IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MILES R. MILLER,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

10-cv-569-bbc

- -

This case concerns Miles R. Miller's application for Disability Insurance Benefits, which he filed on April 4, 2008, alleging disability resulting from back pain. After a hearing on April 1, 2010, administrative law judge Zane A. Lang found plaintiff not disabled. This decision became the final decision of the Commissioner when the Appeals Council denied review in July 2010.

On appeal, plaintiff contends that the administrative law judge committed three errors: 1) he erred in evaluating medical opinion evidence; 2) he assessed plaintiff's credibility improperly; and (3) he failed to address a significant conflict in the vocational evidence. I conclude that plaintiff is correct and that this case must be remanded.

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

FACTS

A. Plaintiff

Plaintiff was born in 1951. He completed two years of technical college and has a degree in electronics and a 1991 degree in precision inspection. He had past work as a sawing and assembling supervisor and installer of heating and air conditioning.

Plaintiff injured his back on December 8, 2005 in a work-related accident while removing an old furnace from a house. AR 192. About a week later, he began seeing David Nanstad, D.C., for chiropractic treatment. AR 425. A December 22, 2005 lumbar spine magnetic resonance imaging scan identified a bulging disk at L5-S1. AR 189.

B. Medical Evidence

1. Dr. Mark Schlimgen

At Dr. Nanstad's suggestion, plaintiff saw Mark Schlimgen, M.D., a pain management physician, on January 6, 2006. AR 259. Schlimgen stated that plaintiff's scan showed disk degeneration at L5-S1 with a central disk protrusion, but no herniations or neural impairment. Schlimgen concluded that plaintiff's pain was consistent with the identified posterior annular tear at L5-S1. AR 259-60. Schlimgen gave plaintiff two injections of a

local anesthetic at L5-S1 in January 2006. AR 251-52. 262-63. On February 3, 2006, Schlimgen referred plaintiff for physical therapy, AR 246, which he underwent in February and March 2006. AR 270.

On April 5, 2006, plaintiff returned to see Dr. Schlimgen, reporting that he was still in pain after the physical therapy. Schlimgen did not think surgery was an option for plaintiff. AR 238. Instead, he administered facet joint arthograms at L4-5 and L5-S1 on April 19, 2006. AR 229. On June 5, 2006, Schlimgen prescribed hyrdocodone for plaintiff's increasing pain. AR 227.

Plaintiff returned to see Dr. Schlimgen in November 2006, at which time he received an epidural injection at S1. Schlimgen noted that plaintiff had evidence of an annular eruption injury at L5-S1. He noted that physical therapy did not help plaintiff because his pain kept him from doing the exercises. In his opinion, the majority of plaintiff's pain was mechanical back pain, but he had some radicular symptoms down the backs of both legs, left greater than right. AR 219-220.

Dr. Schlimgen saw plaintiff again on January 5, 2007. He prescribed Tramadol for his back pain and referred him to physical therapy. Also, he prescribed a transcutaneous electrical nerve stimulation (TENS) unit. Schlimgen noted that, although plaintiff had attended physical therapy in the past, he was not sure whether plaintiff had been "real faithful" with the exercise program. AR 201. Plaintiff underwent a physical therapy

evaluation and started a trial of a TENS unit. AR 271. Dr. Schlimgen released plaintiff from the pain clinic in January 2007. AR 201.

2. Dr. Phillip J. Porter

On October 19, 2006, Dr. Nanstad referred plaintiff to Dr. Phillip J. Porter, a neurosurgeon, stating that plaintiff's left leg was weak and that any physical activity irritated his condition. AR 425. Dr. Porter examined plaintiff on November 13, 2006 and ordered a magnetic resonance imaging scan, which was performed on November 15, 2006. This scan showed a mild posterior disk bulge at L5-S1 with an annular tear and a small left paracentral disk protrusion at L3-4, with no new abnormalities since the December 2005 scan. AR 196. An examination revealed that plaintiff had limited range of motion in his back with tenderness. AR 190. Dr. Porter noted that plaintiff had a predominance of back over leg pain, bilateral leg symptoms and somewhat "underwhelming" imaging. He gave the following opinion, "[c]ombining this with the fact that this is a work-related injury with some legal action pending, I think there are a number of red flags indicating that there is a very low likelihood of him getting significant improvement in his symptoms with surgical treatment via microsickectomy. Similarly, I do not think a surgery of larger magnitude such as AP fusion would be appropriate for many of the same reasons." Porter recommended reassessment by a pain clinic. AR 190-91.

3. Dr. David Nanstad

On December 28, 2006, Dr. Nanstad wrote to plaintiff's attorney, stating that plaintiff could not perform any occupation that would involve physical activity. He was pessimistic that plaintiff would ever make a complete recovery. In his opinion, plaintiff's radiculopathy was not a result of a disk problem but was caused by soft tissue or facet irritation. AR 423-24.

4. Dr. Gerald Favret

In March 2007, plaintiff saw his family physician, Dr. Gerald Favret, for a physical. Plaintiff reported that he had completed physical therapy, was doing home exercises and was walking one to two miles in the morning. AR 340. Dr. Favret treated plaintiff with Tramadol and saw him eight times through October 2008. AR 341, 348-49, 353-60, 377-78, 381-82, 404-09.

On June 21, 2008, plaintiff saw Dr. Favret and reported that he continued to experience significant pain, although he was trying to decrease his Tramadol use during the day. He could walk for up to an hour and mowed his lawn in 30-minute increments, with an hour of rest in between. Dr. Favret observed that plaintiff had a somewhat stooped forward position, with slight decrease of motor strength in the left lower extremity. AR 405.

On October 21, 2008, plaintiff reported to Dr. Favret that his pain seemed worse and

that he could stand for only about 20 minutes before changing position. Plaintiff reported doing some cooking and cleaning and a little bit of picking up outside the home, although he mainly read. AR 408.

5. Dr. Joseph T. Hebl

Plaintiff saw Dr. Joseph T. Hebl, an occupational physician, in September 2007. Hebl noted that the 2005 and 2006 magnetic resonance imaging scans showed plaintiff had a concentric disk bulge at L5-S1 with an annular tear and left paracentral disk protrusion at L3-4. AR 311. Hebl concluded that plaintiff had chronic severe low back pain, weakness, loss or range of motion and left lower extremity, radiculopathy of persistent and severe nature. Also, Hebl noted that the 2006 magnetic resonance imaging scan showed evidence of disk herniations at L3-4 and L5-S1. AR 312. Plaintiff continued to see Dr. Hebl once a month through May 2008. AR 311-25, 327-32, 384-85. Plaintiff received chiropractic treatments from Kevin Patterson, D.C., from September 17, 2007 through February 6, 2008. AR 280-92.

On April 3, 2008, Dr. Hebl noted that despite medications, pain clinic injections, physical therapy and chiropractic care, plaintiff continued to have severe back pain, weakness, loss of range of motion and radiculopathy. In Hebl's opinion, plaintiff was not able to return to gainful employment. AR 312.

On May 16, 2008, plaintiff saw Dr. Hebl, reporting worsening back pain and radiculopathy. AR 385. Hebl stated that in his opinion plaintiff had reached the end of healing with respect to his work injury and that he had a 15% disability and was unable to return to work. Hebl stated that plaintiff "is unable to return to substantial gainful employment as defined by Social Security Disability regulations and guidelines." AR 384. He thought that plaintiff would ultimately need back surgery to correct his work-related back condition. AR 384. Also, Hebl noted that plaintiff could engage in personal activities of a sedentary nature one to two hours a day, two to three days a week when he was physically able to do so. In January 2009, Dr. Hebl filled out a worker's compensation form and included in it his May 2008 opinions. AR 426-27.

On January 29, 2009, Dr. Hebl wrote to plaintiff's attorney in response to the independent medical examination of plaintiff by Dr. Paul Leibert. (Dr. Leibert's report is not in the record, but Hebl summarizes it in his letter.) At first Leibert thought plaintiff had a soft tissue injury, but after a second examination, Leibert concluded that plaintiff was malingering. Hebl disagreed with Leibert's findings, saying that plaintiff was unable to return to gainful employment as a result of his work injury and that he was permanently disabled. AR 459-60.

C. Consulting Physicians

On June 3, 2008, state agency physician Mina Khorshidi completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of degenerative disk disease and hypertension. Khorshidi found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk six hours in an eight-hour workday and sit six hours in an eight-hour work day. She noted that plaintiff had experienced back pain since a December 2005 injury, with some lower extremity weakness. Khorshidi indicated that the plaintiff's doctor's conclusions were vague (she did not say which doctor she was referring to) and that on April 8 the doctor had stated only that plaintiff was disabled and should file for Social Security benefits AR 387-94.

On January 7, 2009, state agency physician Robert Callear completed a physical residual functional capacity assessment for plaintiff, listing a diagnosis of degenerative disk disease. Callear found that plaintiff could lift 20 pounds occasionally and 10 pounds frequently, stand or walk six hours in an eight-hour work day and sit six hours in an eight-hour work day, with occasional stooping and crouching. AR 410-14. Callear reviewed plaintiff's treatment and the magnetic resonance imaging scan. He concluded that plaintiff's back condition allowed him to perform light work with occasional stooping and crouching and that his chronic pain did not appear to lessen his exertional capabilities. AR 415. Callear acknowledged that Dr. Hebl believed that plaintiff was unable to return to employment because of his back condition, but Callear stated that this issue was ultimately

reserved for the commissioner. AR 416.

Callear noted that plaintiff's allegations were not inconsistent with the objective findings in the record. He found no evidence to suggest exaggeration of symptoms and he found plaintiff's statements about his symptoms and their functional effects fully credible. AR 417.

D. Vocational Evidence

On January 26, 2009, vocational consultant Sidney Bauer evaluated plaintiff and completed a report in plaintiff's worker's compensation proceeding. Plaintiff reported that he was able to stand, walk and sit for approximately 15 to 20 minutes and lift approximately 16 pounds, although bending was very difficult. Also, plaintiff reported lying down to rest for an hour every three hours and taking Tramadol and extra strength Tylenol for pain. AR 173-74.

In discussing plaintiff's transferrable skills and abilities, Bauer stated as follows:

> Mr. Miller has an Associate Degree in Electronics, however he obtained the degree nearly 40 years ago and has no current work experience in that area. He has a vocational diploma in inspection. His education and work experience in that area are both antiquated. In viewing Mr. Miller's education and past work experience as a whole, he would not have skills that would transfer to other light occupations. His past education and work would not offer transferable skills.

AR 175.

E. Plaintiff's Activities and Work History Reports

In his May 15, 2008 activities report submitted to the state agency, plaintiff reported a wide variety of daily activities. He reported driving, cooking, doing laundry, performing yardwork, climbing stairs four to five times a day. Also, he reported going out to eat, seeing movies and volunteering. AR 127-131.

On his work history report, plaintiff listed two jobs: (1)"fix-it-man" for Western Dairyland from 2001 through 2005; and (2) supervisor at Ashley Furniture from May 1993 to May 1999. AR 119.

F. Hearing Testimony

At the hearing, plaintiff testified that he had last worked on December 8, 2005 for Western Dairyland as a carpenter, AR 26-27, and that before that he had worked at Ashley Furniture as a supervisor on an assembly line. At that job, he entered information about parts and attendance into a computer and generated weekly attendance and productivity reports. AR 27-29.

Plaintiff testified that he was 59, had graduated from high school, had a degree in electronics and had a 1991 degree in precision inspection. AR 30. He lived with his girlfriend and his 32 year old son. AR 30. He cooked, vacuumed and washed dishes, took

care of the lawn once in a while, shopped for groceries every two weeks with his girlfriend and drove for an hour at a time, but did not do the laundry. AR 31.

Plaintiff testified that he took Oxycontin for pain and muscle relaxers, AR 31-32, but that injections and physical therapy were not effective. AR 32-33. He could stand for an hour to an hour and a half and sit for an hour. His back pain was constant at a level of 7 to 8, based on a pain scale of 1 to 10, with 10 being the most severe. AR 34. He had to lie down every day for two or three hours because of his back pain. AR 35.

The administrative law judge called Heidi Paul to testify as a neutral vocational expert. He began by asking her to describe plaintiff's past work. Paul classified plaintiff's past work as sawing and assembly supervisor, (DOT #669.132-010), which is a medium exertion, skilled job, and as an installer of heating and air conditioning, (DOT # 637.262-024), which is a medium exertion, skilled job. AR 37.

Next, the administrative law judge asked Paul whether an individual of plaintiff's age, education and work experience, who could lift 20 pounds occasionally, 10 pounds frequently and sit, stand or walk six hours in an eight-hour work day with occasional postural limitations could perform plaintiff's past work. She said he could not. AR 38. Paul testified that plaintiff would have transferable skills of handling people, working with people, working with computers, producing reports, analyzing lots of information and working with equipment. The administrative law judge asked the expert whether there were jobs to which

these skills could be transferred. She testified that they would transfer to supervisor of furniture assembly, (DOT # 709.134-010), which was light exertion and skilled. The administrative law judge asked Paul how this job was different from the job plaintiff had done at Ashley Furniture. She responded that it would not include the heavy work. Paul testified that there were 490 of these jobs in the local economy and 666,800 jobs in the national economy. Paul testified that a second job would be a data entry clerk (DOT # 203.582-054), which is a unskilled sedentary job. She testified that there were 180 jobs locally and 283,500 jobs nationally. AR 38.

Finally the administrative law judge asked the expert whether there was any work that could be performed by a person who could not work five days a week eight hours a day. She testified that there was not. AR 39.

G. The Administrative Law Judge's Decision

In reaching his 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, he found that plaintiff had not engaged in substantial gainful activity since December 8, 2005, the alleged onset date. AR 10. At step two, he found that plaintiff had a severe impairment of degenerative disk disease of the lumbar spine with disk bulges and an annular tear. AR 10. At step three, he 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 11.

Once the administrative law judge 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. He found that plaintiff retained the residual functional capacity to perform light work with occasional postural limitations. AR 11.

In determining plaintiff's residual functional capacity, the administrative law judge considered the medical evidence in the record. He gave little weight to the opinions of Dr. Porter and Dr. Leibert regarding plaintiff's alleged malingering and simple soft tissue lower back injury because he found them not well supported by the record. However, he gave Dr. Porter's and Dr. Schlimgen's interpretations of the plaintiff's latest magnetic resonance imaging scan more weight than Dr. Hebl's interpretation. Hebl found from the scan that plaintiff had a herniated disk, but Porter and Schlimgen found that the scan showed concentric disk bulge at L5-S1 with an annular tear and left paracentral disk protrusion at L3-4. The administrative law judge gave greater weight to the opinions of Porter and Schlimgen because one was an orthopedist and one was an anesthesiologist and Hebl was a specialist in occupational medicine. AR 14. Further, the administrative law judge found that

Hebl's conclusion that plaintiff was unable to perform any substantial gainful activity was not supported by the record and gave it little weight. AR 14.

In discussing the opinion of Dr. Nanstad, the administrative law judge found it to be consistent with the clinical and diagnostic findings and entitled to considerable weight with respect to plaintiff's inability to perform his past relevant work. He then said, "However, Dr. Nanstad's opinion that the claimant is unable to perform any job involving physical activity requires greater specificity and elaboration." AR 14. Finally, the administrative law judge gave controlling weight to the opinions of state agency medical consultants, Drs. Khorshidi and Callear, because he found their opinions consistent with the medical evidence. AR 14.

Also, the administrative law judge considered the credibility of plaintiff's testimony. He considered plaintiff's testimony concerning his difficulty lifting, walking and sitting for any appreciable period of time and his chronic pain that prevented him from working. 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 the administrative law judge's assessment that plaintiff could perform light work with occasional postural limitations. In making this determination, the administrative law judge considered the wide variety of activities that plaintiff had reported on his activities report, which he found inconsistent with his testimony

at the hearing. The administrative law judge concluded that these activities were inconsistent with the pain that plaintiff alleged. Also, he found that plaintiff did not experience any disabling side effects from any of his medications. AR 14.

At step four, the administrative law judge found that plaintiff's restrictions would keep him from performing his past work (sawing and assembling supervisor and installer of heating and air-conditioning), AR 15, but found that plaintiff had acquired work skills from his past relevant work that were transferable to other occupations. At step five, he found that there were a significant number of jobs available in the national economy that plaintiff could perform. He concluded that the vocational expert's testimony was consistent with the information contained in the Dictionary of Occupational Titles. Then the administrative law judge found using the Medical Vocational Rules that plaintiff was not disabled.

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, he 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, he 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." Hofslien v. Barnhart, 439 F.3d 375, 377 (7th Cir. 2006). When a treating physician's opinion is well supported by medically acceptable clinical and laboratory diagnostic techniques and no evidence exists to contradict it, the administrative law judge has no basis on which to refuse to accept the opinion. Id.; 20 C.F.R. § 404.1527(d)(2). When, however, the record contains well supported contradictory evidence, the treating physician's opinion "is just one more piece of evidence for the administrative law judge to weigh," taking into consideration the various factors listed in the regulation. Id. These factors include the number of times the treating physician has examined the claimant, whether the physician is a specialist in the allegedly disabling condition, how consistent the physician's opinion is with the evidence as a whole and other factors. 20 C.F.R. §

404.1527(d)(2). An administrative law judge must provide "good reasons" for the weight he gives a treating source opinion, id., and must base his decision on substantial evidence and not mere speculation. White v. Apfel, 167 F.3d 369, 375 (7th Cir. 1999). An opinion of a non-examining physician is not sufficient by itself to provide evidence necessary to reject a treating physician's opinion. Gudgel v. Barnhart, 345 F. 3d 467, 470 (7th Cir. 2003).

Controlling weight may be given only to an opinion of a treating source. Social Security Ruling 96-2p. A "treating source" is defined in 20 C.F.R. § 404.1502 as a medical source who has provided ongoing treatment to a plaintiff. Although the administrative law judge may consider findings of non-examining sources, such as state agency medical consultants, he is not bound by them. 20 C.F.R. § 404.1527(f)(2)(I).

In this case, the administrative law judge stated in his decision that he had given controlling weight to the opinions of state agency medical consultants. This was an error because these medical consultants were not treating sources. The commissioner argues that this is merely "inartful wording" on the administrative law judge's part and that the judge gave great weight to these opinions as he is allowed to do and not controlling weight. However, that is not what the administrative law judge said. Martinez v. Astrue, 630 F.3d 693, 694 (7th Cir. 2011) (criticizing commissioner for defending administrative law judge's decision using evidence not relied on by administrative law judge and by invoking overbroad conception of harmless error).

Although I agree that the administrative law judge erred in giving controlling weight to Khorshidi and Callear's opinion, the opinion of Dr. Callear was much more extensive than the routine physical residual functional capacity assessment. Callear stated that he had reviewed plaintiff's treatment and magnetic imaging scan and concluded that despite his chronic pain plaintiff could perform light work with occasional stooping and crouching. Plaintiff argues that Callear's opinion is inconsistent because he found plaintiff's statements about his functional limitations and symptoms to be "fully credible," but then did not consider plaintiff's pain in his residual functional determination. This argument overlooks Callear's specific statements that plaintiff's chronic pain did not appear to lessen his ability to perform light work with occasional stooping and crouching.

However, the administrative law judge erred in weighing the other medical opinion evidence that contradicts the opinions of Callear and Khorshidi. Both Drs. Hebl and Nanstad believed that plaintiff could not perform any work. In discounting Nanstad's opinion, the administrative law judge said it required greater specificity and elaboration, although this is not a sufficient reason to reject a treating physician's opinion. The administrative law judge gave a more detailed reason for rejecting Hebl's opinion, finding that Hebl's interpretation of the magnetic resonance imaging scan differed from the interpretation of Dr. Porter and Schlimgen and was not supported by the evidence of the record. (Hebl had found that plaintiff's second magnetic resonance imaging scan showed

that plaintiff had a disk herniation rather than a disk bulge. As plaintiff points out, if the administrative law judge's weighing of the medical evidence depended on the difference between a disk bulge and a disk herniation, then the administrative law judge should have consulted the physicians for clarification. Barnett v. Barnhart, 381 F. 3d 664, 669 (7th Cir. 2004).)

In sum, I am not convinced that, even if the administrative law judge had given the proper weight to the opinion of Drs. Khorshidi and Callear, he gave adequate reasons for rejecting the opinions of plaintiff's treating physicians Dr. Nanstad and Dr. Hebl. Therefore, I am remanding the case for reconsideration of the weight to be given the opinions of the treating and non-treating sources.

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 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, 630 F.3d at 694. In this case, however, the administrative law judge considered plaintiff's testimony that he had difficulty lifting, walking or sitting for any appreciable time and that his chronic pain prevented him from working. The administrative law judge concluded that the wide variety of activities that plaintiff reported on his May 15, 2008 activities report was inconsistent with his allegations of pain and with his testimony at the hearing. Also, he found that plaintiff did not experience any side effects from any of his medications. The administrative law judge concluded that plaintiff's testimony was not credible to the extent that it was inconsistent with the administrative law judge's assessment that plaintiff could

perform light work with occasional postural limitations.

However, there is other evidence in the record concerning plaintiff's activities that the administrative law judge did not consider. In June, plaintiff reported to Dr. Favret that he could walk for up to an hour and mow his lawn in 30-minute increments with an hour of rest in between. But in October 2008, he reported that he could stand for only about 20 minutes before changing position and that he could do some cooking, cleaning and a little bit of picking up outside the home, although he mainly read. At the hearing, plaintiff testified his pain was more severe and he would have to lie down every day for two or three hours because of his back pain. This evidence, suggesting that plaintiff's ability to perform activities had decreased since 2008, was not considered by the administrative law judge. On remand the administrative law judge should make a new credibility finding after considering this evidence and reconsidering the medical opinions as discussed above.

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 his conclusion that significant numbers of jobs exist in the economy that the claimant can perform. Id.

In this case, the administrative law judge applied the Medical-Vocational Guidelines to find plaintiff not disabled, after finding from the testimony of vocational expert Paul that plaintiff had transferable skills that would enable him to perform jobs existing in significant numbers in the national economy. Plaintiff argues that the administrative law judge erred in concluding that plaintiff had transferable skills because there was contradicting evidence in the record in the form of a January 26, 2009 report by vocational expert Sydney Bauer, which the administrative law judge did not address in his decision.

Although the commissioner agrees that the administrative law judge failed to consider

the evidence, he contends once again that the error is harmless. I do not agree. The administrative law judge relied on Paul's testimony that plaintiff had transferable work skills to find that there were a significant number of jobs available in the national economy that plaintiff could perform.

Paul testified that plaintiff's skills of handling people, working with people, working with computers, producing reports, analyzing of lots of information and working with equipment were transferable. On the other hand, Bauer found that plaintiff's education and work experience in electronics and inspection were "antiquated" and were not transferable skills. From Paul's testimony, I infer that the skills she finds to be transferable are those plaintiff used at Ashley Furniture. I find it troubling that the administrative law judge failed to consider the fact that these skills were used in a job that plaintiff left more than ten years before the hearing. As plaintiff points out, computer skills have changed rapidly in those ten years. In addition, the record shows that plaintiff's degrees were earned before 1991, that he has had no further education in either electronics or computers, that he earned his electronics degree more than 40 years earlier and that his work experience was outdated. The administrative law judge failed to consider this evidence and did not explain why he rejected it. Because this finding was central to the administrative law judge's finding that plaintiff was not disabled, remand is necessary for consideration of this evidence. Indoranto v. Barnhart, 374 F.3d 470, 474 (7th Cir. 2004).

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Miles R. Miller'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