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

JEFFREY A. APPEL,

Plaintiff,

v.

MICHAEL ASTRUE,
Commissioner of Social Security,,

Defendant.

OPINION AND ORDER

10-cv-435-wmc

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Jeffrey A. Appel seeks reversal of the Commissioner's decision that he is not disabled, and, therefore, not eligible for Disability Insurance Benefits and Supplemental Security Income under Title II and Title XVI of the Social Security Act, codified at 42 U.S.C. §§ 416(I) and 423(d) and 1382(c)(3)(A).

Appel contends that the administrative law judge made an incorrect residual functional capacity assessment because he failed (1) to consider the complete report of the consulting examiner and (2) to give the appropriate weight to the opinion of Appel's treating physician. The court finds that the administrative law judge properly determined that Appel retained the residual functional capacity to perform unskilled, sedentary work with a sit or stand option and will affirm the Commissioner's decision.

FACTS[1]

A. Background

Jeffrey Appel was born on June 5, 1961 and has a limited education. Appel had worked in the past as a logger. AR 15. He had apparently been a diabetic since 1989.

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

In March 2007, Appel filed an application for disability insurance benefits and supplemental security income, alleging that he had been unable to work since January 1, 2004, due to diabetes and injuries from a 1997 motorcycle accident. AR 80, 83, 100. After the local disability agency denied Appel's application initially and upon reconsideration, he requested a hearing. Administrative Law Judge Sherwin F. Biesman heard testimony on July 8, 2009, from Appel, AR 22-28, and from a neutral vocational expert, AR 29-33. On August 7, 2009, the administrative law judge issued his decision, finding Appel not disabled. AR 9-16. This decision became the final decision of the Commissioner on June 21, 2010, when the Appeals Council denied Appel's request for review. AR 1-3.

B. Medical Evidence

In 1997, Appel was involved in a motorcycle accident. AR 98. As a result of that accident, Appel fractured a number of bones and lost some hearing in one ear. AR 191. Appel was nevertheless able to return to work as a logger and was not observed to have any significant hearing difficulties. AR 97, 101.

For financial reasons and lack of insurance, Appel was not seen in a clinic again until 2004. AR 160. In May 2004, Appel received "diabetic counseling." On June 2, 2004, Dr. Gokhan Guvenli also noted that Appel had "early signs of retinopathy."[2] AR 157. Appel continued with diabetic counseling through the fall of 2003. AR 155-59.

The next time Appel sought medical treatment was on April 19, 2007, at the Gunderson Lutheran Clinic. Through the Clinic's patient assistance programs, Appel had

[2] Retinopathy is disease of the retina that results in impairment or loss of vision. New Oxford American Dictionary. 3rd ed. 2010.

been getting his medications from drug companies, but he declined an examination out of fear of the cost. Appel was advised at that time of some alternative, low-cost programs, including the free clinic at St. Claire's Clinic in La Crosse, but apparently did not pursue them. AR 154.

On October 9, 2007, Appel had an x-ray of his lumbar spine at the Chippewa Valley Hospital and Oakview Care Center. The findings were that he had degenerative disc disease with multilevel osteophyte formation. AR 190.

In early 2008, Appel started receiving medical treatment at the Chippewa Valley Free Clinic. On February 6, 2008, he was assessed with diabetes mellitus, an irregular heart rhythm and a history of numbness in both legs. Appel reported no history of diabetic retinopathy or nephropathy. The clinic renewed his medications. AR 217.

On February 28, 2008, Dr. Lance McQuillan examined Appel and discussed his diabetes with him, but Appel reported no back pain. AR 215-16.

Through October 2008, the clinic noted that Appel had uncontrolled diabetes, erratic blood sugars and chronic neuropathies. AR 213-16, 232. On January 8, 2009, Appel went to the diabetes clinic and reported back discomfort. Blood tests were performed. The doctor noted that Appel's diabetes was poorly controlled. AR 230-31. He was also seen in the clinic on February 19, 2009. AR 230.

On February 28, 2008, Dr. Lance McQuillan, a doctor at the Chippewa Valley Free Clinic, who had examined Appel, completed a medical examination and capacity form. He concluded that because of Appel's diabetes and low back pain he could only lift up to ten pounds and could only sit two hours in an eight hour day and stand two hours in an eight

hour work day. He stated that Appel would need to shift positions frequently with minimal to no pulling, bending or stooping. McQuillan also noted that Appel had some limitations on his cognitive and mental abilities and could only work four hours a day. He noted that Appel's suspected diabetic retinopathy limits his reading. AR 207-08.

C. Consulting Physicians

On October 10, 2007, Dr. Robert Dohlman completed a consultative examination for the state disability agency. Appel complained of urinary frequency and leg and feet cramps, but admitted that he sparingly tested his blood sugars and gave himself insulin depending on how he felt. Appel reported that he did his own housework, laundry and grocery shopping and that he was able to mow the lawn and shovel snow slowly. AR 191.

On examination, Dohlman noted Appel had palpable muscle spasms of the right lumbar area, but no tenderness to percussion over the thoracic and lumbar spine and dull range of motion. Further, he noted that Appel had full range of motion and no decreased sensation or decreased motor strength in his lower extremities. Dohlman concluded that plaintiff had insulin-dependent diabetes with the beginning of lower extremity peripheral neuropathy, degenerative arthritis in lumbar spine and degenerative disc disease at L5-S1.

In Dr. Dohlman's opinion, Appel would need a job that would allow him

> to sit no longer than 15 minutes at any one stretch. He would be able to walk around the job site. He could walk stairs, though it would be slowly, and he would be unable to climb ladders. His lifting would have to be limited to 25 pounds infrequently because of his arthritic back and degenerative lumbar disc disease. He would need transportation to and from the job site as he is not presently driving. He would be able to operate hand controls though he may have difficulty operating foot controls because of his degenerative arthritis in his back

> and degenerative disc disease with inability to sit longer than approximately 15 minutes at one stretch.

AR 193-94.

On June 18, 2007, state agency physician Mina Khorshidi completed a physical residual functional capacity assessment for Appel, listing a diagnosis of insulin dependent diabetes mellitus. AR 178. Khorshidi found that Appel could lift 50 pounds occasionally and 25 pounds frequently, stand or walk six hours in an eight-hour workday and sit six hours in an eight-hour work day. AR 179-185.

On November 8, 2007, state agency physician Dar Muceno completed a physical residual functional capacity assessment for Appel, listing diagnoses of diabetes mellitus, degenerative disk disease and peripheral neuropathy. AR 195. Muceno found that Appel 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 workday. AR 196-202.

D. Hearing Testimony

At the July 8, 2009, administrative hearing, Appel testified that he lived in a subsidized apartment and that he had last worked in 2004 as a logger. AR 23. He testified that he was not currently working because of his diabetes. Appel testified that he did the best he could managing his diabetes and monitored his blood sugar four times a day. He took insulin and had done so for twenty years. He was trying to quit smoking. Appel testified that his diabetes caused him to have a backache, feet cramps and hand cramps. AR 24-25

Appel testified that he cleaned his apartment and visited with friends. He could lift

five to ten pounds, stand from five to fifteen minutes and walk for five minutes to a half hour. Appel elevated his feet a third of the day. AR 26-27.

The administrative law judge called Kenneth Ogren to testify as a neutral vocational expert. AR 29. In the first hypothetical, consistent with Dr. Dohlman's findings, the administrative law judge asked the expert to assume an individual of Appel's age, education, and work experience who is able to sit no longer than 15 minutes and then would have to get up and stretch, lift up to 25 pounds infrequently and operate hand controls, but would be unable to climb ladders. The expert testified that this individual could perform sorter, inspector and polisher jobs. The expert testified that these jobs were unskilled, sedentary jobs that could be performed with a sit or stand option, but could not be performed by an individual who needed to walk around the workplace. AR 33..

The administrative law judge then asked the vocational expert to assume a hypothetical individual who had the limitations identified by Dr. McQuillan in his February 28, 2008 capacity assessment. The expert testified that Dr. McQuillan endorsed a limitation to part-time work, which meant that the individual could not perform any jobs existing in the national economy. AR 29-32.

E. Administrative Law Judge's Decision

In reaching his conclusion that Appel was not disabled, the administrative law judge performed the required five-step analysis. *See* 20 C.F.R. §§ 404.1520, 416.920. Under this test, the administrative law judge sequentially considers (1) whether the claimant is 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,

Appendix 1, (4) whether the claimant can 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, he is automatically found to be disabled. If the claimant meets steps one and two, but not three, then he 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 to prove that the claimant is capable of performing work in the national economy. *Id.*

At step one, the administrative law judge found that Appel had not engaged in substantial gainful activity since January 1, 2004, his alleged onset date. At step two, he found that Appel had severe impairments due to insulin-dependent diabetes mellitus with peripheral neuropathy and degenerative disc disease of the lumbar spine. AR 11.

At step three, however, the administrative law judge found that Appel did *not* have an impairment that met or medically equaled any impairment listed in 20 C.F.R. 404, Subpart P, Appendix 1. AR 13. The administrative law judge found that Appel retained the residual functional capacity to perform unskilled, sedentary work with a sit or stand option. In reaching this decision, he considered the medical evidence and the opinions of the state examining physician Robert Dohlman and Appel's treating physician Lance McQuillan. He gave Dr. Dohlman's opinion that Appel would be able to perform sedentary work with a sit or stand option considerable weight because "it was consistent with the medical records as a whole and with the residual functional capacity finding contained therein. AR 14.

In contrast, the administrative law judge explained that he gave Dr. McQuillan's opinion little weight because McQuillan's progress notes did not support the extreme limitations he assessed:

> For example, it is noted that the claimant would have limitations in his ability to see due to diabetic retinopathy. However, there is no objective evidence regarding retinopathy in the medical evidence. Additionally, the assessment on its face lacks medically sufficient diagnostic basis for the extreme limitations assessed. There is no psychiatric diagnosis indicated to support the mental limitations identified; and since the limitations identified are not expressly related to any medically determinable mental impairment, it is difficult to determine the basis for Dr. McQuillan's opinion. Furthermore, Dr. McQuillan's opinion is inconsistent with the claimant's own reports regarding his functional capabilities (e.g., he is able to mow the lawn, rake the lawn, etc.).

AR 15.

After considering Appel's daily activities and his non-compliance with diet and medications, the administrative law judge determined that Appel's testimony concerning his limitations was not credible. The administrative law judge also considered Appel's lack of pursuit of medical care for extended periods. He stated as follows:

> Although the claimant indicated that he had not pursued medical treatment due to lack of insurance and finances, he was provided with alternative clinics and prescription programs and still failed to maintain regular treatment.

AR 14.

At step four, the administrative law judge found that plaintiff was unable to perform his past relevant work as a logger. At step five, the administrative law judge found, based on the testimony of the vocational expert, that there were jobs available in the state of Wisconsin that Appel could perform. These included 6,000 sorter jobs (DOT # 734.687-082), 1,200 inspector jobs (DOT # 685.687-014), and 3,000 polisher jobs (DOT # 713.684-038). The expert testified that based on his experience all of these jobs can be performed sitting or standing. Based on this testimony, the administrative law judge (1) found, pursuant to SSR 00-4p, that the vocational expert's testimony was consistent with

the information contained in the Dictionary of Occupational Titles; and (2) concluded that Appel was not disabled because there were a significant number of jobs available in the national economy that he could perform. AR 15-16.

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, re-weigh 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. Residual Functional Capacity

First, Appel contends that the administrative law judge erred in rejecting a part of Dr. Dohlman's report without explanation, even though he purported to give the report considerable weight. Dohlman stated that Appel could only sit for fifteen minutes at a stretch and "would be able to walk around the job site." Plaintiff interprets these two statements of Dohlman's to mean that when Appel could no longer sit after 15 minutes he had to walk around. This is not, however, what Dohlman said. He did not say that Appel was required to walk around the job site, but rather that he was able to do so. As defendant points out, this is the only interpretation of Dohlman's statements that makes sense, given that he also said Appel "would be able" to operate hand controls, which cannot be interpreted to mean he was *required* to use hand controls. Accordingly, there is no need for further clarification from Dohlman or more explanation from the administrative law judge on this point.

Appel also finds it significant than when the administrative law judge summarized Dr. Dohlman's limitations for the vocational expert, he said Appel could sit no longer than 15 minutes and then he would have to stretch, rather than saying, as Dohlman did in his report, that Appel could sit for only fifteen minutes "at any one stretch." This, however, does not change the fact that Dohlman's limitations suggested a sit or stand option. The administrative law judge did not, as Appel suggests, alter Dohlman's report. Dohlman's report is substantial evidence that Appel could perform sedentary work with a sit or stand option. Therefore, the hypothetical question posed to the expert was based on Dohlman's report. In answering the hypothetical, the expert stated that there were significant jobs that this individual could perform. Therefore, the administrative law judge did not err in finding

Appel not disabled.

Second, Appel contends that the administrative law judge erred by not giving more weight to the opinion of Dr. McQuillan, his treating physician. 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 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 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). 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).

Appel argues that, in determining the weight to give Dr. McQuillan's opinion, the administrative law judge did not consider the number of times the treating physician 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. Although the court agrees that the administrative law judge did not specifically articulate each of these factors, the court is able to infer that the administrative law judge took these factors into consideration. The record indicates that Dr. McQuillan saw Appel once and that he was not a specialist in either diabetes or degenerative disc disease.[3] More importantly, he set out the reasons that McQuillan's opinion was inconsistent with the medical evidence, as well as Appel's reported activities. The court concludes that the administrative law judge considered the proper factors in determining the weight to be given to McQuillan's opinion.

The administrative law judge explained why he was rejecting Dr. McQuillan's opinion that Appel could not work. For one thing, he noted that McQuillan's own treatment notes did not support his opinion, insofar as there was no objective evidence to support McQuillan's conclusions that Appel's vision was limited or that he had any diagnosis that supported cognitive or mental limitations. Further, he found that McQuillan's limitations were not consistent with plaintiff's reported activities, such as being able to mow, rake, shovel, cook, clean and do laundry. Because the administrative law judge gave good reasons for not giving significant weight to Dr. McQuillan's opinion that Appel could not work, the court sees no basis to overturn that determination.

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[3] Appel argues that he should not be faulted because he had but a single visit with McQuillan at a free clinic, because that is the product of his inability to afford a continuity and quality of care. But as the administrative law judge found, Appel apparently did have opportunities for follow up, free care and did not pursue them. Moreover, both the administrative law judge and this court treat Dr. McQuillan as his "treating physician," just not one whose opinion carries the same weight as a physician who saw Appel regularly or as a specialist.

ORDER

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

Entered this 13th day of February, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge