IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUSAN M. BUNNELL,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner Social Security
Administration,

Defendant.

OPINION AND ORDER

10-cv-830-bbc

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Plaintiff Susan M. Bunnell is seeking review of a decision denying her claim for disability benefits under the Social Security Act. 42 U.S.C. § 405(g). The administrative law judge concluded that plaintiff could perform her past relevant work as a loan officer and that she could perform other sedentary jobs in the national economy. Plaintiff contends that the administrative law judge erred by (1) failing to made a valid credibility determination; (2) rejecting the opinions of plaintiff's treating physicians; and (3) finding that plaintiff could perform her past relevant work without taking into consideration plaintiff's mental impairment in the area of concentration, persistence and pace. Because I agree with plaintiff that the administrative law judge's decision does not stand up to close examination, I am reversing the decision and remanding for further proceedings.

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

BACKGROUND

Plaintiff was born on June 29, 1962. AR 51. She had a high school education and past relevant work as a loan officer, nurse's aide, sausage stuffer and unit clerk. She was injured in 2004 while working as a Health Unit Coordinator for Luther Hospital: she was hit by a patient and fell, injuring her neck.

On December 27, 2007, plaintiff filed an application for disability insurance benefits, alleging disability as of May 31, 2007 because of headaches, depression and severe neck pain that caused her to pass out on occasion. AR 134-43, 153. On October 15, 2009, she had a hearing before Administrative Law Judge Gail Reich, who heard testimony from plaintiff, AR 51-69, two neutral medical experts, AR 69- 81, and a neutral vocational expert, AR 81-87.

Plaintiff was 47 years old at the time of the hearing. Her testimony included the following:

- she stopped working as a Health Unit Coordinator on May 31, 2007 because she was passing out at work and in pain, and her employer could not modify her work in a way that would accommodate her problems, AR 52, 54.

- she lives with her husband and does her housework (cooking, cleaning and laundry) in "increments," AR 53-54; she is able to squat down to take dishes out of the oven if they are not too heavy, AR 66, and she handles her own hygiene but sometimes has trouble washing her hair and bending over to put on shoes and socks, AR 63;

- she cannot get through an eight-hour day without lying down, although she was able to work a 12-hour day before she stopped working, AR 59-60;

- she can sit or stand for no more than 20-30 minutes at a time and walk on a flat surface for 30-45 minutes, AR 62;

- she has trouble sleeping but does not nap during the day, AR 62-63;

- she has depression, difficulty controlling her emotions, crying spells, memory problems and problems with concentration, focus and attention span, AR 63-64;

- she no longer maintains her own checkbook because she made too many mistakes, AR 64;

- she has a driver's license but does not drive; her daughters or her husband drive her to the store and to doctor's appointments; AR 53;

- her grandchildren visit but she is unable to take care of them, AR 66;

- after she was struck in the head, she had to have a full fusion disk replacement in her neck at C5 and C6, AR 55; she does not consider the surgery to have been successful, id.;

- she has had therapy and she takes medication, including, Lyrica, Nortripyline and Tizanidine, which alleviate her pain but cause her to be sleepy and forgetful, AR 57;

- her pain is primarily in her neck and head but it radiates down her arms and legs at times, which is why she has an implanted pain stimulator, AR 57;

- she rates her daily pain as 6 out of 10, with medication, AR 58;

- her pain is not worsening but her blackouts are more frequent, id.; she estimates that her blackouts occur two to three times a week, AR 69;

- she no longer rides horses, plays softball, rides a snowmobile or takes and trips or vacations, but she does visit friends and family once or twice a week, AR 65.

On September 15, 2009, Dr. David Usher, a psychiatrist who had treated plaintiff for depression, completed a form titled "Clinical Assessment of Pain." AR 494. He checked boxes indicating that Bunnell had incapacitating pain and that physical activity such as walking, standing and bending greatly increased her pain, causing abandonment of tasks

related to daily activities or work. He indicated that plaintiff's medication would restrict her from the work place because she was unable to function at a productive level. Finally, he indicated that plaintiff would miss 20 of 20 work days in a month. AR 494.

On October 2, 2009, Dr. Thomas Floren, a doctor in occupational medicine, who had seen plaintiff on a number of occasions in 2008, completed a form titled "Clinical Assessment of Pain." AR 493. He checked boxes indicating that plaintiff had incapacitating pain and that physical activity such as walking, standing and bending would usually increase her pain. He noted that it would cause her distraction but not prevent her from functioning in work tasks except that occasionally it would increase her pain greatly, causing abandonment of tasks related to daily activities or work. He indicated that plaintiff's medication would severely limit her effectiveness in the work place because she would be distracted, inattentive and drowsy. Finally, Floren indicated that plaintiff would miss 8-10 of 20 work days in a month because of incapacitating pain.

The record contains results of examinations from the Mayo Clinic, where plaintiff had had an examination following her cervical spine surgery. On October 30, 2007, Dr. W.F. Krauss found no evidence of either myelopathy or radiculopathy. AR 349. On April 10, 2008, an electromyography nerve conduction test at Luther Hospital was normal and showed no evidence of left cervical radiculopathy or impingement of the left upper extremity. AR 266. An x-ray of the cervical spine on May 8, 2008 showed no abnormal motion on flexion/extension views and an MRI on the same day showed a solid fusion. AR 398.

Two medical experts testified at the administrative hearing. Dr. Thomas Maxwell,

an internist, testified that plaintiff's medical problems include degenerative joint disease of the cervical spine with a fusion performed in May 2004, chronic pain syndrome of the cervical spine, recurrent syncopy and chronic headaches. AR 69-70. In his opinion, these impairments did not meet a listing but they were functional limitations for plaintiff and her ability to engage in sustained work activity. AR 70. He agreed with her treating physicians that she would miss "essentially more than four days a month of work" because of her blackouts in combination with her neck pain. AR 71.

Dr. Michael Lace, Ph.D., a licensed psychologist, testified that plaintiff had an impairment of depression but that it was not severe and she had a global assessment of functioning of 70. In his opinion, plaintiff would have no limitations in the work setting because of any mental health problems. AR 74. He acknowledged that plaintiff had been found to have moderate limitations in her concentration, persistence and pace, but he called the report of that finding an outlier. AR 74-75.

Vocational expert Gregory Jones testified about plaintiff's ability to perform her past relevant work and other jobs in the national or regional economy. The first hypothetical question put to him was whether an individual could perform any of plaintiff's past relevant work or any jobs in the national or regional economy if she could "lift ten pounds occasional, less than ten frequently" and could not push and pull with her upper extremities with "less than ten [pounds] occasional,"among other limitations. AR 82. His answer was no. AR 82-83. If the individual could lift ten pounds occasionally and push and pull ten pounds occasionally, she could perform plaintiff's past relevant work as a loan officer. AR 84.

However, if the same individual is limited to simple, repetitive tasks, she could perform in this position, but there would be jobs available in the national and regional economy that could accommodate those limitations. Id. These jobs included telephone information clerk, charge account clerk and call-out operator. AR 84-85. In response to a question from plaintiff's counsel, Jones said that a person who had to miss more than two days of work in a month would be unable to retain employment.

On January 14, 2010, the administrative law judge denied plaintiff's claim. In her decision she found at step one that plaintiff was not employed. At step two, she found that plaintiff had severe impairments in the form of degenerative joint disease of her cervical spine, chronic pain of service spine status post spine fusion surgery and chronic headaches but that her medically determinable mental impairments did not cause more than minimal limitation in her ability to perform basic mental work activities and were therefore nonsevere. AR 18.

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, because there was no evidence of nerve root or spinal cord compromise, spinal arachnoiditis or lumbar spinal stenosis resulting in pseudoclaudication. AR 19. Relying on the testimony of neutral medical expert Maxwell, she concluded that plaintiff did not have an impairment that met or medically equaled Listing 104, Spine Disorders. AR 19. She found that plaintiff retained the residual functional capacity to perform sedentary work except for work involving more than lifting

10 pounds occasionally, sitting, standing or walking for more than six hours out of eight, occasional climbing of ramps and stairs, occasional balancing, stooping, kneeling, crouching and crawling and occasional pushing and pulling with upper extremities and occasional reaching overhead. She found that plaintiff had to avoid climbing ladders, ropes and scaffolds, avoid unprotected heights and hazardous machinery and must not be responsible for the safety of others. Id.

In determining this residual functional capacity, the administrative law judge set out the requirements of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. She then described plaintiff's testimony about her limitations and summarized the medical evidence in the record:

> The claimant testified that she goes to doctor's appointments, goes to the store, can cook, and do housework, laundry and can walk for 45 minutes at a time. (Hearing Testimony). Her activities are consistent with the reduced level of functioning found herein.

AR 23.

In assessing plaintiff's physical residual functional capacity, the administrative law judge considered the opinions of plaintiff's treating physicians, Dr. David Usher and Dr. Andrew Floren, that plaintiff would miss more than four days of work a month. (Usher had estimated 20 out of 20 days; Floren had estimated 8-10.) She rejected both these opinions because the forms signed by the physicians were of the "check the box" variety and the doctors did not offer support for their conclusions. By contrast, the administrative law judge noted, the medical expert, Dr. Maxwell, had testified that the "treating physicians' conclusions were not supported by that doctor or any doctor's clinical or laboratory

findings." The administrative law judge then discounted Dr. Maxwell's opinion that plaintiff would miss more than four days of work because she found the opinion inconsistent with plaintiff's activities of daily living on a regular and continuing basis. AR 21.

At step four, the administrative law judge found from the testimony of the vocational expert that plaintiff was able to perform her past relevant worker as a loan officer, as both actually and generally performed. AR 23. Alternatively, at step five, the administrative law judge found, in reliance on the testimony of the vocational expert, that plaintiff was not disabled because there were jobs existing in significant numbers in the national economy that plaintiff could perform. The administrative law judge found the testimony of the vocational expert consistent with the information contained in the *Dictionary of Occupational Titles*. AR 23-24.

The Appeals Council declined to review the case. AR 1.

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 his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Credibility Determination

Generally, an administrative law judge's determinations regarding credibility are entitled to deference because that judge has the ability to see and hear the testimony, but that deference does not excuse the administrative law judge from explaining the reasons for her determination. Castile v. Astrue, 617 F.3d 923, 929 (7th Cir. 2010). She still must follow the general requirement to build an "accurate and logical bridge" between the evidence and the decision. Id.

Unfortunately, as in all too many Social Security cases, the administrative law judge's decision in this case is deeply flawed. The first problem is that she failed to make any credibility assessment of plaintiff, despite her obvious disbelief of plaintiff's reports of her problems. Instead, she said only that plaintiff's statements about her activities were consistent with the residual functional capacity she had found. This is another example of the much-maligned boilerplate: "the claimant's statements concerning the intensity, persistence and limiting effect of [his] symptoms are not entirely credible to the extent they are inconsistent with the above residual functional capacity assessment." The Court of Appeals for the Seventh Circuit has criticized this language repeatedly in multiple published opinions as "meaningless" because it "backwardly implies that the ability to work is

determined first and is then used to determine the claimant's credibility." Shauger v. Astrue, 675 F.3d 690, 696 (7th Cir. 2012) (internal quotations omitted), and because it " fail[s] to indicate which statements are not credible and what exactly 'not entirely' is meant to signify." Spiva v. Astrue, 628 F.3d 346, 348 (7th Cir. 2010). See also Roddy v. Astrue, No. 12-1682, 2013 WL 197924, *4 (7th Cir. Jan. 18, 2013) (court "has consistently criticized" this "boilerplate"); Bjornson v. Astrue, 671 F.3d 640, 645–46 (7th Cir. 2012) ("[T]he boilerplate implies that the determination of credibility is deferred until ability to work is assessed without regard to credibility, even though it often can't be"); id. at 646 (directing Social Security Administration to "take a close look at the utility and intelligibility of its 'templates'"); Parker v. Astrue, 597 F.3d 920 (7th Cir. 2010) (language is "meaningless boilerplate" because "statement by a trier of fact that a witness's testimony is 'not entirely credible' yields no clue to what weight the trier of fact gave the testimony").

The administrative law judge did not explain how plaintiff's activities make her testimony concerning her pain incredible, identify which statements about pain and the side effect of her medications were not credible or cite the evidence that detracted from plaintiff's credibility. Because the administrative law judge failed to properly assess plaintiff's credibility, the case must be remanded to the commissioner for a proper credibility finding.

In saying that plaintiff had the residual functional capacity to work in her previous occupation or in other jobs, the administrative law judge did not explain why she thought that staying home, doing household tasks on an "incremental" basis with opportunities to lie down if necessary, equaled paid work subject to an employer's work rules. The reliance

on "daily activities" is another common practice of which the court of appeals has been critical. Hughes v. Astrue, 2013 WL 163477 *3 (7th Cir. Jan. 16, 2013) ("We have remarked the naiveté of the Social Security Administration's administrative law judges in equating household chores to employment."); Roddy, 2013 WL 197924, at *7 ("We have repeatedly cautioned that a person's ability to perform daily activities, especially if that can be done only with significant limitations, does not necessarily translate into an ability to work full-time."). In Bjornson, 671 F.3d at 647, the court explained the problem: "The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons and is not held to a minimum standard of performance, as she would be by an employer." The court added that "[t]he failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases." Id. (citing Punzio v. Astrue, 630 F.3d 704, 712 (7th Cir. 2011); Spiva, 628 F.3d at 351–52; Gentle v. Barnhart, 430 F.3d 865, 867–68 (7th Cir. 2005); Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005); Kelley v. Callahan, 133 F.3d 583, 588–89 (8th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1284 n. 7 (9th Cir. 1996)).

In any event, the evidence regarding plaintiff's daily activities does not support the administrative law judge's finding. Plaintiff testified at the hearing that she had difficulty engaging in all of the activities listed by the administrative law judge and that she often needed to lie down during the day in order to complete the tasks. The administrative law judge did not cite any evidence contradicting plaintiff's testimony. Accordingly, I must

remand the case for a new credibility determination. The new administrative law judge assigned to this case should reassess plaintiff's credibility and may need to make new step four and five findings after completing that reassessment.

C. Failure to Consider Treating Physicians' Opinions

The administrative law judge dismissed the opinions of plaintiff's treating physicians, Dr. Usher and Dr. Floren, on the ground that they merely checked certain boxes, without addressing the evidence in the record that supported those check marks. Oddly enough, she cited Dr. Maxwell as having said that the conclusions of the treating physicians were not supported by any doctor's clinical or laboratory findings, AR 21, although the hearing transcript does not contain any such statement by Maxwell. It does, however, contain a statement by Maxwell that he agreed with the opinions of plaintiff's treating physicians that she would miss work more than four times a month. AR 71. Although the administrative law judge made a stab at explaining why she disagreed with all three doctors by saying that Maxwell's opinion of how many days of work plaintiff would miss was "inconsistent with [plaintiff's] own activities of daily living on a regular and continuing basis," AR 21, this purported reason is unpersuasive, as explained above.

The administrative law judge's inadequate attempt to refute Maxwell's opinion on this point, her misstatement of Maxwell's testimony and the absence of good reasons to reject the opinions of the treating physicians are additional reasons to remand this case. On remand, the new administrative law judge should reassess the weight to be given to the

opinions of Usher, Floren and Maxwell about the number of days that plaintiff would have to miss in any month.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Susan M. Bunnell's application for Disability Insurance Benefits is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 4th day of February, 2013.

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