IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SARAH GILLERT,

OPINION AND ORDER

Plaintiff,

11-cv-671-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Sarah Gillert is seeking review of a decision of the Commissioner of Social Security denying her claim for disability insurance benefits and supplemental security income. Plaintiff alleged disability as a result of attention deficit disorder, depression, learning disability and fibromyalgia. She contends the administrative law judge erred in two respects: she failed to include plaintiff's moderate limitations in concentration, persistence and pace in the hypothetical question that she posed to the vocational expert; and her opinion was not supported by substantial evidence because it rested on flawed testimony from the vocational expert.

Although the administrative law judge reviewed the evidence thoroughly, the hypothetical questions that she asked the vocational expert did not include all of plaintiff's mental limitations. Therefore, the decision must be reversed and remanded for further proceedings. The testimony of the vocational expert was incorrect in other respects as well,

but I need not determine whether those mistakes would constitute reversible error on their own.

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

RECORD FACTS

A. Background

Plaintiff was born on June 21, 1970. She worked as a customer service representative for six months in 1998 before attending college and obtaining a bachelor's of science degree in art. After graduation, she taught art at a private grade school about 10 hours a week for the 2005-06 school year, but left that job because she was unable to attend work on time or to complete the job requirements. AR 62-63, 163. Plaintiff has a history of treatment for fibromyalgia, chronic fatigue and various mental disorders, including attention deficit disorder, oppositional/defiant disorder and depression.

Plaintiff filed an application for disability insurance benefits and supplemental security income on October 19, 2007, alleging disability as of October 16, 2002 because of attention deficit disorder, learning disability, depression and fibromyalgia. AR 162. She later amended the onset date to her application date. AR 206. After the state agency denied her application initially and upon reconsideration, she requested a hearing, which was held on January 31, 2011 before Administrative Law Judge Virginia Kuhn. The administrative law judge heard testimony from plaintiff, AR 60-78, and a neutral vocational expert, AR 78-86. She issued her decision on February 11, 2011, finding plaintiff not disabled. AR 13-25.

This decision became the final decision of the commissioner when the Appeals Council affirmed it on September 16, 2011.

B. Medical Records

A report from Edward Wingra, M.D., a physician at a sleep disorders clinic, AR 24-50, shows that he saw plaintiff about significant sleep problems she had experienced since 1998. Wingra's plan was to get plaintiff on a regular sleep schedule through behavioral medicine.

In April 2006, Harvey Weinberg performed psychological testing of plaintiff and gave her a diagnosis of ADHD, noting that further testing was necessary for a definitive diagnosis. AR 275. On April 26, Jon Dickson, M.S., found that plaintiff met the criteria for adult attention deficit hyperactivity disorder and for oppositional/defiant disorder. AR 273-74. He scheduled plaintiff for a Minnesota Multiphasic Personality Inventory and referred her to behavioral health for treatment of ADHD. Weinberg reviewed plaintiff's MMPI-2 and concluded that she also suffered from mild depression, not otherwise specified. AR 271. After meeting with plaintiff again in July 2006, Weinberg noted that her erratic sleep routine and sleep deprivation may account for some of her recent ADHD symptomatology. AR 270.

On May 23, 2006, plaintiff began seeing Sarah Naik, M.D., as her primary care physician. AR 242-43. She told Naik she had past diagnoses of for treatment of fibromyalgia and ADHD and that she experienced fatigue. Naik prescribed amitriptyline for plaintiff's fibromyalgia but deferred to behavioral health regarding her ADHD.

On August 17, 2006, plaintiff saw Mariana Vosika, M.D., a psychiatrist, for a followup on Weinberg's and Dickson's ADHD diagnosis. AR 269. Vosika placed plaintiff on Provigil for her fatigue and disrupted sleep/wake schedule. Id.

On August 23, 2006, plaintiff had a neurology consultation with Anil Bouri, M.D., who concluded that plaintiff did not need a sleep study to rule out sleep disorders, because he believed the "sole cause" of her insomnia and fatigue was "a circadian rhythm disorder with irregular sleep-wake cycle" with underlying depression, anxiety and/or personality disorder. AR 234-35. He "urged her to keep a sleep diary," and he set up an appointment with Gregory Prichett, Psy.D., in neuropsychology.

Plaintiff met with Prichett on September 13, 2006. AR 232. He reported that plaintiff had not brought a sleep diary or completed sleep questionnaire, as Dr. Bouri had asked her to. He told her it would be difficult to formulate a plan of action with her unless she could complete these inventories. AR 233.

Plaintiff saw Prichett a second time, on October 13, 2006. AR 228. She had still not prepared any sleep diary but she said she had completed the questionnaire, but had left it at home. Pritchett told her that it would be difficult to make any headway with her sleep problems unless she could at least try to conform to a regular schedule and restrictions. Id.

On October 20, 2006, plaintiff had a consultation with rheumatologist Peter Valen, M.D. He noted that she had a previous diagnosis for fibromyalgia and concluded that "her symptoms and exam are certainly compatible" with fibromyalgia. AR 226-27. Her primary symptoms were mental fogginess and fatigue. Valen prescribed Flexeril, or cyclobenzaprine,

in place of the amitriptyline to "see if it helped with her sleep disorder."

On November 3, 2006, plaintiff had a third neuropsychology consultation with Prichett for "ongoing difficulties with her sleep-wake cycle." AR 224-25. Plaintiff reported that she slept most of the day but stayed awake until 4 or 5 a.m. doing housework or other activities, in part because she was "so disorganized with her scheduled activities that she is not able get things together well enough to get on a regular nighttime sleeping schedule." After plaintiff presented "obstacles" to pursuing all of Pritchett's recommendations, he told her that he had little else to offer except that she should implement sleep hygiene rules or find ways to adapt her life to her sleep schedule and that she should follow up with Dr. Vosika. AR 225.

On March 7, 2007, plaintiff told Dr. Naik that the higher dose of Flexeril had improved her sleep cycles but they remained "less than perfect." AR 218. Naik also noted that plaintiff felt relatively well on the Provigil. At some point, at least as early as July 2007, she also began taking Dexedrine for her ADHD. AR 214.

In April 2007, Dr. Vosika referred plaintiff to Marsha Lukasek, M.S. for psychotherapy. Lukasek saw plaintiff from May 8, 2007 until June 2008. Plaintiff often arrived late to her sessions with Lukasek. AR 254, 255, 256, 257, 258, 264. In the first meeting, Lukasek observed that plaintiff was "quite verbal in the session and often need[ed] redirection to remain focused and on task." AR 265. She was also "quite emotional and cried openly in the session." She gave plaintiff a diagnosis of "major depressive disorder, not otherwise specified, with attention deficit disorder." AR 266.

Between June and November 2007, plaintiff told Lukasek that she suffered from excessive fatigue that interfered with her daily functioning and limited her ability to maintain employment. AR 254-66. Plaintiff attributed the fatigue to her fibromyalgia but also said that she stayed up late and slept during the day. See AR 252, 254, 255. Lukasek encouraged plaintiff to try to obtain part-time employment to give her life structure, but plaintiff had strong feelings that she could not be a reliable employee and she expressed frustration at being challenged to become more organized. AR 256, 261. Lukasek observed on several occasions that plaintiff tended to blame others for her problems. AR 251, 255, 256. She expressed distrust for doctors, who she believed gave her incorrect diagnoses and believed that she was resisting treatment. AR 255. According to Lukasek, plaintiff was "quite entrenched in her belief that she is highly limited in her physical capabilities and has become quite defensive if these beliefs are challenged." AR 259.

In January 2008, Lukasek questioned the usefulness of ongoing treatment because plaintiff was "unwilling and quite resistant to change her beliefs and/or behaviors." AR 369-70. Lukasek decided to work toward discharging plaintiff from treatment because she thought the likelihood of change was "minimal at best." They agreed in March 2008 to reduce the frequency of plaintiff's treatments, AR 365, and their final session was in June 2008. AR 361-62.

On March 17, 2008, plaintiff saw Vosika again. AR 366. She continued to report problems with her sleep/wake cycle and told Vosika that she feared she might never control the problem even with her best efforts.

On January 7, 2009, plaintiff saw rheumatologist Carol Danning, M.D., to talk about "new ideas" regarding her chronic fatigue. AR 337-39. Danning noted that although plaintiff had had a diagnosis of fibromyalgia in the past because of chronic achiness, "it sounds like her activities are much more limited by her sleep cycle problems and fatigue than truly by pain." AR 338. Danning concluded that fibromyalgia treatments were unlikely to be effective because pain was not limiting her functioning. AR 339. Her fatigue would have to be addressed through behavioral medicine, because few treatments for chronic fatigue can help "someone with [the] very poor sleep hygiene that [plaintiff] appears to have." Id.

Plaintiff saw Dr. Vosika several times in 2010, each time reporting that her sleep schedule remained erratic. AR 441-44. Her thought process was always logical and she never reported bizarre thought content or thoughts of self-harm. On several occasions, Vosika reported that plaintiff's mood was dysphoric and once that her affect was sad and tearful. AR 440, 441, 444. On other occasions her mood was stable and her affect was pleasant. AR 444, 445. Plaintiff reported in August and October 2009 that she had not been compliant with her Provigil or Dexedrine and in November that she had stopped taking the Dexedrine all together. AR 440, 441 and 442.

C. Consultative Exams

On March 3, 2008, plaintiff saw the agency consultative examiner, James Hobart, Ph.D., for a mental status evaluation. AR 277-81. Plaintiff "acknowledge[d] some degree of depression but primarily describe[d] her symptom pictures as significant fatigue." AR

278. Cognitively, she was fully alert and oriented to time, place and person. Hobart observed that her "only obvious impairment in attention and concentration was her tendency to be overly verbal with her presentation of information."

Hobart gave plaintiff the following diagnosis: Axis 1, pain disorder associated with psychological and medical condition, probable dysthymia, attention deficit disorder, by patient history, and learning disability, by patient report; Axis II, dependent personality features; Axis II, fibromyalgia/chronic fatigue syndrome, by patient report; and Axis IV, moderate stressors. He assigned her a global assessment of functioning of 40-50.

With respect to work capacity, Hobart stated that plaintiff would have no difficulty understanding, remembering or carrying out simple work-related instructions and would maintain fair workplace relations. AR 281. He thought her ability to sustain concentration, attention and work pace was "likely poor" because she "describes difficulty staying on task, and this was also noted during her interview." Id. He also opined that her ability to adapt to change was poor and to withstand routine work stresses was "very problematic." Id.

On April 28, 2008, Ward Jankus, M.D., completed a physical consultative exam. AR 287-89. Plaintiff told Jankus about her erratic sleep schedule and her fatigue problems, explaining that some days she feels good and can walk a few miles and other days she cannot get out of bed. Jankus gave plaintiff a diagnosis of "complicated multifactorial pain/fatigue/ depression issues all of which feed on each other," but stated that their cause was unclear. His exam found "no obvious orthopedic indications or upper motor neuron/ lower motor neuron neurologic deficits." He assigned no limitations on her functional capacity.

On May 14, 2008, state agency physician Michael Baumblatt, M.D., reviewed the record and concluded that plaintiff could perform light exertional work, with no additional restrictions. AR 292. She was limited to lifting 20 pounds occasionally, 10 pounds frequently, and to sitting and standing or walking for six of eight hours. Mina Khorshidi, M.D., concurred on November 5, 2009.

D. State Agency Psychologist Opinion

On May 22, 2008, Jack Spear, Ph.D., reviewed plaintiff's record and completed a Psychiatric Review Technique form. Under the "A Criteria," Spear found that plaintiff had 12.04 Affective Disorder and 12.07 Somatoform Disorder. AR 299. Under the "B Criteria," he wrote that plaintiff had moderate restrictions in her activities of daily living, in maintaining social functioning, and in maintaining concentration, persistence and pace. AR 309. He found no evidence of episodes of decompensation.

Spear also completed a Mental Residual Functional Capacity Assessment form. In his opinion, plaintiff had no marked limitations but was moderately limited in her ability to

- carry out detailed instructions
- concentrate for extended periods
- perform within a schedule and maintain punctuality and regular attendance
- work in coordination with others without being distracted
- complete a normal workday and workweek
- interact appropriately with the public
- accept instructions and respond appropriately to criticism

- get along with co-workers without distracting them or exhibiting behavioral extremes
- respond appropriately to changes in the work setting.

AR 313-14. In his sparse explanation of these findings, Spear noted only that plaintiff had "pain issues" and her "[a]bility to follow instructions and concentrate varies." AR 315.

On November 4, 2009, Deborah Pape, Ph.D., filed a "case analysis" affirming Spear's reports "as written." AR 404. Pape also noted plaintiff's credibility issues, lack of aggressive treatment and lack of cooperation.

E. Hearing Testimony

At her hearing before the administrative law judge, plaintiff complained that her irregular sleep schedule made her tired all of the time and caused her to have difficulty concentrating. On better days she was able to perform art projects and function for four to eight hours, but on worse days, she would be up all night "zoning out" in front of the television. If she worked beyond her abilities on good days, then she would pay for it for days following. She testified that her condition was cyclical and unpredictable, with some better months but other months in which she is unable to do anything.

The administrative law judge called Stacy Starr to testify as a vocational expert. Starr testified that plaintiff's only previous relevant work was as a customer service representative. The administrative law judge asked Starr what work would be available for a younger individual (40), who was limited to a light exertional level, to "unskilled tasks that are consistent from day to day," tasks "primarily performed alone" rather than in "collaboration

with others," and to jobs with "flexibility in terms of production standards, and specifically what I mean by that is that these would be tasks that would not be with strict time requirements or strict production quotas that need to be met." AR 82-83.

Starr responded that such a person would not be able to perform plaintiff's past relevant work, but she identified three occupations that plaintiff could perform:

> She can be a food tray preparer which is unskilled, exertional is light. There's 12,409 jobs available in Wisconsin. She can be a dishwasher. It's unskilled, it's also light. There's 9,284 jobs available. She can be a table worker. It's unskilled at two. It's considered sedentary work. There's 21,679 jobs available.

AR 84. According to Starr, an "at-will sit/stand option" would not affect the availability of these jobs, but if the person was unable to perform full time work or needed an allowance for being off task beyond the normal lunch break, no work would be available. AR 85-86. She testified that her opinion about these occupations was consistent with the Dictionary of Occupational Titles, but that her testimony about the effect of the sit/stand option was based on her experience as a job placement officer. AR 85. Plaintiff's counsel did not ask the vocational expert any questions about these jobs.

F. The Administrative Law Judge's Decision

In reaching her conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. 20 C.F.R. §§ 404.1520, 416.920. At steps one and two, the administrative law judge concluded that plaintiff had not engaged in substantial gainful activity since her application date and that she had the severe impairments of attention deficit hyperactivity disorder, personality disorder and

fibromyalgia.

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. Part 404, Subpart P, Appendix 1. She compared plaintiff's impairments to Listings 12.02, organic mental disorders and 12.08, personality disorders. She found that plaintiff had no marked limitations in any of the "paragraph B" criteria, but had moderate difficulties in social functioning and concentration; moderate difficulties in persistence and pace; and mild to moderate limitations in the activities of daily living. AR 17.

With respect to plaintiff's residual functional capacity, the administrative law judge concluded that plaintiff was limited to light exertional work, that was unskilled, with limited changes in the workplace, limited interaction with others, flexible time requirements and "flexibility in production standards, which means there are no strict time requirements or strict production quotas that must be met." AR 18.

In determining plaintiff's residual functional capacity, the administrative law judge analyzed the testimony and opinion evidence thoroughly. She gave "considerable weight" to Hobart's opinion regarding plaintiff's overall mental status, limitations in daily living and capacity for unskilled work, but no weight to his determination that plaintiff's GAF was 40 to 50. She noted various ways in which that score was inconsistent with the Hobart's own report. AR 23. She also gave "considerable weight to the assessments submitted by Dr. Spear and Dr. Pape," including Spear's finding that plaintiff's mental impairments caused moderate limitations to her activities of daily living, social functioning and concentration,

persistence and pace. AR 24.

After finding at Step 4 that plaintiff was unable to perform her past relevant work, AR 24, the administrative law judge proceeded to step five to determine whether plaintiff's non-exertional limitations would prevent her from performing occupations that exist in significant numbers in the national economy. Relying on the vocational expert's testimony, the judge found that plaintiff could perform representative occupations such as a food tray preparer, dishwasher and table worker. AR 25. The judge also stated that the vocational expert's testimony was consistent with the information contained in the Dictionary of Occupational Titles as required by Social Security Ruling 00-4p. AR 25. Accordingly, she concluded 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, she 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. Limitations in Concentration, Persistence and Pace

"Hypothetical questions posed to vocational experts ordinarily must include all limitations supported by the medical evidence in the record," Steele v. Barnhart, 290 F.3d 936, 942 (7th Cir. 2002), including deficiencies of concentration, persistence and pace. O'Connor-Spinner v. Astrue, 627 F.3d 614, 619 (7th Cir. 2010) (citations omitted). Plaintiff argues that the hypothetical used by the administrative law judge during her hearing failed to account for her moderate limitations in concentration persistence and pace.

The administrative law judge agreed with Spears and Hobart that plaintiff had moderate limitations in concentration, persistence and pace. However, the judge did not include that express limitation in her hypothetical question. Instead, she asked the vocational expert to consider someone limited to light exertional work that was unskilled, with limited changes in the workplace, limited interaction with others, flexible time requirements and without "strict time requirements or strict production quotas that must be met." AR 18. Plaintiff contends that this alternative hypothetical question was inadequate to convey plaintiff's mental limitations to the vocational expert.

The Court of Appeals for the Seventh Circuit has cautioned that for most cases the administrative law judge should refer to limitations in "concentration, persistence and pace" expressly in the hypothetical. O'Connor-Spinner, 627 F.3d at 619. Nevertheless, the court has also upheld hypothetical questions using different terminology "when it was manifest

that the . . . alternative phrasing specifically excluded those tasks that someone with the claimant's limitations would be unable to perform." Id. For instance, when the claimants' limitations in concentration, persistence and pace arose from stress or panic disorders, the court has upheld hypothetical questions that included only limitations to low-stress and low-production work because these limitations excluded the conditions likely to trigger the claimants' symptoms. Id. (collecting cases). In contrast, the court has held repeatedly that the mere limitation to "simple, unskilled or routine work" is insufficient to account for difficulties with concentration, persistence and pace. Craft v. Astrue, 539 F.3d 668, 677-78 (7th Cir. 2008); Young v. Barnhart, 362 F.3d 995, 1003-04 (7th Cir. 2004).

In this case, the administrative law judge's hypothetical question encompassed many of plaintiff's mental limitations, including her difficulty in working with others without being distracted and her difficulty with being on time. However, the hypothetical did not account for several of Spears and Hobart's findings about plaintiff's mental limitations, although the judge said she was giving their opinions considerable weight. Spears concluded that plaintiff would have moderate difficulty maintaining regular attendance, completing a normal workday and workweek, concentrating for extended periods and carrying out detailed instructions. Hobart concluded that plaintiff would have difficulty staying on task and sustaining concentration, attention and work pace.

The commissioner argues that these limitations were incorporated in the administrative law judge's finding that plaintiff was limited to occupations with "flexibility in production standards, which means there are no strict time requirements or strict

production quotas that must be met." The commissioner may be correct that concentration difficulties will prevent a person from performing jobs with strict time limits and production quotas. However, a limitation to jobs with flexible production standards does not exclude all of the jobs that a person with a deficiency in concentration would be unable to perform adequately. Moreover, I do not see how this production standards limitation could possibly account for difficulties following instructions, maintaining attendance or completing a workday or workweek. The hypothetical posed by the administrative law judge would not lead the vocational expert to exclude all those tasks that would prevent someone with plaintiff's limitations in concentration, persistence and pace from performing. Therefore, remand is required.

C. Vocational Expert's Testimony

Plaintiff also argues that the administrative law judge's opinion was not supported by substantial evidence because the vocational expert's testimony was unreliable. Plaintiff argues, and the commissioner appears to concede that none of the occupations listed by the vocational expert satisfy the administrative law judge's hypothetical. , Dft.'s Resp. Br., dkt. #12, at 12. The listing that corresponds to "food tray preparer" in the The Dictionary of Occupational Titles is "319.677-014, food service worker-hospital," which is medium exertional work. The listing that corresponds to a "dishwasher" is a "318.687-010, kitchen helper," which is semi-skilled work. Finally, the occupation of "table worker" does not appear in the Dictionary and neither party has identified a corresponding listing.

Plaintiff's counsel did not question the vocational expert's testimony about these jobs during the hearing. In her written decision, the administrative law judge relied on this testimony and stated affirmatively that it was consistent with the Dictionary. Because I am remanding the case for another reason, I need not decide whether the judge should have noticed these mistakes or whether the error would require remand on its own. However, the vocational expert and administrative law judge should take care to avoid similar mistakes on remand.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Sarah Gillert's application for disability insurance benefits is REVERSED and the case is REMANDED to the commissioner under sentence four of 42 U.S.C. § 405(g) for a new determination of her mental residual functional capacity and a subsequent determination of disability at step five.

Entered this 11th day of February, 2013.

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