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

RICHARD MELTON,

Plaintiff,

OPINION AND ORDER

v.

06-C-0427-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This is an appeal from an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Richard Melton, who suffers from a back impairment, challenges the commissioner's determination that he is not disabled and therefore ineligible for Disability Insurance Benefits under sections 216(i) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d). A vocational expert testifying at plaintiff's administrative hearing offered the opinion that, based upon his experience, a significant number of jobs existed in the state economy that plaintiff could perform in spite of his limitations. In this appeal, plaintiff alleges that the vocational expert's "experience" does not constitute substantial evidence to support the administrative law judge's decision. In addition, plaintiff alleges that the administrative law judge erred in rejecting the opinion of one of plaintiff's treating physicians, Dr. John Stark, and in finding that plaintiff's claim of total disability was not wholly credible. For the reasons explained below, I reject

plaintiff's arguments, deny his motion for summary judgment and affirm the commissioner's decision.

The following facts are drawn from the administrative record (AR):

FACTS

Plaintiff was 32 years old on the date of the administrative law judge's decision. He was in special education classes in school and fell one credit short of obtaining his high school diploma. He claims that he cannot read or write. He has past work experience as a tree trimmer.

On March 24, 2003, plaintiff injured his back at work when the skidder he was operating rolled over. His subsequent course of medical treatment was described in detail by the administrative law judge and requires little elaboration. (A copy of the administrative law judge's decision is attached to this opinion.) To summarize, plaintiff sought treatment from a number of health professionals, including Dr. Narins in April 2003 (AR 154, 161-62), Dr. Carlsen in May 2003(AR 147-49) and June 2003 (AR 145), Dr. Rieser in September 2003 (AR 204-08) and Dr. Lawson in October 2003 (AR 198-99). All of these doctors reported minimal findings and recommended conservative treatment such as medications, physical therapy and epidural injections. On October 16, 2003, Dr. Rieser completed a "Report of Workability" form on which he indicated that plaintiff could return to light duty with no frequent bending, lifting or twisting and should change position every

30 minutes. Plaintiff was also seen by Dr. Stephen Barron, who conducted an independent medical examination of plaintiff in connection with plaintiff's claim for worker's compensation. In a report dated December 2, 2003, Dr. Barron stated that plaintiff was capable of working without restrictions.

On November 4, 2003, plaintiff sought treatment from Dr. John Stark, an orthopedic surgeon. Dr. Stark reviewed plaintiff's April 2003 MRI scan and found that it showed dehydrated discs at L5-S1 and L2-L3 and narrowing of the neuroforamen on the left at L5-S1. On February 16, 2004, Dr. Stark operated on plaintiff's spine, performing a bilateral hemilaminotomy at L5-S1. Initially, Dr. Stark predicted that plaintiff would need two months to recover from the surgery. In April 2004, Dr. Stark indicated that plaintiff had not quite reached a healing plateau but that he was likely to be recovered fully in two months.

After the surgery, plaintiff sought treatment from Dr. Matthew Eckman, a physical rehabilitation specialist, for pain in his neck and upper back pain and to a lesser degree in his lower back. Dr. Eckman concluded that plaintiff had a post-operative lumbar strain and a cervical strain with disc hydration, as shown on an MRI. Dr. Eckman prescribed medication and referred plaintiff to physical therapy. At a visit with plaintiff on December 15, 2004, Dr. Eckman questioned plaintiff's motivation to regain employment and noted that plaintiff appeared to be exaggerating his symptoms. Dr. Eckman recommended that plaintiff see a qualified rehabilitation consultant and seek vocational rehabilitation. Dr.

Eckman stated that plaintiff could return to light work with the ability to change positions as needed.

In a letter dated August 1, 2005, Dr. Stark stated that he had recommended that plaintiff undergo a fusion of the lumbosacral level because of foraminal stenosis and instability. Reviewing this recommendation, Dr. Barron disagreed with Dr. Stark's opinion that further surgery was necessary or reasonable. In a supplement to his initial report, Dr. Barron explained that a recent MRI scan showed no evidence of nerve root compression and that plaintiff had demonstrated no objective findings during a recent physical examination.

Plaintiff applied for Disability Insurance Benefits on December 8, 2003. After the local disability determination service denied his claim initially and on reconsideration, plaintiff requested a hearing before an administrative law judge. A hearing was convened on November 29, 2005 before Administrative Law Judge Larry Meuwissen. Plaintiff appeared with his lawyer. Plaintiff testified that he had not had the fusion surgery recommended by Dr. Stark because he could not afford it. Plaintiff said that he didn't do much at home and tried to stay within the restrictions his doctors had given him. Plaintiff testified that he was taking medications prescribed by his physicians, including eight Vicodin tablets a day.

The administrative law judge called Robert Brezinski to testify as a vocational expert. Brezinski is a certified rehabilitation counselor with 20 years' experience providing vocational rehabilitation services to injured workers. Plaintiff raised no objections to Brezinski's qualifications.

The administrative law judge asked Brezinski whether there were jobs in the regional or national economy that could be performed by a person of plaintiff's age and education who was limited to light work; could not stand or walk more than six hours; could not sit more than five hours; could use his hands for repetitive simple grasping, fine manipulation and pushing and pulling; could occasionally bend, squat or climb; and who would need to change positions as needed between sitting and standing. Brezinski testified that such an individual could perform the jobs of bench assembly, of which there were 5,000 to 6,000 in Wisconsin; cashier, of which there were 2,000 to 3,000 jobs; and security guard, of which there were 3,000 to 4,000 jobs. Brezinski indicated that he had reduced the numbers of jobs from the total available in the state to account for plaintiff's need for a sit-or-stand option, noting that he had placed people in cashiering positions that allowed for either sitting or standing. In response to another question, he indicated that, with the exception of the assembly positions, the numbers of jobs would remain the same even if plaintiff was limited to lifting no more than 10 pounds. The assembly positions would be reduced to 2,000 to 3,000 jobs. Brezinski also testified that if the time the hypothetical individual could be on his feet was limited to no more than 2 hours a day total, the security guard positions would be reduced to 1,000 jobs.

The administrative law judge asked Brezinski whether his testimony concerning the jobs described was consistent with the *Dictionary of Occupational Titles*. He responded: "I---it is taking into consideration what I've already mentioned about--the jobs I've already

mentioned." AR 488. He said that his testimony concerning the impact of the sit-or-stand option was drawn from his own experience, adding that the *Dictionary* did not contain such information.

After the hearing, on February 16, 2006, Dr. Stark filled out a work abilities questionnaire on behalf of plaintiff. AR 427-30. Dr. Stark was of the opinion that plaintiff could not lift ten pounds, even on an occasional basis. In addition, Dr. Stark reported that plaintiff could stand or walk fewer than 2 hours in an 8-hour workday. Dr. Stark wrote "unsure" when asked about plaintiff's ability to sit, push or pull. Dr. Stark indicated that at plaintiff's last office visit in May 2005, plaintiff had had ongoing complaints of pain and tenderness and that Dr. Stark had recommended a fusion to help with the L5-S1 disc disease.

On April 14, 2006, the administrative law judge issued a decision applying the familiar five-step process for evaluating disability claims. 20 C.F.R. § 404.1520. After concluding that plaintiff had not engaged in substantial gainful activity after his alleged onset date (step one), that plaintiff had the severe impairment of degenerative disc disease status-post laminotomy (step two), and that plaintiff's impairment did not meet or equal the criteria of any impairment presumed to be disabling (step three), the administrative law judge assessed plaintiff's work-related limitations, also known as residual functional capacity, to determine whether plaintiff was capable of returning to his past work or to any other work existing in significant numbers in the regional economy. After reviewing both the medical

and nonmedical evidence, the administrative law judge concluded that plaintiff had the ability to perform work requiring him to lift 10 pounds frequently, stand or walk two of eight hours and sit six of eight hours, so long as plaintiff had the option to change position from sitting to standing every hour and to stand or move around briefly as needed. In reaching this conclusion, the administrative law judge rejected the opinion of plaintiff's orthopedic surgeon, Dr. John Stark, that plaintiff was limited to less than a sedentary level of work activity and the allegation of plaintiff that his pain and resulting limitations were so severe as to preclude him from competitive employment.

At step four, the administrative law judge found that plaintiff could not return to his past work as a tree trimmer. Relying on Brezinski's testimony, he concluded at step five that plaintiff could perform the jobs of assembler, cashier and security monitor and that a significant number of these jobs existed in Wisconsin. Finding that the expert's testimony was "persuasive and uncontradicted," he noted that Brezinski had explained that any discrepancies between his testimony and the *Dictionary of Occupational Titles* had been based upon his experience. AR 21.

The Appeals Council declined to review the administrative law judge's ruling, making the administrative law judge's decision the final decision of the commissioner for purposes of judicial review.

OPINION

A. Step Five Determination

To be entitled to disability insurance benefits under the Social Security Act, a claimant must establish that he is under a disability. The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). The initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, then the burden shifts to the commissioner to show that the claimant was able to perform other work in the national economy despite the severe impairment. Stevenson v. Chater, 105 F.3d 1151, 1154 (7th Cir. 1997); Brewer v. Chater, 103 F.3d 1384, 1391 (7th Cir. 1997). This shifting of the burden to the commissioner is not statutory, "but is a long-standing judicial gloss on the Social Security Act." Walker v. Bowen, 834 F.2d 635, 640 n. 3 (7th Cir. 1987).

Social Security Ruling 00-4p explains that in meeting his burden at step five, the commissioner can rely on information contained in the *Dictionary of Occupational Titles.* The *Dictionary*, published by the Department of Labor, gives detailed physical requirements for a variety of jobs. The Social Security Administration has taken "administrative notice" of the *Dictionary*. 20 C.F.R. § 404.1566(d)(1). Alternatively, the commissioner may rely on

information provided by a vocational expert. SSR 00-4p. However, an administrative law judge who takes testimony from a vocational expert about the requirements of a particular job must determine whether that testimony is consistent with the *Dictionary*. Prochaska v. Barnhart, 454 F.3d 731, 735 (7th Cir. 2006). The ruling states:

> When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:
>
> Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
>
> If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

SSR 00-4p.

The ruling explains that because the *Dictionary* "lists maximum requirements of occupations as generally performed, not the range of requirements of a particular job as it is performed in specific settings," a vocational expert may be able to provide more specific information about jobs than that provided by the *Dictionary*. Id. "Information about a particular job's requirement or about occupations not listed in the DOT may be available in other reliable publications, information obtained directly from employers, or from a [vocational expert's] experience in job placement or career counseling." Id. When there is a conflict between the vocational expert's testimony and the *Dictionary*, the administrative law judge is free to rely on the vocational expert's testimony so long as the administrative

law judge determines that "the explanation given by the [vocational expert] is reasonable and provide[] a basis for relying on [that] testimony rather than on the DOT information." Id.

Plaintiff concedes that the administrative law judge ascertained whether the vocational expert's testimony was consistent with the *Dictionary* and elicited an explanation for the conflict. He argues, however, that it was not reasonable for the administrative law judge to find that the vocational expert's "experience" was a sufficient basis to accept his testimony.

I disagree. As an initial matter, I reject plaintiff's suggestion that the standards promulgated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), for the admissibility of expert testimony apply to disability adjudications. In Daubert, the Court rejected the viability of the "general acceptance" test for determining the admissibility of scientific evidence and held that the Federal Rules of Evidence, including Fed. R. Evid. 702, provide the governing standards. Id. at 587. The Federal Rules of Evidence do not apply to disability adjudications. Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002).

In Donahue, the court explained that although an expert's testimony at a disability hearing is not subject to the demanding standards of Rule 702, the testimony still must be reliable in order to be "substantial." Id. Nonetheless, said the court, "an expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand." Id. As the court explained in Prochaska, 454 F.3d at 735, SSR 00-4p places the burden of making this inquiry on the administrative law judge. Plaintiff compares this case

to Prochaska, but the facts are inapposite. Unlike the situation in Prochaska, the administrative law judge in this case complied with his duty and asked the expert to explain his conclusions.

Plaintiff appears to be arguing that the expert's explanation in this case, namely, that his answers were based upon his experience placing individuals in various jobs, failed to provide a foundation adequate to establish that his testimony was reliable. I agree that the administrative law judge could have elicited more information from the vocational expert, for example, by asking him to provide specific examples of assembly or cashier positions allowing for a sit-stand option and to explain how he arrived at the number of those jobs existing in Wisconsin. Questions of this sort would go a long way toward developing a complete record and preventing challenges on appeal like plaintiff raises here. Nevertheless, nothing in SSR 00-4p or the court's opinion in Prochaska requires the administrative law judge to elicit a "detailed" explanation from the vocational expert; the explanation need only be "reasonable." As noted previously, SSR 00-4p provides that a vocational expert's experience in job placement can provide a sufficient reason for the administrative law judge to accept the vocational expert's testimony over the information in the *Dictionary*. Brezinski's explanation that his testimony was drawn from experience was backed up by his résumé, which shows that he has 20 years' experience providing rehabilitation services to injured workers. Brezinski's unchallenged qualifications, in conjunction with his explanation that his testimony regarding the availability of work available to someone with plaintiff's

limitations was based upon his experience, were sufficient to meet the commissioner's burden at step five of the sequential evaluation. If plaintiff wanted to explore in more detail the foundation for Brezinski's testimony, his lawyer could have cross-examined him on this point at the hearing. Having declined to do so, plaintiff is not in a good position to challenge the foundation for Brezinski's opinion.

B. Dr. Stark's Opinion

"[T]he weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). When, however, the record contains well-supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the regulation. Id. These factors include how often the treating physician has examined the claimant, whether the physician is a specialist in the condition claimed to be disabling, how consistent the physician's opinion is with the evidence as a whole, and other factors. 20 C.F.R. § 404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion. Id.

The administrative law judge explained that he was rejecting Dr. Stark's opinion because it was not well supported and was inconsistent with other substantial evidence in the record. He cited multiple reasons for this conclusion, including the absence of any record of a visit with plaintiff on May 2005, which Dr. Stark had indicated on the functional capacity form was the last date he had seen plaintiff; the inconsistency of Dr. Stark's conclusion with his previous prediction that plaintiff would be limited for only a few months after his February 2004 surgery; Dr. Stark's professed uncertainty regarding some of plaintiff's limitations and his apparent reliance on plaintiff's pain in reaching his conclusions; the absence of objective medical findings to support Dr. Stark's opinion; and the inconsistency between Dr. Stark's opinion and that of all of the other medical opinions, including those of Dr. Eckman, Dr. Barron and others.

Plaintiff does not dispute the accuracy of any of these findings. He argues only that Dr. Stark's opinion was entitled to special weight because he was the only doctor who determined that the April 2003 MRI showed that plaintiff "has some disc changes and wedging which may suggest a segmental lordotic type of posture when erect which would result in the foraminal stenosis." AR 264. Without citing any authority, plaintiff asserts that this "is a very rare stenosis condition of the back" and that Dr. Stark's opinion should have carried more weight because no other physician considered the condition.

Plaintiff's argument is unpersuasive. Several other physicians, including Dr. Reiser, a spine specialist, reviewed the same MRI and concluded that it showed only degenerative

disc disease that required only conservative management. Further, even if Dr. Stark might have seen something on the MRI that all the other doctors missed, the fact remains that the MRI study to which plaintiff refers was *prior* to his back surgery, which Dr. Stark performed, presumably, to correct the condition. Indeed, on April 13, 2004, two months after the surgery, Dr. Stark reviewed the MRI and noted that "[t]he previous suggested lateral recess and foraminal stensosis [sic] has been addressed at L5-S1." AR 255. The administrative law judge committed no error in determining that Dr. Stark's opinion was deserving of little weight.

C. Plaintiff's Credibility

Finally, I find no error with respect to the administrative law judge's determination that plaintiff was not wholly credible insofar as he alleged a total inability to work. Plaintiff argues that it was wrong for the administrative law judge to find fault with his failure to undergo the second surgery recommended by Dr. Stark without first asking plaintiff why he was not pursuing the treatment. This argument is unfounded. Both the administrative law judge and plaintiff's attorney questioned plaintiff on this issue at the hearing. AR 472, 479. Plaintiff stated that was unable to pay for the surgery, noting that neither his worker's compensation carrier nor the state would cover the cost. The administrative law judge mentioned this testimony specifically in his decision. (He added, however, that no evidence existed to show that plaintiff had sought other low- or no cost treatments.) Plaintiff simply

has no basis to argue either that the administrative law judge did not consider why plaintiff did not obtain the surgery or that he drew an adverse credibility inference from plaintiff's failure to have it.

None of plaintiff's other arguments convince me that the administrative law judge made an improper credibility determination. The administrative law judge wrote a thorough, cogent opinion in which he considered all of the factors relevant to credibility, including the objective medical evidence, plaintiff's daily activities, plaintiff's statements regarding his limitations, his treatment history and medical opinions. In addition, he implicitly considered plaintiff's use of medication when he noted that for part of the time period at issue, plaintiff had required only over-the-counter pain medication and that he had not reported any medication side effects. Because the administrative law judge supported his credibility determination with reasons that are not "patently wrong," Schmidt v. Barnhart, 395 F.3d 737, 746-47 (7th Cir. 2005), and were sufficiently specific to enable meaningful appellate review, Brindisi v. Barnhart, 315 F.3d 783, 787 (7th Cir. 2003), this court has no basis for not accepting it.

ORDER

IT IS ORDERED that plaintiff Richard Melton's motion for summary judgment is DENIED. The decision of the defendant, Michael J. Astrue, Commissioner of Social Security, denying plaintiff's application for Disability Insurance Benefits is AFFIRMED.

The clerk of court shall enter judgment for defendant and close this case.

Entered this 8th day of June, 2007.

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