

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

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LIZETTE PEREZ-RUIZ,

Plaintiff,

v.

MICHAEL ASTRUE,  
Commissioner of Social Security,

Defendant.  
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OPINION AND ORDER

10-cv-323-bbc

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 Lizette Peres-Ruiz seeks reversal of the commissioner's decision that she is not disabled and therefore is not eligible for Supplemental Security Income under Title II and Title XVI of the Social Security Act, codified at 42 U.S.C. §§ 416(I) and 423(d) and 1382(c)(3)(A). Plaintiff contends that the administrative law judge erred in finding that she was not disabled because she was capable of performing her past relevant work. Plaintiff takes issue with the administrative law judge's reliance on testimony of a vocational expert to the effect that plaintiff is capable of performing the duties of her job as a store manager as those duties are usually performed in

the national economy. The vocational expert acknowledged that the heavy lifting tasks that were part of plaintiff's previous job would not longer be possible for plaintiff to perform, but that the managerial duties would be.

Plaintiff maintains that the vocational expert erred in reaching this conclusion and that he should have analyzed her previous job as a composite, that is, one that combines aspects of two separate job listings. I find that the administrative law judge made the correct decision when she found from the vocational expert's testimony and the evidence in the record that plaintiff could perform her past work as a store manager as that job is generally performed. She did not need to consider the allegedly composite nature of the previous job. Therefore, I am denying plaintiff's motion for summary judgment and affirming the administrative law judge's decision.

The following facts are drawn from the administrative record (AR). The parties agree that no facts are in dispute and dispute only the administrative law judge's decision to accept the testimony of the vocational expert on plaintiff's ability to perform the functions of a store manager as that job is generally performed in the national economy. Therefore, the facts are limited to those relevant to that issue.

## FACTS

### A. Background

Plaintiff was born on April 22, 1949. AR 10. She has a high school education and past relevant work as a manager of a retail establishment. AR 11, 24. Her last insured date was December 31, 2005.

Plaintiff filed an application for disability insurance benefits and supplemental security income on November 29, 2006, alleging that she had been unable to work since February 1, 2005 because of a herniated disc in her upper back. AR 48, 89-96, 112. After the local disability agency denied plaintiff's application initially and upon reconsideration, a hearing was held at plaintiff's request on March 9, 2009 before Administrative Law Judge Sharon L. Turner. The administrative law judge heard testimony from plaintiff, AR 10-24, a medical expert, AR 24-30, and a neutral vocational expert, AR 30-36. On July 2, 2009, the administrative law judge issued her decision, finding plaintiff not disabled. AR 48-55. This decision became the final decision of the commissioner on April 16, 2010, when the Appeals Council denied plaintiff's request for review. AR 1-6.

### B. Hearing Testimony

At the hearing, plaintiff testified that she had worked as a manager at Clam Man Seafood, a fish market in Southampton [presumably, Southampton, New York]. She

testified that her job required her to lift 100 pounds of clams, whole tuna, swordfish and halibut, clean and fillet fish and shuck clams, oysters and scallops. AR 22. She performed managerial duties, including opening, closing and overseeing personnel and she did some cooking. AR 33.

The administrative law judge called Joseph Torres to testify as a neutral vocational expert. AR 21. Torres testified that plaintiff's past relevant work was as a manager for a retail establishment and that The Dictionary of Occupational Titles classifies the job as light work (DOT # 185.167-046), which would be within plaintiff's capabilities. He noted that plaintiff had testified that she performed the job at a very heavy exertional level. AR 35.

The Dictionary describes the job as follows:

Manages retail store engaged in selling specific line of merchandise, such as groceries, meat, liquor, apparel, jewelry, or furniture; related lines of merchandise, such as radios, televisions, or household appliances; or general line of merchandise, performing following duties personally or supervising employees performing duties: Plans and prepares work schedules and assigns employees to specific duties. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepares, or directs workers preparing, merchandise displays and advertising copy. Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records, or preparing daily record of transactions for ACCOUNTANT (profess & kin.) 160.162-018, or performs work of subordinates, as needed. Orders merchandise or prepares requisitions to replenish merchandise on hand. Ensures compliance of employees with established security, sales, and record keeping procedures and practices. May answer customer's complaints or inquiries. May lock and secure store. May interview, hire, and train employees. May be designated according to specific

line of merchandise sold, such as women's apparel or furniture; related lines of merchandise, such as camera and photographic supplies, or gifts, novelties, and souvenirs; type of business, such as mail order establishment or auto supply house; or general line of merchandise, such as sporting goods, drugs and sundries, or variety store.

The administrative law judge asked Torres to assume an individual of plaintiff's age, education level and work experience of the plaintiff, having the ability to perform light work provided that she is allowed to change position briefly every hour for one to three minutes with only occasional climbing balancing, stooping, kneeling, crouching, crawling, work above shoulder level with either upper extremity, no exposure to dangerous moving machinery, no concentrated exposure to dust, fumes, gases, vapors or sudden severe temperature changes and no supervision of the safety operations of others. AR 35. Torres testified that plaintiff could perform the job as a manager of a retail store as classified in the Dictionary of Occupational Titles, but not as plaintiff had testified that she actually performed it in her job at the Clam Man. AR 36. In response to a question from the administrative law judge, Torres confirmed that his testimony was consistent with the information found in the Dictionary of Occupational Titles and its companion publication, Selective Characteristics of Occupations Defined in the Revised DOT. AR 37.

### C. Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge

performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. At step one, she found that plaintiff had not engaged in substantial gainful activity since February 1, 2005, the alleged onset date of her disability, that plaintiff had severe impairments, but that she did not have an impairment or combination of impairments that met or was the medically equivalent of any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 51.

Before reaching step four, the administrative law judge found that plaintiff retained the residual functional capacity to perform light work provided that she was allowed to change position briefly every hour for one to three minutes with only occasional climbing balancing, stooping, kneeling, crouching, crawling, work above shoulder level with either upper extremity, no exposure to dangerous moving machinery, no concentrated exposure to dust, fumes, gases, vapors and no sudden severe temperature changes and was not in charge of the safety operations of others. AR 51. Plaintiff does not challenge these findings.

In making her residual functional capacity assessment of plaintiff, the administrative law judge considered the medical evidence in the record together with the testimony of the medical expert, Dr. Nafosi. She also considered plaintiff's daily activities.

At step four, the administrative law judge found that plaintiff was capable of performing her past work as a manager of a retail establishment. In doing so, she relied on the vocational expert's testimony that plaintiff had relevant past work experience as a retail

manager (DOT #185.167-046), which is classified as skilled light level work activity. She noted that plaintiff had performed the job at the heavy level of work activity. The administrative law judge stated that when she compared plaintiff's residual functional capacity to the physical and mental demands of the work of a retail manager, she found that plaintiff is able to perform her past work as a retail manager as it is generally performed. From this, the administrative law judge found that plaintiff was not disabled.

Plaintiff challenges only the correctness of the administrative law judge's findings that plaintiff could perform her past work and was therefore not disabled. Accordingly, I need address only this issue.

## OPINION

### A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). 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).

### B. Past Relevant Work

“To determine whether a claimant can perform his past relevant work, an administrative law judge must compare the demands of the claimant’s past occupation with his or her present capacity.” Steward v. Bowen, 858 F.2d 1295, 1299-1300 (7th Cir. 1988); Social Security Ruling 82-62 (administrative law judge must obtain sufficient information about skill level, exertional demands and nonexertional demands of claimant’s past work to permit decision as to whether claimant can return to that work). In making this comparison, the adjudicator need not consider only the functional demands and duties of the job as the claimant actually performed it, but may consider the functional demands of the job as generally required by employers in the national economy. Smith v. Barnhart, 388 F.3d 251, 253 (7th Cir. 2004); Steward, 858 F.2d at 1301. Under Social Security Ruling 82-61(2), a claimant who retains the residual functional capacity to perform the functional demands and job duties of a particular past relevant job as she actually performed it, the claimant should be found "not disabled." Alternatively, under § (3) of 82-61, a claimant who retains the capacity to perform the functional demands and job duties generally required in such jobs should be found to be “not disabled.” A claimant may be unable to perform “the excessive functional demands or job duties actually required in the former job but will be considered ‘not disabled’ if she can perform the functional demands and job duties as generally required by employers throughout the economy.”



Relying on a specific listing in the Dictionary of Occupational Titles, the administrative law judge found that plaintiff fell into the third category set out in Ruling 82-61. Plaintiff could perform the functional demands and job duties as required by employers throughout the economy of the retail manager job (DOT # 185.167-046), even though plaintiff would be unable to perform the job at a heavier exertional level, as she had performed it previously. The administrative law judge's finding was based on the testimony of the vocational expert who had heard plaintiff's testimony concerning the duties of her past job.

Disagreeing with this finding, plaintiff contends that her past works fits more closely into the job listing in the Dictionary of Manager of Food Service (DOT # 187.167-106) because the Clam Man was a restaurant. This may be true, but it does not help plaintiff because there is no relevant distinction between these two jobs. Both are listed in the Dictionary as light skilled jobs. Because plaintiff is capable of performing either job if it does not involve the "excessive" exertional demands of her former managerial job, she is not disabled.

Plaintiff contends that the administrative law judge should have considered her past relevant work at Clam Man as a composite job, because her work there actually encompassed two job listings in the Dictionary: a retail manager and a meat cutter. To the extent that the work included meat cutting, the job would have been classified as heavy work.

Social Security Ruling 82-61 sets out “Further Information”:

There may be cases involving significant variations between a claimant's description and the description shown in the DOT. In some instances, an apparent variation may result from an incomplete or inaccurate description of past work. Employer contact or further contact with the claimant, may be necessary to resolve such a conflict. Also composite jobs have significant elements of two or more occupations and, as such, have no counterpart in the DOT. Such situations will be evaluated according to the particular facts of each individual case. For those instances where available documentation and vocational resource material are not sufficient to determine how a particular job is usually performed, it may be necessary to utilize the services of a vocational specialist or vocational expert.

As the commissioner points out, the administrative law judge did not simply consult the Dictionary to decide how to classify plaintiff's former work, but called on a vocational expert to testify on the subject. After hearing plaintiff's testimony about the job that plaintiff had performed at Clam Man, the expert classified it as a manager of a retail store. Also, he testified that plaintiff had performed the job at a heavy exertional level.

It is difficult to see how this “composite job” argument advances plaintiff's claim. It is undisputed that her former job included heavy exertional work that she is no longer capable of performing. However, it does not follow that the job is a “composite” that has no counterpart in the Dictionary. Social Security Ruling 82-61 assumes that when past relevant work may have aspects of light work and heavy work, a vocational expert may be needed to separate the heavy exertional aspects of the former job from the other aspects that require only the capacity to do light work. Although plaintiff made no argument at the hearing that

her past job was a composite job in fact, the administrative law judge anticipated such an argument when she called upon a vocational expert to do exactly what the ruling contemplates.

After reviewing the evidence in the record, including the testimony of plaintiff and the vocational expert together with the administrative law judge's decision, I conclude that the lifting, fish filleting and cooking duties that plaintiff performed in her past job were excessive functional demands of the job as she had previously performed it. The vocational expert provided the necessary evidence that these functions could be separated from the duties of a retail manager as that job is generally performed in the national economy and that plaintiff was capable of performing the light work functions. Accordingly, I find that the administrative law judge properly found that plaintiff could perform her past work as a retail manager as that job is generally performed.

#### ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, is AFFIRMED and plaintiff Lizette Perez-Ruiz's appeal is DISMISSED. The

clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 27th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge