IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM DREFAHL, OPINION AND ORDER

Plaintiff,

11-cv-271-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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This case concerns an application filed by William Drefahl for Disability Insurance Benefits on March 20, 2007, alleging disability beginning January 18, 2006 caused by degenerative disc disease. After a hearing on December 15, 2009, administrative law judge Arthur J. Schneider found plaintiff not disabled. This decision became the final decision of the Commissioner when the Appeals Council denied review on October 25, 2010.

On appeal, plaintiff contends that the administrative law judge failed to properly assess plaintiff's credibility and failed to properly weigh the medical opinions. 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. Medical Evidence

Plaintiff injured his back at work on August 23, 2005. In January 2006, plaintiff began to experience low back pain and shooting pain in his right leg. He was laid off from his job. AR 181. On January 10, 2006, plaintiff saw Dr. Stephen A. Lindahl who diagnosed lumbosacral spine L4-5 disc herniation. Lindahl referred plaintiff to Dr. Zikel a neurosurgeon, and restricted plaintiff to no lifting more than 10-12 pounds, no lifting from the floor to his waist and sedentary work 30 minutes in an hour. AR 188-89.

Plaintiff saw Dr. Zikel, who prescribed physical therapy. AR 179. On February 15, 2006, plaintiff returned to see Dr. Lindahl, who noted that plaintiff had L4-5 disc herniation documented on a magnetic resonance imaging scan and right leg numbness. AR 184. Lindahl limited plaintiff to work alternating between sitting, standing and walking every 20 minutes; no work above shoulder height; no repeated squatting, bending or twisting; no ladders or climbing and no lifting more than 10 to 15 pounds. AR 185. He recommended that plaintiff walk two to three miles a day.

On March 15, 2006, plaintiff saw Dr. Lindahl, who diagnosed a L4-5 disc herniation with "radiculopathy currently resolving." Lindahl recommended that plaintiff increase his exercise. AR 181. He continued the same permanent work restrictions. AR 182.

Plaintiff participated in physical therapy six times between January and February 2006.

AR 169-73, 175-76. The physical therapist described plaintiff as "inconsistent" about self-reporting and objective measures. AR 164, 169.

On December 11, 2009, Dr. Mary Franz saw plaintiff at the Monroe Clinic. She noted as follows:

> From your history and exam it does seem that you have a herniated disc. How much disability that causes and what you might do to improve it isn't clear at this point. You will have a more extensive evaluation from physical therapy.

AR 220. She recommended that plaintiff be as active as he could. Plaintiff did not continue this course of treatment because of the cost. AR 224.

B. Consulting Physicians

On June 12, 2007, Dr. Thomas F. McCoy examined plaintiff at the request of the state disability agency. McCoy noted that an x-ray of plaintiff's lumbar spine revealed mild to moderate degenerative joint disease at L5-S1 with some anterior spurring at L5 and facet hypertrophy at L5-S1 and L4-S1. AR 194. Plaintiff reported that he could sit or stand for 20 minutes at a time and walk for a block and back after a brief rest. AR 193. On examination, plaintiff could stand on his heels and on his toes and squat to about 30 degrees. Motor and sensory evaluations were normal. McCoy thought that plaintiff could alternate between sitting and standing but should avoid stairs. AR 194. McCoy noted that plaintiff

was on medications for his back and had permanent restrictions from Dr. Lindahl because of his back. AR 194.

On June 27, 2007, state agency physician Mina Khorshidi completed a physical residual functional capacity assessment for plaintiff, listing a diagnosis of herniated L5-S1 disc. AR 201. Khorshidi found that plaintiff 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 202.

On September 19, 2007, state agency physician Syd Foster completed a physical residual functional capacity assessment for plaintiff, listing diagnoses of degenerative disc and joint disease of the lumbar spine. AR 209. Foster 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. AR 210.

C. Hearing Testimony

At the hearing plaintiff testified that he was born on February 13, 1959 and had completed ninth grade. AR 53. He had worked for VP Buildings of Evansville for 28 years as a machine operator. He had last worked on January 18, 2006. He filed claims for workers' compensation and unemployment benefits. His workers' compensation claim was settled and he received unemployment benefits for six months. AR 54-55. On his previous job, he lifted

as much as several hundred pounds and lifted 50 pounds every day. AR 56.

Plaintiff testified that he had severe pain in his lower back and shooting pains through his right leg. AR 58. He testified that he used a cane and that he could sit comfortably for 10 to 20 minutes. AR 59. Plaintiff is most comfortable lying down, but does physical therapy at home. AR 60. He testified that one of his worst problems is putting on his shoes. If he does not put on his shoes correctly, he is injured for the day. AR 60. Plaintiff testified that during the day, he watches television and moves around and takes medication for pain. AR 59.

In answering questions posed by his lawyer, plaintiff explained that the surgeon he had seen recommended surgery, but only as a last resort because it might make his condition worse. AR 57. He explained that he had taken Vicodin, Flexeril and Cyclobenzaprine in the past but that he could not afford to pay for them now. AR 57. Also he testified that he had no insurance. AR 57.

The administrative law judge questioned plaintiff about a 2007 accident report, asking him whether alcohol had been involved. Plaintiff said that he had not had any alcohol in his system. AR 63-64.

Next, the administrative law judge called Leslie Goldsmith to testify as a neutral vocational expert. AR 64. Goldsmith testified that plaintiff's past work as a machine operator is defined in The Dictionary of Occupational Titles as medium skilled work although

plaintiff had performed it at a heavier exertional level. AR 66. The vocational expert testified that if the hypothetical individual could perform medium work he would not be able to perform plaintiff's past work as he performed it at the heavy exertional level. Goldsmith testified that the individual could perform both light and sedentary assembly jobs, machine operator jobs and packaging jobs. Next, the administrative law judge asked the expert to assume an individual who could perform light work. The expert testified there would be 15,000 assembly jobs, 20,000 machine operator jobs and 2,500 packaging jobs that the individual could perform. AR 67. On questioning by plaintiff's lawyer, Goldsmith testified that an individual who missed two or more days a month would not be able to perform the identified jobs. AR 68.

D. 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 January 18, 2006, the alleged onset date, even though he had applied for and received unemployment compensation. AR 20. At step two, he found that plaintiff had the severe impairment of degenerative disc disease. AR 20. 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 21.

Once he 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.

In determining plaintiff's residual functional capacity, the administrative law judge considered the restriction to sedentary work imposed by plaintiff's treating physician Dr. Lindahl, and noted it was not meant to be a permanent restriction. Further, the administrative law judge did not give Dr. McCoy's opinion much weight because he found it was based on plaintiff's self-reports. The administrative law judge indicated that no surgery or invasive techniques had been recommended. AR 22. He noted that one state agency physician, Dr. Foster, limited plaintiff to the full range of light work, while another state agency physician, Dr. Khorshidi, limited plaintiff to medium work. AR 22.

Also, the administrative law judge considered the credibility of plaintiff's testimony in light of 20 C.F.R. 404.1529 and 416.929 and Social Security Rulings 96-4p and 96-7p. He considered plaintiff's statements that his past job required heavy levels of exertion, even though vocational testimony indicated that the work usually involved no more than medium exertion. Also, he considered the fact plaintiff had been collecting unemployment late in

2006, which would have required him to represent himself as physically able to work. AR 22. The administrative law judge concluded that plaintiff's "medically-determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of those symptoms are not credible to the extent they are inconsistent" with his assessment that plaintiff could perform unskilled sedentary work. AR 22.

At step four, the administrative law judge found that plaintiff's restrictions would keep him from performing his past work (machine shop worker) because the job was usually performed at a medium exertional level. AR 23. At step five, he used the Medical-Vocational Guidelines to find that for persons of plaintiff's age, education, work experience and residual functional capacity, jobs existed in significant numbers in the national economy that plaintiff could perform. He concluded that plaintiff was not disabled under the Medical Vocational Rules. Also, the administrative law judge relied on the vocational expert's testimony to find that there were a significant number of jobs plaintiff could perform in the national economy, including 15,000 assembly jobs, 20,000 packaging jobs and 2,500 machine operation positions. AR 24.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). The decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies benefits, she must build a logical and accurate bridge from the evidence to her conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Credibility

Under Social Security Ruling 96-7p, an administrative law judge must follow a two-step process in evaluating an individual's own description of his or her impairments: 1) determine whether an "underlying medically determinable physical or mental impairment" could reasonably be expected to produce the individual's pain or other symptoms; and 2) if such a determination is made, evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's

ability to do basic work activities." Social Security Ruling 96-7p, 1996 WL 374186, *1 (1996); see also Scheck v. Barnhart, 357 F.3d 697, 702 (7th Cir. 2004). When conducting this evaluation, the administrative law judge may not reject the claimant's statements regarding his symptoms on the sole ground that the statements are not substantiated by objective medical evidence. Instead, the administrative law judge must consider the entire case record to determine whether the individual's statements are credible. Relevant factors the administrative law judge must evaluate are the individual's daily activities; the location, duration, frequency and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; the individual's prior work record and efforts to work; and any other factors concerning the individual's functional limitations and restrictions. SSR 96-7p; 20 C.F.R. §§ 404.1529(c), 416.929(c). See also Scheck, 357 F.3d at 703; Zurawski, 245 F.3d at 887.

An administrative law judge's credibility determination is given special deference because that judge is in the best position to see and hear the witness and to determine credibility. Shramek v. Apfel, 226 F.3d 809, 812 (7th Cir. 2000). In general, an administrative law judge's credibility determination will be upheld unless it is "patently wrong." Prochaska v. Barnhart, 454 F.3d 731, 738 (7th Cir. 2004); Sims v. Barnhart, 442

F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying."). However, the administrative law judge still must build an accurate and logical bridge between the evidence and the result. Shramek, 226 F.3d at 811. The court will affirm a credibility determination as long as the administrative law judge gives specific reasons that are supported by the record. Skarbeck v. Barnhart, 390 F. 3d 500, 505 (7th Cir. 2004).

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

In this case the administrative law judge's credibility assessment does not identify which of the plaintiff's statements he finds not credible. Plaintiff testified that he had severe pain and was most comfortable lying down. I cannot tell from the administrative law judge's decision why he found these specific statements incredible. First, he refers to plaintiff's statement concerning the past exertional level of his job as being heavy when the vocational expert classified it as medium. It is reasonable to conclude that plaintiff may have actually

performed his job at a higher level than the level at which it was classified in The Dictionary. I cannot conclude that this statement affects the credibility of his statements about pain or his activities.

Second, the administrative law judge states that plaintiff was collecting unemployment in 2006 which necessitated that he represent himself as ready, willing and physically able to work. Plaintiff testified that he collected unemployment for six months. Although this fact could call into question plaintiff's credibility, there is no evidence in the record that plaintiff sought work beyond his limitations imposed on him by Dr. Lindahl.

Further, the administrative law judge failed to consider the objective medical evidence, the magnetic resonance imaging scan and x-ray showing the herniated disc and degenerative joint disease, plaintiff's limited activities and his need to lie down and his excellent work history. Also, in making his credibility assessment the administrative law judge failed to consider the side effects of plaintiff's medication or his lack of insurance to pay for medication or pursue medical treatment. This credibility assessment is not sufficient under Martinez. Therefore, I will remand this case in order that a new assessment may be made of the credibility of plaintiff's statements concerning his pain and limitations.

C. Treating Physician's Opinion

Plaintiff claims that the administrative law judge erred in weighing the medical

opinions. The commissioner has established a regulatory framework that explains how an administrative law judge is to evaluate medical opinions, including opinions from state agency medical or psychological consultants. 20 C.F.R. §§ 404.1527(d), 416.927(d). Generally, opinions from sources who have treated the plaintiff are entitled to more weight than non-treating sources, and opinions from sources who have examined the plaintiff are entitled to more weight than opinions from non-examining sources. 20 C.F.R. §§ 404.1527(d)(1) and (2), 416.927(d)(1) and (2). Other factors the administrative law judge should consider are the source's medical specialty and expertise, supporting evidence in the record, consistency with the record as a whole and other explanations regarding the opinion. Haynes v. Barnhart, 416 F.3d 621, 630 (7th Cir. 2005); 20 C.F.R. §§ 404.1527(d)(3)-(6), 416.927(d)(3)-(6). The administrative law judge "must explain in the decision" the weight given to the various medical opinions in the record. 20 C.F.R. §§ 404.1527(f)(2)(ii); 416.927(f)(2)(ii).

"[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). In a recent decision Scott v. Astrue, 647 F.3d. 734, 740 (7th Cir. 2011), the Court of Appeals reaffirmed this standard.

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).

In this case, the administrative law judge lists the opinions of plaintiff's treating physician, Dr. Lindahl; the consulting physician, Dr. McCoy; and the state agency physicians, Dr. Khorshidi and Dr. Foster. In order to reject the opinion of treating physician Lindahl that plaintiff was limited to sedentary work, the administrative law judge had to provide good reasons for this decision. Dr. Lindahl believed that plaintiff had to alternate between sitting, standing and walking every 20 minutes, not work above shoulder height, not perform work with repeated squatting, bending or twisting and not lift more than 15 pounds. This opinion was not consistent with the administrative law judge's assessment that plaintiff could perform light work, which requires lifting 20 pounds occasionally. In rejecting Dr. Lindahl's opinion,

the administrative law judge concluded that Dr. Lindahl's restrictions were not intended to be permanent. However, the record shows that Dr. Lindahl described the limitations as permanent and that Dr. McCoy referred to these limitations as permanent. I am not persuaded that the administrative law judge gave good reasons for rejecting Dr. Lindahl's opinion.

Next, the administrative law judge considered the opinion of Dr. McCoy, who had examined plaintiff for the state disability agency. Although the administrative law judge was correct in stating that Dr. McCoy's assessment of plaintiff was based on plaintiff's self-reports, he failed to note the objective evidence in McCoy's report that an x-ray showed that plaintiff had degenerative joint disease of his lower back. This evidence should have been considered in weighing Dr. McCoy's opinion.

Finally, the administrative law judge chose to believe Dr. Foster's opinion that plaintiff could perform light work rather than Dr. Khorshidi's opinion that plaintiff could perform medium work. He does not give any reasons for this choice or point to evidence to support his conclusion that plaintiff could perform light work rather than medium or sedentary work. There is evidence in the record that suggests plaintiff's ability to work may be more limited than the administrative law judge found; he did not consider the objective medical tests and plaintiff's testimony concerning his activities. On remand, the administrative law judge should consider this evidence in re-weighing the medical opinions to determine plaintiff's residual

functional capacity.

In conclusion, although plaintiff asks me to recommend the assignment of a different administrative law judge on remand, I decline to do so. Plaintiff refers to the administrative law judge's reference at the hearing to an accident report that is not in the record. However, there is nothing to indicate that the judge considered this report in making his decision after hearing plaintiff's explanation of the report. I find nothing in the record to suggest that Judge Schneider is biased against plaintiff.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff William Drefahl'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 24h day of October, 2011.

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