IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LORI C. COPPERNOLL,

Plaintiff,

OPINION AND ORDER

v.

10-cv-535-bbc

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Lori C. Coppernoll seeks disability insurance benefits, contending that her cervical degenerative disc disease and other impairments prohibit her from working. This is the second time she has appealed to this court from a decision by an administrative law judge denying her benefits. On June 23, 2009, I remanded plaintiff's action for judicial review of an adverse decision to the Commissioner of Social Security. Case No. 08-cv-382-bbc. On remand, the administrative law judge held a second hearing and issued a decision finding again that plaintiff was not disabled. On July 22, 2010, the Appeals Council declined to take jurisdiction over plaintiff's claim, leaving the decision of the administrative

law judge as the final decision of the commissioner. Plaintiff seeks judicial review of the second adverse decision of the commissioner under 42 U.S.C. § 405(g).

Plaintiff contends that the administrative law judge failed to determine the reliability of the vocational expert's testimony and failed to resolve the inconsistencies between that testimony and the Dictionary of Occupational Titles. I conclude that plaintiff is correct and that this case must be remanded once again because the commissioner's decision that plaintiff is capable of performing work in the national economy is not supported by substantial evidence.

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

FACTS

A. Plaintiff

Plaintiff was born in 1962. She graduated from high school. From the early 1990's through 2003 she worked at Wal-Mart as a cashier and floor person. She alleged disability as of December 2003 because of neck and back pain, headaches, left arm pain and depression.

B. First Case

In plaintiff's previous case, the administrative law judge found that plaintiff had severe impairments of degenerative disc disease of the cervical spine, intermittent left shoulder impingement and headaches, but that she retained the residual functional capacity to perform sedentary work with not more than occasional use of the non-dominant left upper extremity and no more than occasional repetitive head movement. Although the administrative law judge found that plaintiff could not perform her past work, he found her not disabled because there were jobs available in the national economy that she could perform.

On her first appeal to this court, plaintiff raised a number of challenges to the administrative law judge's decision, foremost of which was that the administrative law judge failed to cite reliable evidence for his conclusion that a significant number of jobs existed in the regional or national economy that plaintiff can perform. Plaintiff challenged the reliability of the vocational expert's testimony, contending that the job of "telephone quotation clerk" was obsolete and that the alternative job of "mall clerk" identified by the expert did not fit her limitations. Also, she argued that data underlying the vocational expert's opinion was unreliable because it was based on flawed methods. I found that the commissioner had failed to respond to plaintiff's challenges. Therefore, I remanded the case to the commissioner to address the reliability of the vocational expert's testimony and to

resolve an apparent inconsistency regarding the frequency with which head movement is required of information clerks and interviewers.

C. Hearing Testimony

1. Plaintiff

Following remand, defendant held a hearing on December 15, 2009. Plaintiff testified that she had not worked since her last hearing. AR 509. She testified that she had worked previously as a department manager at Wal-Mart. AR 510.

Plaintiff testified that her neck condition was "pretty much the same" as it had been at the first hearing, but that her migraine headaches had become more of a problem. AR 516. Although she was prescribed Relpax for her headaches, she did not take it because of the cost. AR 522. She testified that she weighed 220 pounds. AR 528.

2. Vocational expert

Robert J. Neuman testified at both hearings as the neutral vocational expert. At each hearing, the administrative law judge asked Neuman to assume an individual of plaintiff's age, education and work experience with the residual functional capacity to perform sedentary work with no driving, occasional use of the non-dominant arm and occasional head movement. At the first hearing, Neuman had testified that data from the end of 2007

showed plaintiff could perform 2,100 information clerk jobs and 700 interviewer jobs. AR 530. At the second hearing, Neuman testified that, according to data from the end of 2008 and the Occupational Employment Quarterly, there were 700-900 information clerk jobs (census code 540) that plaintiff could perform and 100-200 interviewer jobs (census code 531) that plaintiff could perform in the state of Wisconsin. He testified that nationally there were 87,000 to 89,000 information clerk jobs and 31,000-33,000 interviewer jobs that plaintiff could perform. Neuman explained that he had to rely on the Quarterly to determine available jobs until a better method was found. AR 531-32.

The administrative law judge asked Neuman why he gave a range of available jobs and how he arrived at the range. He testified as follows:

> I give a range because, as I said earlier, there's no way that I know of that gives specific numbers of unskilled, or for that matter, semi-skilled and skilled jobs. So rather than try and stick with a specific number, I think it is safer and more logical to give a range of numbers. How I got those numbers again, I used the Occupational Employment Quarterly. The State figures that I gave, as I mentioned earlier, had been reduced. The national figures I give a range. The high number is what the Occupational Employment Quarterly had. The low number is what I used, or use.

AR 532. The administrative law judge then asked plaintiff to explain why he used the 700 number and not another number, like 450. Neuman stated that it is simply a range he thought was more acceptable. He explained that the Occupation Employment Survey

conducts surveys on a triannual basis, interviewing 1.2 million employees to obtain the data in The Occupational Employment Quarterly. AR 532-33.

The administrative law judge asked Neuman to identify specific jobs that could be classified as information clerk or interviewer. Neuman testified that the Dictionary of Occupational Titles identifies two information reception clerk jobs that are sedentary and unskilled, namely, call-out operator, DOT # 237.367-014, and telephone quotation clerk, DOT # 237.367-046. Neuman noted that because plaintiff had challenged the existence of the telephone quotation clerk job at the previous hearing, he was relying only on the call-out operator in business services and retail trade. He testified that the Occupational Employment Survey showed in 2006 that there were 16,000 of these jobs nationally and 900 in Wisconsin. He reduced the number to 700 for 2009. AR 533-34.

The administrative law judge asked Neuman whether the 700-900 information clerk jobs he identified consisted entirely of sedentary call-out operators. In answering this question, Neuman stated as follows:

> Based on the information that I have, contrary to what Attorney Angermeier indicated there, there are telephone quotation clerks in the United States. And even though his letter from a stock market employee indicates that that is not the case, with his experience, and I think he said he had 25 years experience, I would not be comfortable in saying that there are not any telephone quotation clerks working for a financial service agency, not necessarily in the stock market, on the stock market floor

> because obviously we don't have a stock market here in the State of Wisconsin.

AR 534. He testified that telephone quotation clerks are now used as credit authorizers and checkers in finance, insurance industries and mortgage and loan companies. He said, "I would say that the seven to 900 covers information and reception clerks that are sedentary in nature."

Neuman also stated that there may be some semi-skilled jobs in the information and reception area that now may be categorized as unskilled and the 700-900 jobs include these as well. AR 534-35. The administrative law judge asked Neuman who would employ these people. He responded that the employers would be financial advisers, financial planners, credit unions and finance and insurance industries. AR 535. Neuman told the administrative law judge that the 700-900 jobs were unskilled work. AR 536.

Moving on to the interviewer job category, Neuman testified that the charge account clerk is a sedentary and unskilled position but jobs as referral clerk, temporary help agency, DOT # 405.367-062, and registration clerk, DOT #205.367-042, would also be available. He testified that these jobs have not been updated since the 1970's. AR 537-38.

Plaintiff's lawyer asked Neuman whether he would agree that the only unskilled sedentary job was a telephone quotation clerk. Neuman responded that the Dictionary lists the call-out operator as an unskilled sedentary job as well. AR 543. Asked about the method

used by the Quarterly, Neuman testified "there's 14 DOT codes in a particular census code, and there are 1,000 jobs in that census code, they equally distribute the jobs to each DOT code." AR 544. In Neuman's opinion, this method is flawed. AR 545.

In response to a question by the administrative law judge, Newman said he had arrived at the number of jobs available nationally in the same way as he had arrived at the regional numbers. AR 545-46. Next, the administrative law judge asked Neuman whether the number of regional and national jobs to which he had testified could be performed by an individual who could occasionally use her left arm and move her head up to one-third of the time and Neuman responded that they could be. AR 546-47.

D. The Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge incorporated by reference his prior decision, including his analysis of the medical records. Then he performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. Under this test, the administrative law judge considers sequentially 1) whether the claimant is not currently employed; 2) whether the claimant has a severe impairment; 3) whether the claimant's impairment meets or equals one of the impairments listed in 20 C.F.R. § 404, Subpt. P, App. 1; 4) whether the claimant is unable to perform his past work and 5) whether the claimant is capable of performing work in the national economy. Knight v.

Chater, 55 F.3d 309, 313 (7th Cir. 1995). If a claimant satisfies steps one through three, she is found automatically to be disabled. If the claimant meets steps one and two, but not three, then she must satisfy step four. Id. The claimant bears the burden of proof in steps one through four. If the claimant satisfies step four, the burden shifts to the commissioner at step 5 to prove that the claimant is capable of performing work in the national economy. Id.

At step one, the administrative law judge found that plaintiff had not engaged in substantial gainful activity between December 8, 2003, her alleged onset date, and March 31, 2009, the date she was last insured. At step two, he found that plaintiff had severe impairments of cervical degenerative disc disease, headaches and intermittent left shoulder impingement. At step three the administrative law judge 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 389.

The administrative law judge determined that plaintiff retained the residual functional capacity to perform sedentary work with occasional use of the left (non-dominant) arm and occasional head movement. At step four, he found that plaintiff was unable to perform any past relevant work. AR 390.

At step five, the administrative law judge found that there were jobs that existed in significant numbers in the national economy that plaintiff could perform. He concluded that

plaintiff was not disabled from December 8, 2003 through March 31, 2009, the date she was last insured. AR 390.

In applying step five, the administrative law judge relied on the vocational expert's testimony that an individual with plaintiff's functional capacity would have been able to perform the requirements of representative occupations. Specifically, the administrative law judge stated that there were 700-900 sedentary information clerk jobs and 100-200 sedentary interviewer jobs in the state and 87,000-89,000 information clerk jobs and 31,000-33,000 interviewer jobs available nationally. AR 387. The administrative law judge noted that the vocational expert had indicated that his testimony was consistent with the information contained in the Dictionary of Occupational Titles. AR 389.

The administrative law judge concluded that

> Claimant's attorney has again attacked the vocational testimony, a tactic which the undersigned thought little of the first time and equally so now. As noted in the first decision, a "significant number" of jobs is not a high barrier, certainly 800 (taking the lower of the expert's ranges) satisfies it. Moreover, the national numbers are clearly substantial: well over 100,000 again taking the low end of the ranges. Although agency judges typically deal with local/state numbers in rendering decisions, it is, in fact, the number of jobs in the "national economy" which is to form the basis for an other work finding, 20 C.F.R. sec. 404.1566.

AR 387-88.

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). When reviewing the commissioner's findings under § 405(g), the court cannot reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the administrative law judge. Clifford v. Apfel, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the commissioner. Edwards v. Sullivan, 985 F.2d 334, 336 (7th Cir. 1993). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the commissioner's decision, id., and 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, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Step Five

An administrative law judge may rely on testimony from a vocational expert to satisfy the commissioner's burden to produce evidence of a significant number of jobs that the plaintiff can perform in spite of her limitations. SSR 00-4p; Warmoth v. Bowen, 798 F.2d 1109, 1112 (7th Cir. 1986). Even if the vocational expert's testimony is little more than a "bottom line," it may satisfy the commissioner's burden to produce evidence of a significant number of jobs provided no one questions the basis for the vocational expert's conclusions at the hearing. Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002). Where, however, the claimant challenges the foundation of the expert's opinions, the administrative law judge must make an inquiry to make sure that the testimony is reliable. Overman v. Astrue, 546 F. 3d 456, 464 (7th Cir. 2008); McKinnie v. Barnhart, 368 F.3d 907, 910 (7th Cir. 2004); Donahue, 279 F.3d at 446.

1. Significant number of jobs

Plaintiff concedes that if there are 800 available jobs in Wisconsin, this is a significant number. Although there is no statutory floor for what constitutes a "significant number" of jobs, courts have found that even fewer than 750 available positions amount to a significant job base. Lee v. Sullivan, 988 F. 2d 789, 794 (7th Cir. 1993). However, plaintiff disputes the accuracy and reliability of the 800 figure or the national number of jobs.

2. Reliability of vocational expert's testimony

Plaintiff contends that the administrative law judge failed to make an inquiry to insure that the vocational expert's testimony was reliable and simply adopted the testimony as reliable with no analysis. She challenges the expert's reliance on the Occupational Employment Quarterly because the method it uses is flawed, as even the expert conceded. AR 530-31 ("until we . . . find a better way to get these numbers, that's what I have to live with"); AR 544-45 (discussing flaw in Quarterly's approach to allocating jobs). The administrative law judge never addressed plaintiff's challenge to the Quarterly, but found against her by implication when he discounted her argument to the contrary. Because plaintiff never made an objection at the hearing to the vocational expert's reliance on the source and thereby forfeited her objection, id., the administrative law judge cannot be faulted for his finding. Moreover, as the Court of Appeals for the Seventh Circuit has noted, the Quarterly is a "source on which [vocational experts] regularly rely." Liskowitz v. Astrue, 559 F. 3d 736, 744 (7th Cir. 2009).

Plaintiff's second challenge is more substantive. She contends that only guesswork and not evidence supported Neuman's use of the Quarterly to determine the number of jobs available. The Quarterly groups jobs by "census code." (Neither party explains what a census code is. On the website for U.S. Publishing, which publishes the Quarterly, the company says only that "[a]ll [Dictionary of Occupational Titles] have been assigned a Census Code by

the National Crosswalk Service Center in Des Moines, Iowa" and that "U.S. Publishing has published a crosswalk for the Census and DOT" that shows all DOT codes and titles grouped by census codes. www.uspublishing.net/datasource references (last visited 4/15/2011). It appears from the vocational expert's testimony in this case that each census code (presumably an area of the country) contains groups of occupations, such as a group of jobs that require only sedentary exertion, and the Quarterly lists the jobs, but does not determine how many of each job are available in that census code. According to Neuman, "[I]f there's 14 DOT codes in a particular census code, and there are 1,000 jobs in that census code, they equally distribute the jobs to each job code." AR 544.

Neuman reduced the number of jobs listed in the Quarterly to 700 information clerks and 100 interviewers in the state. When asked how he arrived at this number, he testified that he found the number "more acceptable," AR 532-33, but that from an actuarial or statistical standpoint there was no particular basis for the number. AR 532. In other words, Neuman guessed about the percentage reduction in the total number of these jobs actually available to plaintiff.

The commissioner does not address plaintiff's assertion that Neuman's opinion was not supported by any evidence, despite the holding in Getch v. Astrue, 539 F. 3d 473, 482 (7th Cir. 2008), that "the ALJ must demand more than an off-the-cuff guess." In Getch, the court found insufficient an opinion by a vocational expert that "probably 50 percent of the

available jobs for seam welders do not require exposure to chemical fumes." In addition, the commissioner stated incorrectly that Neuman provided an actuarial base for reducing the job base. Dft's. Br., dkt. #14, at 3. He did not do this. Moreover, he did not say that he had relied on his professional experience with the job market in reducing the job numbers, although the commissioner argues that he made this statement. Id. at 8. In sum, the commissioner has pointed to nothing in the record to support the reliability of Neuman's job numbers, which he calculated by reducing numbers provided in the Quarterly. Therefore, I cannot find Neuman's testimony reliable.

Finally, there remains some question as to which information clerk jobs Neuman included in the 700 total information clerk jobs. First, he testified that he was considering only the call-out operator, DOT #237.367-014 (a sedentary unskilled job) because of plaintiff's previous argument that the telephone quotation clerk job listed in the Dictionary of Occupational Titles was obsolete. When the administrative law judge asked whether the 700-900 information clerks were call-out operators, Neuman did not answer the question. Rather, he testified that he would not be comfortable stating that there were not any telephone quotation clerks available. AR 534. He explained that telephone quotation clerks could be used as credit authorizers and checkers in finance, insurance industries and mortgage and loan companies.

It is difficult to determine from Neuman's testimony whether the 700-900 information clerk jobs to which he referred include both telephone quotation clerks and call-out operators. If the jobs include only call-out operators, any dispute concerning the continuing existence of the job of telephone quotation clerk is no longer relevant. However, if the 700 jobs include telephone quotation clerks, plaintiff's argument should be addressed on remand. In addition, Neuman testified that some of the estimated 700-900 jobs included jobs that were previously classified as semi-skilled, but that he was classifying as unskilled. He did not explain the bases for the reclassifications.

I cannot find that the testimony of the vocational expert is reliable when he says that there were 800 jobs in Wisconsin that plaintiff could perform. I cannot determine which jobs he included or how he arrived at the number of jobs he provided and the administrative law judge does not explain why he found it reliable.

In the absence of any evidence to support Neuman's guess that there were 800 jobs plaintiff could perform, the testimony does not provide substantial evidence necessary to satisfy the administrative law judge's burden at step five of the sequential evaluation process. Because the commissioner bears the burden at this step, the administrative law judge was obligated to make sure that the expert's testimony was reliable. His failure to do so requires a second remand.

3. Social Security Ruling 00-4p

When, as in this case, an administrative law judge takes testimony from a vocational expert about the requirements of a particular job, SSR 00-4p requires him to ask whether that testimony conflicts with the Dictionary of Occupational Titles before relying on that evidence to support a determination of nondisability. If the expert identifies a conflict or the evidence provided by the expert seems on its face to conflict with information in the Dictionary, the administrative law judge must obtain a reasonable explanation from the expert. 20 C.F.R. § 416.966(e); SSR 00-4p; Overman v. Astrue, 546 F.3d 456, 463 (7th Cir. 2008). In the absence of an apparent conflict, a vocational expert's testimony may satisfy the commissioner's burden at step five even if it is little more than a "bottom line," so long as no one questions the basis for the expert's conclusions at the hearing. Id. 546 F.3d at 465; Donahue, 279 F.3d at 446.

The administrative law judge did not ask Neuman at the hearing whether his testimony was consistent with the information in the Dictionary of Occupational Titles. Plaintiff contends that Neuman's testimony conflicts with the Dictionary, in particular regarding the jobs allegedly consistent with plaintiff's residual functional capacity. However, when the administrative law judge asked Neuman specifically whether the jobs he had identified could be performed by an individual with occasional use of left arm and occasional

head movement, Neuman said they could. In this regard, Neuman's testimony was consistent with the Dictionary.

However, Neuman's testimony was in conflict with the Dictionary when it came to skilled and unskilled jobs. Neuman testified that in addition to a charge account clerk, other interviewer jobs were available, including a referral clerk, temporary help agency and registration clerk. These jobs are listed in the Dictionary as *semi-skilled,* not unskilled jobs. The administrative law judge did not resolve this inconsistency between the dictionary and the testimony. On remand the commissioner should insure that any inconsistencies between the testimony of the vocational expert and the Dictionary of Occupational Titles are resolved.

4. Conclusion

Plaintiff argues that this court should remand for an award of benefits. However, in a recent case, Allord v. Astrue, 631 F. 3d 411, 418 (7th Cir. 2011), the Court of Appeals for the Seventh Circuit upheld this court's decision to remand a case to the commissioner rather than award benefits because the record did not support an award of benefits. The court of appeals stated that "[a]lthough we are loath to extend this litigation even further, the record before the district court did not necessitate a finding that [plaintiff] was disabled as of his date last insured." Id. In this case, the record does not necessitate a finding that plaintiff was disabled from her alleged onset date to her date last insured but it is unclear whether there

are jobs available to plaintiff. Accordingly, I am remanding the case to the commissioner for further proceedings consistent with this decision.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Lori Coppernoll's application for disability insurance benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 13th day of May, 2011.

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