic resonance imaging scan

revealed a small rotation cuff tear and bursitis. Dr. Rother again recommended arthroscopic rotator cuff repair and subcromial decompression. Id.

Left shoulder

- Plaintiff saw another an orthopedic specialist, Dr. John Sauer, for his left shoulder on June 19, 2012. He reported that although the pain in plaintiff's right shoulder was more severe right after the accident, his left shoulder became progressively worse and was hurting more than the right in the past few months. Dr. Sauer noted very limited range of motion in both shoulders and possible radicular issues. He referred plaintiff to a neurologist for further testing before developing a treatment plan. AR 471-72.

- On October 17, 2012, plaintiff saw Dr. Sauer and reported that he had an injection in his shoulder that relieved his pain briefly. Dr. Sauer recommended surgery. AR 519.

- On October 26, 2012, Dr. Sauer performed arthroscopic surgery on plaintiff's left shoulder. AR 481, 824, 838.

- Plaintiff's shoulder pain improved after surgery, but he continued to have a lot of radicular pain in his left arm and pain in his right shoulder. AR 553, 555. On December 12, 2012, Dr. Sauer noted that plaintiff had limited abduction and elevation on his left side with mild to moderate pain. AR 555.

- On June 10, 2013, plaintiff saw Dr. Anne Normand for an evaluation of a mass in his left shoulder at the request of Dr. Sauer. She noted that plaintiff had pain and decreased range of motion in his left shoulder but that the pain was somewhat better than before his surgery. He also reported pain in his right shoulder and numbness and weakness in his left hand and forearm. Dr. Normand was concerned that excising the mass in his left shoulder would further limit his functioning and increase his pain. She noted that plaintiff could benefit from physical therapy if he could find a way to afford it. AR 542-46. Neither plaintiff's insurance or worker's compensation covered physical therapy. AR 551, 555.

- On July 18, 2013, Dr. Anderson confirmed that plaintiff needed physical therapy and advised that inactivity would only make things worse. She refilled plaintiff's prescription for Vicodin, which he had been taking

continuously since at least October 2012. AR 508-09, 513, 567-69 and 571.

Carpal tunnel syndrome and ulnar neuropathy

- After the surgery on his left shoulder, plaintiff reported symptoms of pain, numbness and weakness in his left arm and hand. On January 16, 2013, Dr. Sauer noted that plaintiff had at least moderate carpal tunnel syndrome but that his left shoulder required more healing time before carpal tunnel surgery. AR 554.

- On February 22, 2013, Dr. Sauer performed left carpal tunnel release surgery and left ulnar nerve transposition on plaintiff. AR 44, 529, 824, 838.

- On April 2, 2013, Dr. Sauer noted that plaintiff was "recovering okay" and his numbness and nerve pain had improved. However, he reported that plaintiff still struggled with pain, especially in his left shoulder, and had limited reaching. AR 551.

Although medical records indicate that the surgeries improved plaintiff's symptoms somewhat, he testified that he continues to have a lot of pain in his shoulders and upper torso that limits his ability to function. AR 51, 543, 551-53. His wife helps him shower, wash his hair and put on shoes and clothing. During the 18 months following his accident, his wife had to help him with toileting. AR 51-54. Although he vacuums occasionally, he has to stop after five minutes because of the pain. AR 59. Plaintiff cannot shop or cook, except to use the microwave. He is able to wash small dishes and silverware for a limited period of time and has done laundry, though it causes him pain. AR 55-57. He last worked in February 2012 in a restaurant with restrictions. AR 61. Plaintiff testified that although he needs two additional surgeries (presumably on his right shoulder), his insurance is refusing to pay for them. AR 45-46.

OPINION

A. Treating Physician Opinions

Plaintiff asserts that the administrative law judge did not properly evaluate the opinions of two of his treating physicians, Dr. Mary Anderson and Dr. John Sauer, and failed to provide good reasons for rejecting the hand limitations that they assessed. 20 C.F.R. § 404.1527(c)(2) (treating physician's medical opinion entitled to controlling weight if supported by objective medical evidence and consistent with other substantial evidence in record); Roddy v. Astrue, 705 F.3d 631, 636 (7th Cir. 2013) (administrative law judge must provide sound explanation for rejecting treating physician's opinion). Plaintiff's treating physicians stated the following opinions regarding his ability to work:

- On September 20, 2012, Dr. Sauer completed a "report of work ability form" limiting plaintiff to sedentary work with no overhead reaching and lifting no more than five pounds. He also noted that plaintiff had very limited use of both arms. AR 363, 805.

- In an October 12, 2012 accident report completed for the state worker's compensation division, Dr. Anderson wrote that plaintiff could not lift with his right arm and could not return to work unless he had surgery on his right shoulder. AR 799-800.

- On October 21, November 2 and December 12, 2012, Dr. Sauer completed forms noting that plaintiff was not able to work at all, even with restrictions. AR 801, 1018-19.

- On September 27, 2013, Dr. Sauer wrote that plaintiff remained unable to work and that he was scheduled for a neurology appointment in October. AR 842.

1. Dr. Sauer

The administrative law judge stated that he did not give any weight to Dr. Sauer's opinions because (1) the September 2012 opinion was temporary until plaintiff underwent surgery; and (2) the September 2013 opinion was not supported by the medical evidence and went to the ultimate issue of disability. AR 27. (He did not refer specifically to Dr. Sauer's other opinions, which are similar to the two mentioned in his opinion.) Defendant acknowledges that an administrative law judge must not reject a treating physician opinion solely because it states that a claimant cannot work. Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) (fact that treating physician intrudes on issue reserved to commissioner is not reason to disregard entire opinion). However, she argues that the administrative law judge cited multiple records that he found inconsistent with Dr. Sauer's opinions and that he correctly noted that Sauer's opinions conflicted with other medical opinions in the record. Although it was reasonable for the administrative law judge to conclude that the September 2012 opinion applied only until plaintiff underwent surgery in October 2012, I agree with plaintiff that the administrative law judge did not give an adequate explanation for his rejection of Dr. Sauer's later opinions.

As an initial matter, the opinions of non-examining physicians, by themselves, "are insufficient to summarily reject the examining physicians' opinions." Czarnecki v. Colvin, 595 Fed. App'x. 635, 644 (7th Cir. 2015). Although the administrative law judge listed citations to the record as general support for his rejection of Dr. Sauer's opinion and summarized some of this medical evidence elsewhere in his opinion, he did not identify any specific treatment

notes or test results that contradicted Dr. Sauer's assessment that plaintiff was not able to work after his surgery. Villano v. Astrue, 556 F.3d 558, 562 (7th Cir. 2009). When an administrative law judge decides to discredit a treating physician's opinion, he must discuss, at least minimally, the reasons why. Schaaf v. Astrue, 602 F.3d 869,875 (7th Cir. 2010) (administrative law judge "must provide sound explanation for the rejection"); Godbey v. Apfel, 238 F.3d 803, 808 (7th Cir. 2001) (A court "cannot evaluate whether the ALJ properly rejected [a treating physician's report] in favor of the other doctors' reports, or even ensure that the ALJ examined this report, unless the ALJ explains his reasoning.").

Defendant points out that the portions of the record summarized by the administrative law judge earlier in his decision included a normal left shoulder x-ray from May 2012, an August 2012 magnetic resonance imaging study showing "tiny" or "small" findings in plaintiff's cervical spine and a nerve conduction study showing moderate carpal tunnel syndrome. However, there are two problems with this argument. First, the administrative law judge did not specifically discuss these findings in weighing Dr. Sauer's opinion or explain how they supported his decision to reject Sauer's opinions. Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002) ("[R]egardless whether there is enough evidence in the record to support the ALJ's decision, principles of administrative law require the ALJ to rationally articulate the grounds for her decision and confine our review to the reasons supplied by the ALJ.").

Second, the seemingly "positive" test results do not establish definitively that Dr. Sauer's opinion was unfounded and they do not comprise the full scope of plaintiff's condition. Although defendant and the administrative law judge suggest that "moderate"

carpal tunnel syndrome is not a serious condition, there is nothing in the medical record to support this view. Plaintiff had to undergo surgery for his carpal tunnel syndrome and often wore a brace. Similarly, even though plaintiff's x-rays and cervical spine imaging studies may have been fairly unremarkable, the imaging studies of his shoulders showed a full tear on the right side and a partial tear on the left side, and both injuries required surgical intervention and ongoing pain medication. The imaging studies also showed that plaintiff had degeneration and a mass in his left shoulder.

In reaching his decision, the administrative law judge placed great weight on the opinions of the consulting physicians, especially the reports of Dr. Richard Lemon, who examined plaintiff in September 2012 and September 2013 and found signs of symptom magnification and narcotic abuse. AR 823-40. However, the administrative law judge failed to explain why he believed that the opinions of the consulting physicians were consistent with the medical record whereas Dr. Sauer's opinion was not. In summarizing plaintiff's medical record, he suggests that plaintiff's surgeries improved his condition and left him symptom free. AR 24-26 (citing AR 543, 551-52). However, there is evidence to the contrary. Even though Dr. Sauer and Dr. Normand reported that the anthroscopic and carpal tunnel surgeries alleviated some of plaintiff's symptoms, they noted that he continued to struggle with shoulder pain and limited reaching and range of motion. AR 543-44, 551. In addition, plaintiff testified that the surgeries did not resolve his pain and that his functioning remained limited. An administrative law judge "simply cannot recite only the evidence that is supportive of [his] ultimate conclusion without acknowledging and addressing the significant contrary evidence

in the record." Moore v. Colvin, 743 F.3d 1118, 1124 (7th Cir. 2014).

In addition, after declining to give Dr. Sauer's opinion controlling weight, the administrative law judge did not apply the factors enumerated in 20 C.F.R. § 404.1527(c), including "the length, nature, and extent of the treatment relationship; frequency of examination; the physician's specialty; the types of tests performed; and the consistency and support for the physician's opinion." Larson v. Astrue, 615 F.3d 744, 751 (7th Cir. 2010) (criticizing administrative law judge for saying "nothing regarding this required checklist of factors"). See also Bauer v. Astrue, 532 F.3d 606, 608 (7th Cir. 2008) (stating that when treating physician's opinion is not given controlling weight, "the checklist comes into play"). As plaintiff argues, several of the factors support the conclusion that Dr. Sauer's opinions should be given greater weight. Dr. Sauer was an orthopedic specialist who performed surgery on plaintiff's left shoulder and arm and treated plaintiff for more than a year, and his findings remained relatively consistent throughout the course of his treatment. Campbell v. Astrue, 627 F.3d 299, 308 (7th Cir. 2010) (reaching similar conclusion). Proper consideration of the regulatory factors may have caused the administrative law judge to accord greater weight to Dr. Sauer's opinion. Id.

In sum, the administrative law judge failed to build the requisite logical bridge from the evidence to his conclusion that Dr. Sauer's post-surgery opinions were not supported by the medical evidence. Young v. Barnhart, 362 F.3d 995, 1002 (7th Cir. 2004) (An administrative law judge must build "accurate and logical bridge from the evidence to his conclusion so that, as a reviewing court, we may assess the validity of the agency's ultimate findings and afford

a claimant meaningful judicial review."). Accordingly, I am remanding this case so the administrative law judge can consider all of the relevant medical evidence, review the regulatory factors applicable to treating physician opinions and fully explain his reasoning with respect to the weight that he gives Dr. Sauer's opinions.

2. Dr. Anderson

The administrative law judge found support for a finding of no disability in Dr. Anderson's opinion that plaintiff could not work until he underwent surgery, but he determined that the opinion had only limited value because it did not state any work-related limitations. Id. Defendant concedes that the administrative law judge failed to recognize Dr. Anderson's no lifting limitation but argues that the error is harmless because the restriction was temporary and applied only until plaintiff underwent surgery. McKinzey v. Astrue, 641 F.3d 884, 892 (7th Cir. 2011) ("[W]e will not remand a case to the ALJ for further speculation where we are convinced that the ALJ will reach the same result."). Even though I agree that the restriction seems to be limited pending the outcome of plaintiff's surgery, plaintiff never had the surgery, so presumably the restriction still applies. In addition, there is evidence in the record that plaintiff has not had the surgery because of an insurance dispute and because he needed to wait until the pain in his left shoulder improved. E.g., AR 551. The administrative law judge did not consider any of these issues in summarily rejecting Dr. Anderson's opinion. The administrative law judge also failed to consider how Dr. Anderson's opinion corresponds with plaintiff's full medical history and the subsequent opinions of Dr.

Sauer, who also found plaintiff limited in his ability to lift more than five pounds or resume his employment. Therefore, on remand, the administrative law judge should reconsider his assessment of Dr. Anderson's opinion in light of all of the evidence in the record and fully explain his reasons for the weight he attributes to her opinion.

B. Remaining Issues

Because remand is being ordered on the grounds set forth above, there is no need to address whether the administrative law judge committed reversible error in failing to consider a closed period of disability or finding plaintiff not entirely credible. However, a few points deserve mention.

First, plaintiff is correct that a claimant does not need to have a current disability to qualify for benefits, as long as he has an impairment that has lasted or can be expected to last for continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A); Calhoun v. Colvin, 959 F. Supp. 2d 1069, 1075 (N.D. Ill. 2013). Therefore, on remand, the administrative law judge should consider whether plaintiff was disabled for a period of at least 12 months between his alleged onset date and the date that he was last insured.

Second, the administrative law judge found that plaintiff's statements regarding the intensity, persistence and limiting effects of his symptoms were not fully credible given his erratic work history prior to his disability onset date and his ability to perform a "high level of daily activities," including using the microwave, shopping, vacuuming, maintaining personal hygiene, paying bills and handling bank accounts, texting, using the computer, and visiting

with friends and family. AR 27-28. Plaintiff raises a good point in arguing that none of these activities rises to a "high level" of activity. He also correctly points out that the administrative law judge erred in describing the extent of plaintiff's abilities. The administrative law judge did not cite any evidence contradicting plaintiff's testimony that he needed significant assistance with personal hygiene and that he was unable to shop or vacuum for any significant period of time. Therefore, on remand, the administrative law judge should take care to accurately describe plaintiff's daily activities and functional capabilities and not place too much weight on them. As the Court of Appeals for the Seventh Circuit has cautioned, "[t]he critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons . . . and is not held to a minimum standard of performance, as []he would be by an employer." Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) ("The failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases.").

ORDER

IT IS ORDERED that plaintiff Thomas Roybal's appeal, dkt. #3, is GRANTED and this case is REMANDED to defendant Commissioner of Social Security, pursuant to sentence

four of 42 U.S.C. § 405(g). The Clerk of Court is directed to enter judgment in favor of plaintiff.

Entered this 31st day of March, 2017.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge