

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

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SCOTT ALBERT MERK,

OPINION AND ORDER

Plaintiff,

10-cv-437-bbc

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.  
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This case concerns an application filed by Scott Albert Merk for Disability Insurance Benefits and Supplemental Security Income on October 12, 2006, alleging disability beginning December 1, 2005 caused by degenerative disc disease, lumbar spine impairment, severe back pain, multiple joint arthritis, left knee impairment and right knee impairment. After a hearing on December 10, 2008, administrative law judge Lauren R. Mathon found plaintiff not disabled. This decision became the final decision of the Commissioner when the Appeals Council denied review on June 11, 2010.

On appeal, plaintiff contends that the administrative law judge committed three errors: 1) she did not reasonably weigh plaintiff's treating physician's opinion; 2) she

assessed plaintiff's credibility improperly; and (3) she erred in relying on the Medical-Vocational Guidelines to find that plaintiff could perform a significant number of jobs in the national economy. I conclude that the administrative law judge gave good reasons for discounting the opinion of plaintiff's treating physician, properly assessed plaintiff's credibility and properly applied the Medical-Vocational Guidelines to find him not disabled. For these reasons, 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):

## FACTS

### A. Medical Evidence

#### 1. Before onset date

In June 2001, plaintiff began seeing family practitioner, Dr. Blair Goodsell, for back pain. AR 306. An October 18, 2001 magnetic resonance imaging scan showed that plaintiff had degenerative discs at L3, L4 and L6, small to moderate right paracentral disc protrusion at L5-S1, smaller partially calcified posterior disc protrusion centrally at L4-5 and a minimal annular bulge at L3-4. AR 316. Dr. Goodsell saw plaintiff regularly for ongoing complaints of back pain. AR 298-303. On August 12, 2002, plaintiff told Goodsell that he was also having knee pain. Goodsell prescribed Oxycontin and Vicodin. AR 296.

In October 2003, plaintiff exacerbated his back pain when he bent down to pick up something. AR 276. A November 2003 magnetic resonance imaging scan showed degenerative discs at L3 through S1 with bulging discs and annular calcification. Examination revealed positive straight leg raising, very lethargic spinal motion and walking “like he has a board up his back.” AR 274.

In May 2005, plaintiff had a magnetic resonance imaging scan of his left knee, which showed a small partial tear of the body of the medial meniscus, patchy edema in the proximal tibia representing a possible bone contusion and tiny joint effusion. AR 231. On October 20, 2005, plaintiff reported that his pain was fairly well controlled on his medications, but without his medications, he rated the pain as a 10 on a 10-point pain scale. Plaintiff stated that he did not want any surgical procedures for his disc problems. AR 225.

## 2. After alleged onset date

On December 8, 2005, plaintiff complained of chronic low back pain and sciatica down the left leg that was constant and getting worse even on the medication. Goodsell’s examination indicated that plaintiff had a very painful range of motion in the lower back, with pain radiating down the left leg. Goodsell prescribed Klonopin, Oxycontin, Oxycodone and Lyrica. AR224.

In January 2006, plaintiff reported difficulty with his knees and continued chronic

low back pain. AR 223. In March, he complained of low back pain, as well as joint pain in his shoulders, hands and knees. Dr. Goodsell's examination revealed medial meniscus tenderness in plaintiff's left knee, painful range of motion in his lower back and painful range of motion in the shoulders. Plaintiff continued to take Oxycontin. AR 222.

In May 2006, plaintiff reported increasing back pain, even when he was taking his medications and told Goodsell that he had to rest a lot. Goodsell noted that plaintiff had painful range of motion and positive straight leg raising. Goodsell prescribed Skelaxin and stated that plaintiff was unable to work. AR 221. In a note dated May 31, 2006, Goodsell wrote that plaintiff "was disabled and will be unable to work for at least one year." AR 235.

In September 2006, plaintiff complained of ongoing pain in his back and joint pain in his shoulders, elbows, wrists, hips, knees and ankles. He also reported ongoing left knee pain from the meniscus injury. Goodsell noted that plaintiff had a normal gait, negative straight leg raising on the left and good range of motion, although painful. Goodsell recommended that plaintiff see a neurosurgeon and an orthopedist. Also, he noted that plaintiff's medications seemed to control his pain and that plaintiff ambulated in and out of the office without difficulty. AR 219.

In November 2006, plaintiff reported ongoing back pain with some improvement on Lyrica. Goodsell noted that plaintiff had good but painful range of motion and pain in the low back that mostly did not radiate. Plaintiff wore a splint on his left knee. AR 472. No

significant changes were noted by Goodsell at plaintiff's subsequent visits in January 2007 (AR 463) or March 2007 (AR 516).

In June 2007, Dr. Goodsell completed a Multiple Impairment Questionnaire about plaintiff. AR 520-27. He diagnosed degenerative disc disease of the lumbar spine and gave a prognosis of fair. He cited clinical and diagnostic findings of chronic severe pain and magnetic resonance imaging findings of degenerative disc disease at L3-4, L4-5 and L5-S1. Goodsell wrote that plaintiff was able to sit less than one hour, stand or walk less than one hour total and needed to get up and move around every 30 minutes when sitting and not sit again for 10 to 15 minutes. Goodsell stated that plaintiff could occasionally lift and carry up to 10 pounds but never more. He found that plaintiff had significant limitations performing repetitive reaching, handling, fingering and lifting, needed to avoid heights and could not push, pull, kneel, bend or stoop. Also, Goodsell concluded that plaintiff's pain, fatigue and other symptoms were frequently severe enough to interfere with his attention and concentration and that he would be absent from work on the average more than three times a month as a result of his impairments or for treatment.

A June 2007 magnetic resonance imaging scan of plaintiff's low back showed mild degenerative disc disease and a mild central disc bulge at the L3-4 level, mild facet and spinal stenosis and mild degenerative disc disease and facet degenerative changes at the L4-5 level, with no significant spinal stenosis or herniated disc. AR 502-03. A July 12, 2007 x-ray of

plaintiff's right knee was normal. AR 339. In July 2007, Goodsell noted that morphine controlled plaintiff's pain and helped him function. He also noted that plaintiff's pain was "way out of proportion to what you see on the MRI." AR 501.

In September 2007, plaintiff complained of back pain that radiated down the left and right leg. Although Goodsell noted that plaintiff's pain was fairly well controlled, he thought that plaintiff was unable to work. AR 590. A September magnetic resonance imaging scan of plaintiff's low back showed disc degeneration and facet joint degenerative changes with mild to moderate canal stenosis and mild right foraminal narrowing at L4-5. AR 576.

In October 2007, plaintiff reported pain in both knees and his lower back. Goodsell noted that plaintiff walked with a cane and had a foot drop on the left. (AR 581). Later in October, Goodsell noted that plaintiff's range of motion was limited and he walked as if he had a board or rod in his spine. AR 580. In December 2007, plaintiff told Goodsell that he had seen a neurosurgeon who did not think plaintiff was a surgical candidate. Goodsell noted decreased knee and ankle jerk on the left, mild foot drop on the left, painful and decreased range of motion and pain in the low back that radiated down both legs. AR 570. Throughout 2008, plaintiff's condition did not change and his medications continued to control his pain. AR 563, 566, 650, 656 and 661.

#### B. Other Evidence

On November 2, 2006, plaintiff's wife Brenda Merk, completed a function report for plaintiff. She stated that she had to help him out of bed and with dressing and bathing. She stated that plaintiff could not lift, bend, crouch, carry or walk for any period of time. AR 152-153.

In the function report that plaintiff submitted in support of his application for social security benefits, he stated that he could not stand or sit erect for any length of time without pain, numbness, tingling in his extremities and some loss of motor function. Also, he stated that he had difficulty dressing and bathing. AR 160-61.

### C. Plaintiff's Testimony

At the hearing, plaintiff testified that he was born on June 2, 1966, making him 39 at the alleged onset of his disability and 43 at the time of his hearing. He had attended two and a half years of college. AR 44-45. He stopped working in October 2005 because of pain in his back. AR 22-23. He testified that on average his pain was a five but on bad days it was a ten, on a scale of one to 10, with 10 being the worst. AR 24. Plaintiff said he had not had surgery on his back because he was deathly afraid of it. AR 25. He said that his pain is better controlled than it was in 2005, AR 26, and that the pain medication he took made him sleepy and affected his concentration. AR 27.

Plaintiff testified that he had partial tears in the meniscus in both knees that caused

him pain. AR 28, 31. Also, he had pain in his right shoulder and both wrists. AR 32.

As to his limitations, plaintiff testified that he could sit only 10 to 15 minutes at a time, could walk 20 to 25 yards and could lift 15 pounds once in a while. AR 36-38. He could not bend, kneel, crouch or lift anything over his head with his right arm. AR 39-40.

Plaintiff testified that he had moved to Tucson, but that he still went to a doctor an hour away in Sierra Vista because his family lives there. AR 45. He testified that he drove two to three times a week. AR. 47. Also, he testified that he used the computer 10-20 minutes at a time, three to four times a week. AR 57.

Plaintiff testified that he saw Dr. Goodsell, but that he had also seen Dr. Bushbaum, a neurosurgeon, who had recommended that he have an electromyogram. Plaintiff declined to have this test. AR 50-52.

#### D. The 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. At step one, she found that plaintiff had not engaged in substantial gainful activity since December 1, 2005, the alleged onset date. AR 12. At step two, she found that plaintiff had severe impairments of back pain secondary to degenerative disc disease and knee pain secondary to degenerative joint disease. AR 12. At step three, she found that plaintiff did not have an impairment or



combination of impairments that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 13.

Once she had concluded that plaintiff's impairments were not severe enough to establish that he was presumptively disabled under the regulations, the administrative law judge proceeded to assess plaintiff's work-related limitations to determine whether there was work in the economy that he could perform in spite of his impairments. She found that plaintiff retained the residual functional capacity to perform sedentary work with the ability to understand, remember and carry out both detailed but uncomplicated instructions as well as simple, one or two-step instructions and maintain concentration and attention for simple and repetitive work. AR 13.

In determining plaintiff's residual functional capacity, the administrative law judge considered Dr. Goodsell's functional assessment of plaintiff but found it too restrictive when compared to the objective evidence of record. She pointed out that his opinions were inconsistent with the magnetic resonance imaging scans that showed only "mild" degenerative disc disease of the lumbar spine, a "small" partial tear of the left medial meniscus and a "normal" MRI study of the right knee, despite his complaints of severe pain in that knee. Also, she found Goodsell's opinion inconsistent with the notes and observations in his own treatment records in which he had noted that plaintiff's pain was under control following medication treatment. AR 14-15.

After considering plaintiff's subjective allegations of pain, the administrative law judge found that plaintiff's back and knee pain could be expected to limit his ability to ambulate for prolonged periods of time, but that he seemed capable of "functionally ambulating" if he took his pain medications. She concluded that his ability to work at his computer and drive for prolonged periods of time demonstrated his ability to sustain sedentary exertional work. AR 15.

Also, the administrative law judge considered the credibility of plaintiff's testimony in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. She considered the statements of plaintiff and his wife that plaintiff is unable to stand or sit for any length of time without experiencing pain, numbness and tingling in his extremities and that he needs assistance with activities of daily living. In addition, she considered plaintiff's statements that he experienced side effects from his medications, including losing his train of thought and sleepiness, and she included these limitations in her residual functional capacity finding. The administrative law judge acknowledged that plaintiff had pain but that the record indicated the pain was controlled with pain medication. She observed that if plaintiff's pain were as severe as he was alleging, it would be reasonable for him to obtain further diagnostic testing or at least consult with a specialist, neither of which he had done. She also noted that plaintiff was able to drive for over one hour each way to visit his doctor and family and sit at a computer to conduct research. The administrative law

judge concluded that plaintiff ‘s “medically-determinable impairments could reasonably be expected to cause [his] alleged symptoms; however, [his] statements concerning the intensity, persistence and limiting effects of those symptoms are not credible to the extent they are inconsistent” with her assessment that plaintiff could perform unskilled sedentary work. AR 14.

At step four, the administrative law judge found that plaintiff’s restrictions would keep him from performing his past work (self-employed business consultant, retail sales manager, financial adviser and credit manager). AR 38. At step five, she used the Medical-Vocational Guidelines to find that for persons of plaintiff’s age, education, work experience and residual functional capacity, jobs existed in significant numbers in the national economy that plaintiff could perform. She found that plaintiff’s additional limitations had little or no effect on the occupational base of unskilled sedentary work; according to the regulations there are approximately 200 separate unskilled sedentary occupations that could be identified, each representing numerous jobs in the national economy. She concluded that plaintiff was not disabled under the Medical Vocational Rules.

## 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). The decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies benefits, she must build a logical and accurate bridge from the evidence to her conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

#### B. Treating Physician's Opinion

Although an administrative law judge must consider all medical opinions of record, she is not bound by those opinions. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005). "[T]he weight properly to be given to testimony or other evidence of a treating physician depends on circumstances." Hofslie 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). An administrative law judge must provide "good reasons" for the weight she gives a treating source opinion, id., and must base her decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999).

The administrative law judge rejected Dr. Goodsell's June 2007 opinion that plaintiff could not perform sedentary work because she found it inconsistent with the magnetic resonance imaging scans and with his own treatment notes. The rule that an administrative law judge must accept the opinion of a treating physician that is well supported does not come into play in this case. Goodsell might have been plaintiff's treating physician, but the record shows that his opinion was not supported by either the objective tests or his own treatment notes, both of which contradict his stated opinion that plaintiff could not perform sedentary work.

The administrative law judge gave good reasons for discounting Dr. Goodsell's opinion: the magnetic resonance imaging scans showed only mild degenerative disc disease of the lumbar spine, only a small partial tear of the left medial meniscus and a normal study of the right knee. An administrative law judge is not allowed to "play doctor" by interpreting medical notes and forming her own opinions about the severity of conditions or diseases, but one does not have to be a doctor to look skeptically at plaintiff's complaints of pain in light of Goodsell's assessment of "mild" degenerative disc disease and a normal right knee. As the administrative law judge noted, Goodsell's opinion of plaintiff's functional capacity was inconsistent with the doctor's own treatment records showing plaintiff's pain under control following medication treatment.

The record contains substantial evidence to support the administrative law judge's

conclusion that plaintiff's pain was well controlled with medication. In September 2006, Goodsell noted that plaintiff's medications seemed to control his pain and that plaintiff ambulated in and out of the office without difficulty. In July 2007, Goodsell noted that morphine controlled plaintiff's pain and helped him function. At that time, Goodsell noted that plaintiff's pain was out of proportion to what the magnetic resonance imaging scan showed. In September 2007, Goodsell indicated that plaintiff's pain was fairly well controlled. Throughout 2008, Goodsell noted that plaintiff's medications continued to control his pain. The administrative law judge concluded that although plaintiff's back and knee pain could be expected to limit his ability to ambulate for prolonged periods of time, he seemed capable of "functionally ambulating" if he took his pain medication.

In sum, the administrative law judge provided good reasons, supported by substantial evidence in the record, for not giving controlling weight to Goodsell's opinion. Hofslie, 439 F.3d at 377 (administrative law judge determines how much weight to give various medical opinions and court will uphold that decision if it is supported by substantial evidence). The administrative law judge did not err in discounting Goodsell's opinion that plaintiff was disabled.

### C. Credibility

Under Social Security Ruling 96-7p, an administrative law judge must follow a two-step process in evaluating an individual's own description of his or her impairments: 1) determine whether an "underlying medically determinable physical or mental impairment" could reasonably be expected to produce the individual's pain or other symptoms; and 2) if such a determination is made, evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Social Security Ruling 96-7p, 1996 WL 374186, \*1 (1996); see also Scheck v. Barnhart, 357 F.3d 697, 702 (7th Cir. 2004). When conducting this evaluation, the administrative law judge may not reject the claimant's statements regarding his symptoms on the sole ground that the statements are not substantiated by objective medical evidence. Instead, the administrative law judge must consider the entire case record to determine whether the individual's statements are credible. Relevant factors the administrative law judge must evaluate are the individual's daily activities; the location, duration, frequency and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; the individual's prior work record and efforts to work; and any other factors concerning the individual's functional limitations and restrictions. SSR 96-7p; 20 C.F.R. §§ 404.1529(c), 416.929(c). See also Scheck, 357 F.3d

at 703; Zurawski, 245 F.3d at 887.

An administrative law judge's credibility determination is given special deference because that judge is in the best position to see and hear the witness and to determine credibility. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). In general, an administrative law judge's credibility determination will be upheld unless it is "patently wrong." Prochaska v. Barnhart, 454 F.3d 731, 738 (7th Cir. 2004); Sims v. Barnhart, 442 F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying."). However, the administrative law judge still must build an accurate and logical bridge between the evidence and the result. Shramek, 226 F.3d at 811. The court will affirm a credibility determination as long as the administrative law judge gives specific reasons that are supported by the record. Skarbeck v. Barnhart, 390 F. 3d 500, 505 (7th Cir. 2004).

In recent opinions, the Court of Appeals for the Seventh Circuit has expressed criticism of the Social Security Administration's credibility assessments. The court has said that it is not enough for the administrative law judge to say only that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." As the court has noted, assessments like these fail to identify which statements are not credible and what exactly "not entirely" is meant to signify. Martinez v. Astrue, 630 F.3d 693, 694 (7th Cir. 2011). In this case, however, the administrative law



judge considered the specific statements of plaintiff and his wife that plaintiff was unable to stand or sit for any length of time without experiencing pain, numbness and tingling in his extremities and that he needed assistance with his activities of daily living. She explained why she found these statements not credible: the evidence in the record that plaintiff's pain was controlled with medication, his refusal to pursue diagnostic testing or to consult a specialist (plaintiff did not suggest that financial concerns kept him from doing these things), his ability to drive on a regular basis one hour each way to visit his doctor and family and his ability to sit at a computer. She concluded that plaintiff's testimony was not credible to the extent that it was inconsistent with her assessment that plaintiff could perform sedentary work.

On the other hand, the administrative law judge considered plaintiff's statements that he experienced side effects from his medications, including losing his train of thought and sleepiness. I can infer that she found these statements to be credible because she included as limitations in her residual functional capacity assessment plaintiff's statements that he could maintain concentration and attention only for simple and repetitive work. This detailed credibility assessment is not the type of assessment that the court found lacking in Martinez.

The administrative law judge considered the entire record to determine whether plaintiff's statements were credible, including the medical evidence, plaintiff's daily activities,

and that he suffered from the side effects of his medications. She then concluded that although plaintiff had pain and side effects from his pain medication, he was able to perform simple and repetitive sedentary work. I am persuaded that the administrative law judge built an accurate and logical bridge from the evidence to her conclusion that plaintiff's subjective complaints about his pain were not worthy of belief. Shramek, 226 F.3d at 811 (7th Cir. 2000).

#### D. Step Five

At the last step of the sequential evaluation process, the administrative law judge can satisfy the commissioner's burden by relying on one of the Medical-Vocational Guidelines found in 20 C.F.R., Subpart P, App. 2. Caldarulo v. Bowen, 857 F.2d 410, 413 (7th Cir. 1988). These rules take administrative notice of the numbers of unskilled jobs that exist throughout the national economy at the various functional levels (sedentary, light, medium, heavy and very heavy), taking into account the other vocational factors of age, education and work experience. 20 C.F.R., Subpart P, App. 2, § 200.00(b). Because the rules account only for limitations that affect the person's ability to meet the exertional requirements of jobs, they are dispositive only when the person's limitations are exertional in nature (e.g., limitations on sitting, standing, amount of weight lifted). 20 C.F.R., Subpart P, App. 2, § 200.00(e). When a person has additional non-exertional limitations (such as limitations on

the ability to balance, manipulate objects, hear, see, perform mental tasks or tolerate environmental conditions such as heat, cold, dust and fumes), the guidelines can be used only as a “framework for consideration” and the administrative law judge must cite other evidence for her conclusion that significant numbers of jobs exist in the economy that the claimant can perform. Id.

The commissioner’s regulations recognize that in some cases, a person’s non-exertional limitations may be so insignificant that it is obvious they would not diminish the relevant job base and the relevant Medical-Vocational Guideline may still be applied. Soc. Sec. Ruling 83-14. In “more complex” cases, however, the administrative law judge may need the assistance of a vocational expert. Id. The Court of Appeals for the Seventh Circuit has said that a vocational expert is not required if there is “reliable evidence of some kind that would persuade a reasonable person that the limitations in question do not significantly diminish the employment opportunities otherwise available.” Warmoth v. Bowen, 798 F.2d 1109, 1112 (7th Cir. 1986).

The last issue to be considered is whether the administrative law judge erred when she relied on the Medical-Vocational Guidelines. Plaintiff maintains that she did, because he had non-exertional limitations that were severe enough to limit the range of sedentary work that he could perform, including limitations on his ability to understand, remember and carry out detailed but uncomplicated instructions and maintain concentration and attention

for only simple and repetitive work. The administrative law judge addressed these limitations and found they had little or no effect on the occupational base of unskilled sedentary work. Because plaintiff could essentially perform the entire unskilled sedentary occupational base, it was reasonable for the administrative law judge to find that he could perform approximately 200 separate unskilled sedentary occupations, each representing numerous jobs in the national economy. See 20 C.F.R. Pt. 404, Subpt. P, App.2, Sec. 201.00. The administrative law judge satisfied the commissioner's burden at step five by relying on one of the Medical-Vocational Guidelines.

#### ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security is AFFIRMED and plaintiff Scott Albert Merk's appeal is DISMISSED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 10th day of March, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge