IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GLENANN L. YAHNKE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

11-cv-368-bbc

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Plaintiff Glenann L. Yahnke has moved for remand of this case to defendant Michael J. Astrue, Commissioner of Social Security. The case was remanded once before, by stipulation of the parties, but defendant failed to carry out the instructions in the remand. Therefore, it must be remanded again.

RECORD EVIDENCE

Plaintiff filed an application in 2004 for disability insurance benefits and supplemental security income under the Social Security Act, claiming that she was disabled because she had severe degenerative joint disease of both knees, a knee replacement in her

right knee, osteoarthritis, disorders of the back, depression, anxiety and obesity. Her application was denied initially and again upon reconsideration. She requested a hearing, which was held on August 31, 2006, before Administrative Law Judge John H. Pleuss, who filed a written decision, finding plaintiff not disabled. The decision became the final order of the commissioner after the Appeals Council denied plaintiff's request for review.

Plaintiff filed suit in this court, seeking judicial review of the adverse decision. Before the court had taken any action, the parties agreed that a remand was appropriate and filed a stipulation to that effect with the court. Dkt. #13 (07-cv-344-bbc). In reliance on that stipulation, I entered final judgment for plaintiff on November 26, 2007, under sentence four of 42 U.S.C. § 405(g), reversing the decision of the commissioner and remanding the case for further administrative proceedings. I directed the administrative law judge to further develop and evaluate plaintiff's claim and proceed through the sequential evaluation process, issuing a new decision with a new finding of plaintiff's residual functional capacity that "clearly defines the specific frequency of [plaintiff's] need to alternate sitting and standing per Social Security Ruling 96-9p." Dkt. #14 (07-cv-344-bbc). The administrative law judge was to obtain additional testimony from a vocational expert regarding a hypothetical individual who possessed all the limitations identified in the residual functional capacity finding, after which he was to determine whether plaintiff could perform a significant number of jobs available in the economy. Id.

After remand, the medical record was updated with new reports from plaintiff and her treating doctor. A new hearing was held before Administrative Law Judge Pleuss at which a vocational expert was present, along with plaintiff and her counsel. Plaintiff testified at the hearing that she was 50, that she had graduated from high school but that beginning in middle school, she had been in special education classes and that she had not worked since 2003, when she stopped because of pain in her knee. AR 1037-41. She described her knee problems, her back pain and the embolism she had suffered after undergoing knee replacement. AR 1041-46. Plaintiff testified that she took care of her granddaughter, with the help of her 23-year-old son. She described her day as watching television with her legs elevated, getting breakfast for her granddaughter, sometimes helping her granddaughter with dressing and doing some grocery shopping when her son could not do it. Her son did all the cooking. She said that she could drive, but she often experienced stiffness if she drove for 45 minutes or more. AR 1046-51. Finally, she testified that she took lorazepam and amitriptyline for anxiety and depression, metformin for her diabetes and vicodin when her pain was bad.

Administrative law judge Pleuss questioned the vocational expert at the hearing, but did not pose the right questions. Instead of defining the specific frequency of plaintiff's need to alternate sitting and standing and then asking about it, he did not refer to the subject at all. Instead he asked this hypothetical question:

> Assume an individual with the claimant's age, education, and work history, assume this individual's limited to sedentary work, assume the individual is precluded from any climbing of ladders or scaffolds and is precluded from any crawling or kneeling, assume the individual is precluded [from] more than occasional climbing of ramps or stairs, and is precluded from more than occasional stooping, bending, or crouching, assume the individual's precluded from standing more than 30 minutes at a time, finally, assume the individual's precluded from work at unprotected heights or dangerous machinery or at temperature or humidity extremes, considering all these factors, could this individual perform the claimant's past work?

The vocational expert answered "No" to this question. The administrative law judge then asked whether he was aware of other occupations in the state that such an individual could perform. He answered "Yes" to this question and listed the following jobs: office-helper doing some basic clerical, filing, telephone, messages, "things of that nature," of which there were about 2,400 jobs; basic inspection work (2,000 jobs); basic assembly work (5,000 jobs); and information clerk, "receptionist-type of position like you might find at a mall, for example, it'd be approximately 2,300 [jobs]." Trans., dkt. #10, at 1061. When asked whether the hypothetical individual could do the identified jobs if she were precluded from standing more than 15 minutes at a time, the vocation expert answered "Yes." The administrative law judge never made any determination of the frequency with which plaintiff would have to change from sitting to standing or back and never asked the vocational expert about a hypothetical individual who had to alternate sitting and standing.

Before the administrative law judge held the second hearing, he reviewed an expanded

record that included new reports from plaintiff's primary physician, Dr. David Ringdahl. Dr. Ringdahl referred in his October 29, 2009 notes to plaintiff's right leg pain and spinal stenosis, AR 764. Completing a musculoskeletal questionnaire on January 25, 2009, he said that plaintiff would be able to sit for only four hours during any workday. AR 938. On March 24, 2009, his assessment was that plaintiff suffered from depression, back pain, diabetes, vitamin B-12 deficiency and a history of pulmonary embolism. AR 984-85. A reviewing physician from the Social Security Administration, Dr. Syd Foster, found that plaintiff's residual functional capacity was limited to a range of sedentary work. AR 940. Dr. Foster found plaintiff's complaints credible "given her objective presentation to her MD." AR 944.

The administrative law judge found from the expanded record that plaintiff had severe impairments, consisting of arthritic knees with residuals of right knee replacement, degenerative spinal disc disease with mild stenosis at the L2-3 and L4-5 levels and obesity. Id. He noted that he had found no evidence of any new severe impairment in the medical records submitted after the remand. AR 617. Plaintiff's diabetes was stable and her hypertension was without complications. Id.

Although plaintiff continued to complain of severe knee problems, the administrative law judge observed that Dr. Ringdahl's functional capacity assessment did not suggest that she needed to elevate her leg and he reported that she was capable of standing and walking

up to four hours in an eight-hour day. Id. Ringdahl's treating records did not show any ongoing concerns with plaintiff's knees. Id. The administrative law judge found no evidence that plaintiff had serious problems with tension headaches or that she had any significant mental limitations. He noted that "such depression as she has is described as being stable." Id. (citing Exh. #17F, pp. 125, 54 & 40 (AR 870, 794 & 781). (Only the first of these cited pages says anything about depression.)

The administrative law judge concluded that plaintiff had the residual functional capacity to perform a range of sedentary work and that she could not stand for more than 30 minutes at a time. AR 618. He did not say anything in his decision about any need for plaintiff to alternate sitting and standing. Further on in his decision, he said that he did not find it credible that she needed to elevate her legs on a daily basis because Dr. Ringdahl's most recent report did not support her statement to this effect. AR 620. He found that Ringdahl's recent report indicated that plaintiff could "lift weights of ten pounds and stand and sit for four hours each during an eight hour day with some alternation of position." Id. He found that plaintiff was unable to perform any of her past relevant work, that she was now 50 years old, had at least a high school education and was able to communicate in English, but that she had no work skills transferable to sedentary work. AR 621. Before her age category changed, plaintiff had the residual functional capacity to perform the full range of sedentary work, including those jobs identified by the vocational expert at the hearing.

AR 622. The administrative law judge's conclusion was that plaintiff was disabled as of March 13, 2009, but that she had not been disabled within the meaning of the Social Security Act at any time through December 31, 2006, the date on which she was last insured. AR 616. The Appeals Council took no action on his decision, so it became the final action of defendant.

OPINION

Although the administrative law judge wrote a thorough and careful decision explaining why he found that plaintiff had not met the conditions for Social Security disability benefits before she turned 50, he never reached the question on which remand had been ordered. This omission makes it necessary to remand the case one more time.

The administrative law judge approached the case as if the error made in the first round was a mismatch between his decision, in which he found that plaintiff could not stand more than 15 minutes at a time, and his hypothetical question to the vocational expert at plaintiff's first hearing whether plaintiff could stand for "periods of up to one half hour." AR 613. In his question to the vocational expert at the second hearing, he asked again whether a hypothetical individual who could stand for no more than 30 minutes at a time (and had other restrictions) could perform jobs available in the state of Wisconsin, AR 1059-60, and never asked about a hypothetical individual who had to alternate sitting and

standing frequently. Moreover, he never made a determination of plaintiff's need to alternate between sitting and standing that could be used as the basis for the hypothetical question, although this was part of the remand order. Although he cited the parties' stipulation for remand and the court's remand order, both of which focused on the administrative law judge's need to focus on the specific frequency of plaintiff's need to alternate sitting and standing, he never reached the issue he was directed to consider. (Oddly enough, he referred in his decision to the action of Administrative Appeals Judge Mary C. Montanus, who had remanded the case to him for issuance of a new finding "clearly delineating the specific frequency of the claimant's need to alternate between sitting and standing with additional vocational testimony," AR 614, but never reached that issue.)

The commissioner argues in his brief that the administrative law judge followed the purpose behind the court's order and issued a well-reasoned decision in which he considered all the evidence. He maintains that Ketelboeter v. Astrue, 550 F.3d 620 (7th Cir. 2008), supports the procedure the administrative law judge followed in this case, but the citation is inapt. In Ketelboeter, the administrative law judge asked the vocational expert to assume that the hypothetical individual would have to have a sit, stand option where he could sit or stand as needed during the day. Ketelboeter contended that this question was inadequate because it did not specify how frequently he could have to change positions. The Court of Appeals for the Seventh Circuit rejected the Ketelboeter's contention, saying that "a job in

which Ketelboeter could sit or stand 'as needed' would necessarily encompass frequent sitting and standing." Id. at 626. The commissioner argues that a hypothetical question that includes a limitation of standing no more than 30 minutes at a time implies the need to sit or stand as needed throughout the day. The argument is not persuasive. The length of time a person can stand implies nothing about how long that person can remain sitting in one position.

In plaintiff's case, the administrative law judge never mentioned any need to change positions, let alone "as needed." He asked only about a hypothetical individual who could stand no more than 30 minutes at a time. Of course, such a person might very well be able to sit for eight hours a day; nothing about the inability to stand for 30 minutes at a time rules out that option, but Dr. Ringdahl said in his recent reports that plaintiff could sit or stand for four hours at a time, not that she could sit for a full eight-hour day. It is true that the non-treating doctor who reviewed the records, Dr. Foster, found that plaintiff could do a full range of sedentary work. He may be correct, but the administrative law judge never addressed the conflict between Foster and Ringdahl on this point or explained why Foster's opinion should be given more weight than Ringdahl's. He did explain what he saw as inadequacies in Dr. Ringdahl's reports, but he never explained why he believed that Dr. Foster was more credible. An administrative law judge must offer "good reasons" for discounting the opinion of a treating physician. Martinez v. Astrue, 630 F.3d 693, 698 (7th

Cir.2011). Moreover, he seemed to accept Dr. Ringdahl's newer report that plaintiff could sit or stand four hours a day.

In addition, the administrative law judge gave weight to a report that plaintiff was "quite busy with acting as legal guardian for her grandchild." AR 620. He did not refer to anything in the record that would have explained what "quite busy" meant. Certainly, his questioning of plaintiff at the hearing did not support a finding that what she did to care for her grandchild would enable her to work at a full time job. Bjornson v. Astrue, No. 11-2422, 2012 WL 280736, *6 (Jan. 31, 2011) (failure to recognize differences between activities of full-time job and activities of daily living, which offers flexibility in scheduling and help from others and person is not held to minimum standard of performance, is recurrent problem in social security disability cases).

In summary, the administrative law judge's failure to undertake the proper review of plaintiff's case means that it must be remanded one more time for consideration by the commissioner in accordance with the earlier order of remand.

ORDER

IT IS ORDERED that plaintiff Glenann L. Yahnke's motion for summary judgment is GRANTED and this case is REMANDED to defendant Commissioner of Social Security, pursuant to sentence four of 42 U.S.C. § 405(g). Judgment is to be entered in favor of

plaintiff.

Entered this 27th day of February, 2012.

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