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

DEBORAH L. FESSLER,

Plaintiff, OPINION AND ORDER

v. 07-C-100-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Deborah Fessler, who suffers from obesity, mild degenerative disc disease and a host of other musculoskeletal aches and pains, seeks reversal of the commissioner's decision that she is not disabled and therefore is ineligible for either Disability Insurance Benefits or Supplemental Security Income under Titles II and XVI of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d) and 1382c(a). At a hearing on plaintiff's claim for benefits, an administrative law judge posed a hypothetical to a vocational expert that included various limitations endorsed by plaintiff's treating physician, Dr. Reeser. The vocational expert responded that an individual of plaintiff's age and education with those limitations could perform sedentary, unskilled jobs that existed in substantial numbers in Wisconsin, including general office clerk jobs, security guard jobs and others. On the basis of that testimony, the administrative law

judge found that plaintiff was not disabled because she could make a vocational adjustment to a significant number of jobs existing in the national economy in spite of her impairments.

In this appeal, plaintiff contends that the administrative law judge's decision must be reversed and remanded for further proceedings because the vocational expert's testimony regarding the types of jobs plaintiff could perform is inconsistent with the requirements of those jobs as set forth in the *Dictionary of Occupational Titles*. In addition, she argues that more articulation is required to explain why the administrative law judge did not adopt additional limitations endorsed by Dr. Reeser on a "Lumbar Spine Questionnaire." I am rejecting these arguments and affirming the commissioner's decision. Although I agree that the administrative law judge failed to develop the record adequately with respect to the vocational evidence, that error was harmless. The vocational expert's testimony was consistent with the *Dictionary of Occupational Titles* for at least some of the jobs she identified in response to the hypothetical question. As for Dr. Reeser's answers to the Lumbar Spine Questionnaire, the administrative law judge's reasons for rejecting that evidence can be discerned from his decision and are supported by substantial evidence in the record.

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

FACTS

Plaintiff applied for disability insurance benefits and supplemental security income on July 9, 2002, alleging that she was disabled since May 17, 2002 because of a degenerative tail bone and arthritis. Medical records obtained by the Social Security Administration show that plaintiff has been seen by doctors for various musculoskeletal complaints involving the low back, knees, shoulders, feet, ankles, hips, hands and arms. Physical examinations have noted a multitude of subjective complaints but a scarcity of objective findings. Plaintiff is obese, standing 5' 2" tall and weighing approximately 240 pounds. She has been followed for her various problems primarily by Dr. Jonathan Reeser, a physical medicine specialist, who suggested that she might have fibromyalgia. Medical consultants for the state disability determination service reviewed plaintiff's records on July 23, 2002 and October 15, 2002 and found that plaintiff was capable of performing a full range of work at the light exertional level.

Central to the administrative law judge's decision were two reports by Dr. Donald Kelman, a consulting neurosurgeon who examined plaintiff in January and November 2002. After an extensive review of plaintiff's medical history and a thorough examination of plaintiff, Dr. Kelman could find no objective neurological findings to explain plaintiff's pain. He observed several things during his examinations that suggested that plaintiff's pain was "nonorganic" (*i.e.* behavioral) in nature. Those observations included plaintiff's unusual gait,

inconsistencies during plaintiff's presentation, the nonspecific nature of plaintiff's complaints and her tendency to "give way" during motor testing. AR 190-195, 234-239. Dr. Kelman also noted that when he told plaintiff at the first examination that he could find no objective findings to warrant surgery and that her most pressing problem was her excessive weight, plaintiff became quite angry. At that point, plaintiff "asked her companion for her socks and with some evident anger pulled on her own socks quite easily with no obvious discomfort with putting on either sock." AR 236-37. Dr. Kelman noted that this was a "major inconsistency" with plaintiff's behavior at the start of the evaluation, when plaintiff had asked her companion to take off her socks because plaintiff could not do so herself.

On February 10, 2003, Dr. Reeser completed a Return to Work/Physical Capability Form for plaintiff. AR 177. On the form, Dr. Reeser indicated that plaintiff was capable of performing full-time work at the sedentary level that allowed her to alternate between siting, standing and walking and that required no lifting from the floor, no squatting, little bending, and only occasional twisting, stair climbing, overhead work or work at the shoulder level. On a progress note accompanying the form, Dr. Reeser indicated that these limitations were based upon plaintiff's performance during functional capacity testing on January 30 and 31, 2003. AR 178.

On March 16, 2003, Dr. Reeser completed a Lumbar Spine Questionnaire at the request of plaintiff's lawyer. AR 241-248. On the form, Dr. Reeser answered "yes" when asked whether plaintiff would need periods of walking around during an eight-hour day, indicating that plaintiff should walk around for five minutes or less every 90 minutes. In addition, he indicated that plaintiff would need to take unscheduled rest breaks during an eight-hour day, although he could not predict how often this would occur.

After the local disability agency denied plaintiff's claim initially and on reconsideration, plaintiff exercised her right to a *de novo* hearing before the Social Security Administration. On May 20, 2004, an administrative law judge convened a hearing at which plaintiff and a vocational expert testified. Plaintiff was represented by a lawyer. After plaintiff testified, the administrative law judge asked the vocational expert whether there were any jobs that could be performed by an individual who was limited to lifting no more than 10 pounds, standing no more than 15 minutes at a time and no more than two hours total, sitting no more than 30 minutes at a time and six hours or more total, no squatting, rare bending, no more than occasional overhead work on the right and frequent overhead work on the left, no ladder climbing and occasional stair climbing. The vocational expert testified that such an individual could perform a number of unskilled, sedentary jobs that existed in Wisconsin, including security guard (933 jobs), bookkeeping, accounting or auditing clerk (1,482 jobs), interviewer (691 jobs), receptionist or information clerk (2,100

jobs) and general office clerk (1,213 jobs). The expert testified, however, that those jobs would be eliminated if the individual had to take unscheduled breaks approximately every 90 minutes. The administrative law judge did not ask the expert whether her testimony was consistent with job descriptions set forth in the *Dictionary of Occupational Titles* or to cite specific job numbers from the *Dictionary*.

On September 21, 2004, the administrative law judge issued a decision denying plaintiff's applications. Applying the familiar five-step sequential evaluation process for disability claims, 20 C.F.R. §§ 404.1520 and 416.920, the judge found that plaintiff had not engaged in substantial gainful activity since her alleged onset date (step one); had various severe impairments, including musculoskeletal aches and pains possibly suggestive of fibromyalgia or bursitis and mild degenerative disc disease at L5-S1 that were further aggravated by significant obesity (step two); did not have an impairment or combination impairments listed in or medically equal to an impairment listed in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (step three); was unable to perform her past relevant work as a packer, nurse's aide or bus driver (step four); but that plaintiff was nonetheless capable of performing a significant number of jobs in the economy including security monitor, bookkeeper/record clerk, interviewer, and information and general office positions (step five). In reaching his conclusion, the administrative law judge relied on the testimony of the

vocational expert in response to the administrative law judge's hypothetical. The administrative law judge explained that

> [i]n formulating that hypothetical question the undersigned utilized restrictions which had been offered by Dr. Reeser following the formal functional capacity evaluation which had been undertaken in early 2003, Dr. Reeser having been rather sympathetic to claimant yet conceding a capacity for a wide range of sedentary activities. The undersigned gives particular weight to Dr. Reeser whose figures if anything would represent an underestimate of claimant's actual capacity.

AR 23.

The administrative law judge found that in light of plaintiff's obesity, degenerative disc disease and limited tolerance for prolonged weight bearing, the state agency physicians had been "overoptimistic" when they concluded that plaintiff could perform the full range of light work. AR 22. At the same time, however, he found that plaintiff's "complaints of pain and limitations are clearly out of proportion to the medical findings and there is some degree of exaggeration." Id. As evidence, the administrative law judge cited the medical reports from Dr. Kelman, who had noted multiple instances of non-organic findings and functional overlay during his two examinations of plaintiff. The administrative law judge also relied upon the inconsistency between plaintiff's testimony that she could not sit for more than 20 minutes and her ability to sit through the 50-minute hearing with any observable pain behavior, plaintiff's having stopped her last job as a bus driver because the school season ended and not because of any medical condition, plaintiff's having applied for

unemployment compensation benefits during her alleged period of disability and the lack of objective clinical evidence consistent with the degree of pain and limitation reported by plaintiff. AR 23.

The administrative law judge's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

OPINION

A. Standard of Review

Unless the commissioner has committed an error of law, his determination that plaintiff was not disabled for purposes of receiving Social Security benefits is conclusive if supported by substantial evidence. 42 U.S.C. § 405(g); Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). In rendering his decision, an administrative law judge "must articulate, at some minimum level, his analysis of the evidence to allow the appellate court to trace the path of his reasoning." Diaz v. Chater, 55 F. 3d 300, 308 (7th Cir. 1995). The administrative law judge "need not provide a complete written evaluation of every piece of testimony and evidence," although a failure to consider "an entire line of evidence" falls below the minimal level of articulation required. Id.

B. 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.

In this case, the administrative law judge failed to comply with his duty under SSR 00-4p to ask the vocational expert whether her testimony was consistent with the *Dictionary of Occupational Titles*, and if so, to obtain an explanation for any such conflict. The commissioner argues that that error was harmless because there was no conflict with respect to the requirements of the security guard and general office clerk jobs identified by the vocational expert. (The commissioner appears to concede that the vocational expert's testimony was inconsistent with the *Dictionary of Occupational Titles* with respect to the requirements of the interviewer, bookkeeping and receptionist jobs.) According to the

commissioner, the *Dictionary* identifies a subset of sedentary jobs under the broad job categories of security guard and general office clerk, namely "Surveillance-System Monitor," No. 379.367-010; "Clerk-Typist (clerical)," No. 203.362-010; and "Appointment Clerk (clerical)," No. 237.367-010, and it was these jobs to which the vocational expert was referring.

The office clerk positions cited by the commissioner in his brief must be disregarded because they are semiskilled, whereas the administrative law judge found that plaintiff could perform only unskilled work. AR 24 (finding that plaintiff had no work skills that were transferable to skilled or semiskilled work); SSR 00-4p (providing that unskilled work corresponds to an SVP of 1-2). This leaves solely the job of surveillance-system monitor, which is classified in the *Dictionary of Occupational Titles* as a sedentary, unskilled job. Plaintiff does not deny that the requirements of this job fit the parameters of the administrative law judge's hypothetical or that this one job alone would be enough to meet the commissioner's burden at step five. She contends, however, that absent clarification of the vocational expert's testimony, there is no way of knowing whether this is the "security guard" job to which she was referring.

Admittedly, the administrative law judge's failure to perform the SSR 00-4p inquiry made for a sloppy record in this case. Nonetheless, the vocational expert testified that she was identifying security guard jobs that were unskilled and sedentary. AR 455. Because the

Dictionary of Occupational Titles contains a job falling within the security guard category that is unskilled and requires only a sedentary exertional level, the vocational expert's testimony was not entirely inconsistent with the *Dictionary*. (For what it's worth, my own independent research has also discovered unskilled, sedentary jobs that arguably fall under the broad category of "general office clerk," including "Charge-Account Clerk," No. 205,367-014; "Election Clerk," No. 205.367-030; "Addresser," No. 209.587-101; and "Call-Out Operator," No. 237.367-014.) It follows that in the absence of a conflict, the administrative law judge's error in failing to ask the vocational expert about possible conflicts between her testimony and the *Dictionary of Occupational Titles* was harmless. Renfrow v. Astrue, 2007 WL 2296409 (8th Cir. Aug. 13, 2007) (where no conflict between vocational expert's testimony and *Dictionary*, administrative law judge's failure to perform SSR 00-4p inquiry was harmless); Massachi v. Astrue, 486 F.3d 1149, 1154 n.19 (9th Cir. 2007) (noting in dicta that failure to comply with SSR 00-4p could be harmless if there was no conflict between vocational expert's testimony and *Dictionary*); cf. Prochaska, 454 F.3d at 736 (error not harmless where it was unclear from record whether expert's testimony was inconsistent with the *Dictionary*).

C. Dr. Reeser's Opinion

Plaintiff argues that the administrative law judge failed to address Dr. Reeser's opinion, as expressed in his March 2003 responses to the Lumbar Spine Questionnaire, that plaintiff would need a break every 90 minutes to walk around for five minutes and would sometimes need other unscheduled rest breaks. As plaintiff points out, the administrative law judge noted that the vocational expert testified that breaks every 90 minutes beyond the typical break periods would preclude competitive employment. Plaintiff argues that because the administrative law judge did not explain why he rejected the unscheduled break limitation but adopted nearly all the others identified by Dr. Reeser, his decision eludes meaningful review. Further, argues plaintiff, to the extent that the administrative law judge's rationale can be inferred, it lacks substantial support in the evidence.

The commissioner concedes that the administrative law judge did not discuss the unscheduled break limitation endorsed by Dr. Reeser on the Lumbar Spine Questionnaire. He contends that it was unnecessary for the administrative law judge to address this evidence because "it is clear that Dr. Reeser did not think [plaintiff] was disabled." Mem. in Supp. of Comm.'s Decision, Dkt. #15, at 3. As proof, the commissioner points to the "Return to Work/Physical Capability Form" completed by Dr. Reeser in February 2003, on which he indicated that plaintiff could perform sedentary work with a sit or stand option. As plaintiff points out, however, Dr. Reeser was not offering an opinion on that form whether or not

plaintiff was disabled but was merely documenting her various work restrictions. Indeed, Dr. Reeser noted on February 20, 2003 that "it would be extremely difficult for [plaintiff] to find any level of gainful employment which might be able to accommodate these restrictions." AR 178. If Dr. Reeser's prediction were true, then plaintiff might have been disabled under the Social Security Act. I find nothing in Dr. Reeser's notes to support the commissioner's contention that Dr. Reeser offered an "unequivocal" opinion that plaintiff was capable of performing substantial gainful activity.

The commissioner's arguments aside, I am nonetheless satisfied that the administrative law judge sufficiently built a bridge between the evidence and his conclusion. He mentioned the Lumbar Spine Questionnaire in his decision, so it is plain that he considered it. As for the unscheduled break limitation, the administrative law judge could reasonably discount that limitation insofar as Dr. Reeser did not include it on the return to work form that he had completed just a month earlier.

Further, the administrative law judge explained that in adopting the limitations articulated by Dr. Reeser in February 2003, he was being "more than generous" and giving plaintiff the benefit of considerable doubt with respect to her abilities. Noting that Dr. Reeser had been sympathetic to plaintiff, the administrative law judge explained that Dr. Reeser's "figures if anything would represent an underestimate of claimant's actual capacity." AR 23. The administrative law judge also explained that various pieces of evidence in the

record suggested that plaintiff was not as disabled as she claimed to be, including Dr. Kelman's observations of plaintiff during his two examinations. When the decision is read as a whole, the administrative law judge's rationale is clear: although he was willing to give plaintiff the benefit of the doubt and find that she had severe restrictions, more severe restrictions were not substantiated by the evidence. Because the administrative law judge's reasoning is discernible, more articulation is not necessary.

Plaintiff argues that there is no substantial evidence to support the administrative law judge's conclusion that plaintiff would not require periodic, unscheduled breaks during an eight-hour workday. In spite of its passion and length, plaintiff's argument merits little discussion. She argues in part that the administrative law judge ought to have disregarded Dr. Kelman's reports because Dr. Kelman was not evaluating plaintiff's fibromyalgia. This argument makes little sense. No matter what the purpose of Dr. Kelman's examinations, the salient facts are his observations during those examinations, including plaintiff's give-away weakness, complaints of sensory deficits not corresponding to any dermatomal pattern, unusual gait and inconsistent behavior while in the examining room, all of which support the administrative law judge's conclusion that plaintiff was going out of her way to appear disabled. The fact that fibromyalgia's symptoms are primarily subjective did not preclude the administrative law judge from finding that plaintiff was exaggerating her symptoms or require him to adopt Dr. Reeser's limitations *in toto*.

Further, to the extent that plaintiff accuses the administrative law judge of rejecting her complaints merely because they were not supported by the objective medical evidence, that accusation is false. The lack of objective evidence was only one of several factors upon which the administrative law judge relied in rejecting plaintiff's allegation that she was disabled. In addition to the compelling evidence found in Dr. Kelman's reports, the administrative law judge noted that plaintiff's testimony that she could not sit without pain for more than 20 minutes was inconsistent with his own observation that plaintiff was able to sit comfortably throughout the 50-minute administrative hearing. He also pointed to evidence indicating that plaintiff had not stopped work for any medical reason and that she had applied for unemployment compensation during the time period that she claimed she was incapable of performing any work. Contrary to plaintiff's arguments, these were valid reasons to question the credibility of plaintiff's claim that she was disabled. Schmidt v. Barnhart, 395 F.3d 737, 746 (7th Cir. 2005) (administrative law judge could consider claimant's application for unemployment compensation as one of several factors adversely impacting credibility); Powers v. Apfel, 207 F.3d 431, 436 (7th Cir. 2000) (hearing officer could rely in part on observations of claimant's demeanor, behavior and attitude at hearing in gauging whether they were consistent with "general bearing of someone who is experiencing severe pain").

In sum, the administrative law judge's decision is sufficiently clear to allow the court to track his reasoning and be assured that he considered the important evidence. Further, because substantial evidence supports the administrative law judge's conclusion that plaintiff did not have limitations beyond those endorsed by Dr. Reeser in February 2003, he did not err in failing to include additional limitations in his residual functional capacity assessment.

ORDER

IT IS ORDERED that the decision of defendant Michael Astrue, Commissioner of Social Security, denying plaintiff Deborah Fessler's applications for disability insurance benefits and supplemental security income is AFFIRMED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 21st day of September, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge