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

LINDA A. HOEFT,

Plaintiff, OPINION AND ORDER

v. 11-cv-70-wmc

MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,

Defendant.

Plaintiff Linda A. Hoeft seeks judicial review of a decision made by the Commissioner of the Social Security Administration, concluding that she was ineligible for Disability Insurance Benefits under Title II of the Social Security Act, codified at 42 U.S.C. §§ 416(i) and 423(d). Hoeft contends that the administrative law judge who presided over her application for benefits erred in assessing her "residual functional capacity" and in finding that she could perform her "past relevant work." The court agrees that the ALJ erred in determining Hoeft's ability to perform her past relevant work and will, therefore, remand on that ground, while affirming the Commissioner's decision in all other respects.

FACTS

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

A. Plaintiff's Work History, Injury and Application for Benefits

Plaintiff Linda A. Hoeft is a 58-year-old resident of Watertown, Wisconsin. After earning a "general banking diploma," she worked as a bank teller from 1986 through 1992, when she began working as a customer service representative at the Ixonia State Bank. AR 23-24, 32-35, 206, 215. On April 23, 2003, Hoeft fell down a flight of 12 stairs at her home

and badly fractured her right ankle. Although Hoeft was cleared to return to work at the end of July, 2003, she was let go several months later when she could no longer work full time.

Hoeft then worked at a series of part-time office jobs, including as a bookkeeper and an accounts receivable clerk. In 2006, Hoeft obtained a license to sell insurance and worked as a self-employed agent. Later, Hoeft began working part-time as a customer service representative at a "Speedy Loan" store, where she did "pay day advances" and money transfers through Western Union.

Hoeft filed an application for social security disability insurance benefits on December 29, 2006. AR 151-53. In that application, Hoeft alleged that she became disabled on April 23, 2003, and was unable to work full time due to fibromyalgia, osteoarthritis and chronic pain.[1] AR 205. After considering various vocational factors, medical records and reports from consulting physicians, the state disability agency denied her application and her motion for reconsideration. AR 57, 68. On August 6, 2007, Hoeft requested a hearing before an administrative law judge. AR 91-95.

B. Medical Records

The administrative record contains nearly 600 pages of medical records, reports and evaluations regarding Hoeft's condition between 1998, and the time of her disability hearing in November of 2009.[2] In the interest of brevity, this opinion will summarize only those

[1] "Fibromyalgia" is characterized by "pain and stiffness in the muscles and joints that either is diffuse or has multiple trigger points." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 703 (32nd ed. 2012). "Osteoarthritis" is a "noninflammatory degenerative joint disease" that affects joint cartilage. *Id*. at 159, 1344. Chronic pain is "more or less a localized sensation of discomfort, distress, or agony" that "persists over a long period of time." *Id.* at 359, 1363.

[2] Before the onset of disability date, the records show that Hoeft had back surgery to (continued...)

records that pertain to the issues presented for judicial review.

The medical records show that Hoeft was admitted to Watertown Memorial Hospital shortly after midnight on April 24, 2003, having tripped and fell down a flight of 12 stairs at her home. AR 400-01. An emergency room physician diagnosed a right tibia/fibula fracture and immediately referred Hoeft to an orthopedic specialist.[3] AR 401-03. Dr. Thomas W. Grossman, who is a board certified orthopedic surgeon, diagnosed a "pilon fracture" in Hoeft's right ankle, which would require surgery to realign and stabilize the broken bones.[4] AR 321, 340.

Dr. Grossman performed a "closed reduction" procedure to repair the fractures with an "external fixator" to stabilize her tibia and "open reduction surgery" to place internal fixation directly onto the fibula.[5] AR 340, 407. Hoeft returned to see Dr. Grossman for

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[2](...continued)
alleviate a herniated disk on February 5, 1999, and arthroscopic surgery to repair a torn medial meniscus in her left knee on November 7, 2000. AR 338-39.

[3] The "tibia," commonly known as the shin bone, is the larger of two bones that extends down the medial or middle portion of the lower leg from the knee to the ankle. STEDMAN'S MEDICAL DICTIONARY 1167, 1989 (28th ed. 2006). The "fibula" is the smaller bone that is located on the side or lateral portion of the shin. *Id.* at 727, 1051.

[4] A "pilon fracture" is defined generally to include "comminuted" or crushed bones that form the ankle joint. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 743 (32nd ed. 2012); STEDMAN'S MEDICAL DICTIONARY 771 (28th ed. 2006); *see also Nunn v. Astrue*, Civil No. 10-383, 2011 WL 1361551, at *3 (C.D. Cal. April 11, 2011) (describing the pilon fracture as "a very severe fracture that extends from the distal tibia into the ankle").

[5] "Reduction" is a technical term that describes a "manipulative procedure for realigning displaced broken bone ends or 'reducing' the dislocated bones of a joint to normal angles." AMERICAN MEDICAL ASS'N, COMPLETE MEDICAL ENCYCLOPEDIA 1056 (2003). "Open reduction" is a surgical technique in which broken bones are repaired or repositioned through an incision at the site of the injury. *Id.* at 1056. During an open procedure, the surgeon may apply fixtures, such as "a rod, pins, a plate, screws or special bone cement . . . to hold the reduced bone fragments in place." *Id.* A "closed reduction" procedure involves setting displaced
(continued...)

follow-up care on a weekly basis thereafter until July 29, when Dr. Grossman removed the external fixator from Hoeft's right ankle. AR 324-28. The next day, Dr. Grossman advised Hoeft that her ankle had healed enough that she could perform weight-bearing exercises "as tolerated" and that, from a medical standpoint, she could go back to work.

Hoeft returned to work at Ixonia State Bank with the aid of crutches. At a follow-up appointment on August 27, Dr. Grossman told Hoeft that she could start to transition off crutches, but that she should continue physical therapy. *Id*. On September 12, Hoeft told Dr. Grossman that she was experiencing pain in her right knee since she stopped using crutches. AR 324. X-rays showed evidence of "generalized osteopenia" and he suspected "osteonecrosis."[6] After an MRI of Hoeft's knee revealed swelling, but no injury, Dr. Grossman recommended that Hoeft return to crutches and non-weight-bearing physical therapy. AR 324.

On November 26, 2003, Hoeft told Dr. Grossman that things "were not going very well." AR 322. She had been terminated from her employment at the bank, her car had been hit by a hit-and-run driver, and she believed that she was not making any progress with physical therapy. Dr. Grossman observed that she had a "short stride gait on the right with

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[5](...continued)
bones by manipulating them into place without surgery. *Id.* After closed reduction, the repaired fracture may be secured or immobilized by external means. *Id.* at 581, 1056. In Hoeft's case, the surgeon applied an "external fixator" consisting of a metal bar and pins that punctured her skin and attached to the bone to stabilize the fracture. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 713 (32nd ed. 2012); *see also* STEDMAN'S MEDICAL DICTIONARY 738 (28th ed. 2006) (depicting various kinds of fixation applied internally and externally to stabilize bone fractures).

[6] "Osteopenia" means "[d]ecreased calcification or density of bone." STEDMAN'S MEDICAL DICTIONARY 1391 (28th ed. 2006). "Osteonecrosis" is the "death of bone in mass" as opposed to a relatively small incidence of necrosis in bone. *Id.*

relatively little ankle motion." Grossman agreed that Hoeft would not benefit from further physical therapy and recommended getting a functional capacity evaluation to provide objective information regarding her ability to work and "to guide [her] vocational choices." AR 322.

On February 16, 2004, Hoeft met with the physical therapist. AR 342. Based on Hoeft's performance on a number "positional tolerance" tests, the therapist found that Hoeft was capable of functioning in occupations in the "sedentary, light and medium physical demand categories during an 8-hour work day."[7] Noting that Hoeft demonstrated a limited range of motion, balance, strength, gait abnormalities and decreased standing tolerance during testing, the physical therapist recommended that Hoeft not perform work that included crouching or crawling and that job tasks such as walking, standing, and stair climbing should be limited to no more than ten minutes per hour. In May 2004, Dr. Grossman reviewed Hoeft's functional capacity evaluation with her and added it to her chart. AR 321.

On August 1, 2005, Hoeft saw Dr. Grossman for burning discomfort and numbness in her right lower extremity. AR 320. Her x-rays revealed significant degenerative changes in the ankle joint and "generalized demineralization" in her foot. Dr. Grossman thought that her symptoms could indicate "sympathetic reflex dystrophy" or complex regional pain

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[7] A sedentary job is limited primarily to work that involves sitting, with occasional walking or standing, and occasional lifting or carrying of no more than 10 pounds at a time. 20 C.F.R. § 404.1567(a). Light work may involve lifting up to 20 pounds with frequent lifting or carrying of up to 10 pounds at a time along with "a good deal of walking or standing," or "sitting most of the time with some pushing and pulling of arm or leg controls." *Id.* at § 404.1567(b). A person can perform medium-level work if he or she retains the ability to perform sedentary or light work, and to lift up to 50 pounds at a time with frequent lifting or carrying up to 25 pounds. *Id.* at § 404.1567(c).

syndrome.[8] On August 15, Grossman issued Hoeft a disability parking permit and filled out disability insurance forms.

On September 23, 2005, Hoeft contacted Dr. Grossman and reported that her insurance company had "cut off her disability." Grossman advised Hoeft that a valid functional capacity evaluation indicated she was able to perform at the medium level of work. He told her that there had been "no change in his position [that she could perform medium-level work] over the entire course of his treatment with her." AR 319. Dr. Grossman declined to review her claim of disability further and suggested that she "discuss this with her insurance company." *Id.* There are no further treatment records from Dr. Grossman after this time.

In April of 2006, Hoeft's primary care physician referred her to a rheumatologist, Dr. James F. Porter, for an evaluation of the persistent aches and pains that Hoeft had been experiencing. Hoeft reported suffering mild stiffness for 30-60 minutes upon awakening and her pain worsening with standing, walking and certain weather conditions. AR 452. Dr. Porter observed swelling and decreased range of motion in her right ankle, but no other abnormalities. After his initial examination and review of her medical history, Porter found that Hoeft appeared to have osteoarthritis at multiple sites and "myofascial pain," which he characterized as "a syndrome like fibromyalgia but with more localized symptoms." AR 453.

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[8] "Sympathetic reflex dystrophy" is synonymous with complex regional pain syndrome (CRPS), which usually affects an extremity after an injury and is characterized by "intense burning pain," among other things, and may be accompanied by "posttraumatic osteoporosis." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1826 (32nd ed. 2012); *see also* STEDMAN'S MEDICAL DICTIONARY 1895 (28th ed. 2006) (noting that "complex regional pain disorder," also known as "reflex sympathetic dystrophy" or RSD, is defined generally as "diffuse persistent pain usually in an extremity often associated with vasomotor disturbances, trophic changes, and limitation or immobility of joints").

Porter encouraged Hoeft to do regular aerobic or conditioning exercise to improve her "functional status." To decrease pain, Porter prescribed a non-steroidal anti-inflammatory drug (NSAID) and recommended acetaminophen (Tylenol).

At a follow-up visit with Dr. Porter on December 1, 2006, Hoeft reported that she was doing well, but that her current therapy had been "less effective than desired." After conducting a physical exam, Dr. Porter determined that Hoeft continued to suffer from osteoarthritis at multiple sites. AR 444. He also diagnosed fibromyalgia, which he characterized as "a syndrome with symptoms of diffuse persistent pain, tender points, nonrestful sleep, and poor tolerance to minimal degrees of over or under activity," and other common symptoms, including "numbness or tingling sensation in the extremities, poor concentration and fatigue." Overall, Dr. Porter concluded that Hoeft's condition was unchanged and recommended continuing the prescribed therapy regime.

C. Consulting Expert Reports and Initial Denial of Benefits

After Hoeft applied for disability benefits in December of 2006, the state disability agency referred her for examination by two consulting physicians and a consulting psychiatrist retained by the Social Security Administration. Consultative examinations supplement existing medical records and are used on an advisory basis to diagnose a claimant's impairments, as well as any resulting functional limitations.[9]

On March 8, 2007, consulting physician Dar Muceno conducted a physical residual functional capacity evaluation for Hoeft, listing diagnoses of fibromyalgia and osteoarthritis. AR 531. Dr. Muceno found that, with these impairments, Hoeft could perform light work

[9] *See* CAROLYN A. KUBITSCHEK & JON C. DUBIN, SOCIAL SECURITY DISABILITY: LAW AND PROCEDURE IN FEDERAL COURT (2012) (citing 20 C.F.R. §§ 404.1517, 416.917).

consisting of lifting or carrying 20 pounds occasionally and 10 pounds frequently, standing or walking 6 hours in an 8-hour workday and sitting for up to 6 hours in an 8-hour workday. AR 532. He found that Hoeft had no established "postural" or other limitations on her ability to reach in all directions or engage in fine motor skills. AR 533-34. Likewise, he found that Hoeft had no established limitations on her visual acuity, her ability to communicate, or her ability to tolerate various environmental factors. AR 534-35.

On July 2, 2007, consulting physician Pat Chan completed a second physical residual functional capacity assessment for Hoeft, listing diagnoses of post-traumatic right ankle arthritis, fibromyalgia and mild osteoarthritis at multiple sites. AR 551. Consistent with the evaluation completed by Muceno, Dr. Chan found that Hoeft could perform light work, although he noted an additional limitation on Hoeft's ability to operate "pedal controls" with her right foot in view of the post-traumatic arthritis in her ankle. AR 552. Chan also found that the injury to Hoeft's right ankle limited her ability to climb, balance, crouch or crawl. AR 553. In particular, Chan noted that Hoeft should be restricted from walking on uneven terrain. *Id.*

On July 2, 2007, consulting psychiatrist Keith Bauer conducted a psychiatric review. AR 559. Dr. Bauer diagnosed "chronic depression/insomnia," but found that these impairments that were not severe. AR 559, 562. Bauer further found no functional limitations as the result of a mental disorder. AR 569.

After considering Hoeft's medical records and reports filed by the consulting experts, the state disability examiner concluded that Hoeft was capable of performing her past relevant work as a "customer service [representative]/bank teller" as she described those jobs. AR 539-540. As a result, the state disability agency denied Hoeft's application for benefits in July 2007.

D. Additional Medical Records

In connection with her request for a disability determination by an administrative law judge, Hoeft presented additional medical records:

- In August 2007, Hoeft was treated by Dr. Greg Gehred at the Rock River Free Clinic, where she reported having pain in her back, legs, right shoulder and knee. AR 575. Hoeft saw Dr. Gehred again on September 6, where she reported "worse" pain in her back and knees as the result of "working extra hours." AR 576. Dr. Gehred diagnosed post-traumatic arthritis and referred Hoeft for evaluation by a rheumatologist.
- On October 17, 2007, rheumatologist Thomas Hirsch performed an examination on Hoeft after considering her history of "generalized pain for many years," the record of her surgical procedures and her reports of continuing "musculoskeletal discomfort." AR 620-22. Dr. Hirsch noted that Hoeft was getting "very little, if any, exercise" and that she had "a desk job" at a "payday loan shop" for 15-20 hours per week, which reportedly "exasperat[ed] her discomfort and fatigue." AR 620, 621. Hirsch observed that Hoeft's gait was "normal" and that she had no significant spinal tenderness. He noted further that she had full range of motion without swelling or tenderness in her upper and lower extremities, with the exception of her right ankle, which had "diminished range of motion in all spheres."
- After completing his examination of Hoeft, Dr. Hirsch diagnosed "chronic pain syndrome consistent with myofascial pain or fibromyalgia." He noted

further that she "likely" had post-traumatic osteoarthritis of the right ankle. In addition, Dr. Hirsch diagnosed a significant sleep disorder, nicotine addiction, and "polypharmacy," meaning that Hoeft was taking too much or too many forms of medication. AR 621. Hirsch recommended that Hoeft quit smoking, begin a gentle progressive aerobic exercise program, and simplify her medical regime. AR 621-622.

- A full year after seeing her, Dr. Gehred completed two functional capacity form questionnaires in August of 2008 for Hoeft's use in connection with this claim for disability benefits. AR 579-84, 625-632. In addition to fibromyalgia, Dr. Gehred indicated that Hoeft likely had post traumatic osteoarthritis of her right ankle and right knee, and chronic degenerative joint disease in her left knee. AR 625. As the result of these limitations, Dr. Gehred stated that Hoeft could sit for no more than 30 minutes to an hour and stand or walk for no more than an hour during an eight-hour work day. *Id.* He also indicated that Hoeft could lift or carry up to ten pounds "frequently" and 10-20 pounds "occasionally," but that she could "never" lift or carry over 20 pounds. AR 582-83, 629. Despite first seeing her in August of 2007, Dr. Gehred concluded that Hoeft's limitations had made it impossible for her to work on a sustained, full-time basis since April 2003. AR 631.

E. Plaintiff's Hearing Testimony

On November 12, 2009, Hoeft appeared with counsel for a hearing before

Administrative Law Judge Robert L. Bartelt, Jr., on November 12, 2009. AR 127-48. Hoeft testified that she had been unable to perform full-time work for any sustained period and had minimal earnings since falling down the stairs and "shatter[ing]" her ankle on April 23, 2003. AR 17-18. After making an attempt to return to work full time as a customer service representative at Ixonia State Bank, Hoeft explained that she was eventually terminated because "nerve pain" in her right leg made it impossible to perform her duties, which consisted of training new employees, opening new accounts, and managing customers' debit and credit cards. AR 23-24, 34-35. Hoeft also worked as a teller "a couple times a week." AR 23. Hoeft estimated that she spent approximately half of her time sitting and the other half standing. AR 23. When working as a teller, Hoeft was required to lift bags of coins weighing up to 50 pounds and file boxes weighing up to 20 pounds. AR 23, 35.

Hoeft testified briefly about the part-time work that she performed after being terminated by the bank. AR 17-21. She was then working at Speedy Loans, but was only able to work 15-20 hours a week with "special accommodations," which included flexible scheduling and allowing her to take "as many breaks as [she] need[ed]." AR 21-22. Hoeft testified that she missed work "[a] couple times" a month when it hurt too much to get out of bed. AR 22.

Hoeft also testified that her ability to work was hampered by "constant" nerve pain in her right leg, as well as "a lot" of arthritis and fibromyalgia. AR 24. Hoeft reported having intermittent pain in her knees, back and hands, and "sharp stabbing pain" from her neck "all the way down" her back; she also reported constant pain in both hands, which became "worse" if she tried to write. AR 24-25. Hoeft testified that she took pain

medication and tried to do some "light exercising" at home to help with the pain. AR 26. Hoeft also wore a "brace" to steady her right ankle and occasionally used a walker or crutches. AR 27.

Hoeft clarified that her limitations did not keep her from taking care of her "personal needs," such as getting dressed, bathing and fixing her hair. On a typical day, Hoeft would make coffee, check her email on the computer, and then move to the couch for a while. AR 29. Hoeft explained that she slowly moved from one place to another because she could not stay in one spot very long. She testified that it took her over an hour to get ready for work. She was able to do dishes, laundry and some cleaning, but she needed help with groceries because she was unable to lift anything weighing more than "a case of soda." AR 29-30. Hoeft estimated that she could only walk half of a mile at one time or sit for 30 minutes before she needed to get up and stretch. AR 30-31.

The ALJ posed several additional questions to clarify Hoeft's employment history and the nature of her work as a bank employee. AR 31-36. The ALJ noted, in particular, that he frequently observed bank tellers sitting while they performed their job duties and he asked whether Hoeft was ever allowed to sit "on a stool" or chair while she was working as a teller. AR 36. Hoeft replied that she was not allowed to sit or have a stool when she worked as a teller at her last job. When the ALJ observed that several of Hoeft's doctors had advised her to exercise and quit smoking, Hoeft acknowledged that she still smoked, but that she was "keep[ing] it under a pack a day." AR 36-37.

F. The ALJ's and Commissioner's Decision on Hoeft's Application

After considering Hoeft's testimony and the medical records, the ALJ issued a written

decision on February 18, 2010, finding that she was "not disabled" and, therefore, ineligible for social security benefits. AR 44-51. The sequential, five-step inquiry to determine a claimant's eligibility for benefits established by the SSA requires an ALJ to ask as follows: (1) whether the claimant is currently engaged in substantial gainful activity;[10] (2) if not, whether the claimant has a severe impairment or combination of impairments;[11] (3) if so, whether the claimant's impairment meets or equals one of the impairments listed by the Commissioner as presumptively disabling;[12] (4) if not, whether the claimant has the residual functional capacity to perform his or her past relevant work;[13] and (5) whether the claimant is capable of performing work in the national economy. *See* 20 C.F.R. §§ 404.1520, 416.920; *Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995).

At step one of the five-step sequential analysis, ALJ Bartelt observed that Hoeft had "significant work activity and earnings" since the alleged onset of disability date (April 23, 2003). AR 46. He acknowledged, however, that her employment after that date did not rise

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[10] "Substantial gainful activity" is employment that involves doing significant physical or mental activities, for pay or profit. 20 C.F.R. § 404.1572.

[11] An impairment is "severe" if it significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1521(a).

[12] The Social Security Administration has compiled a list of presumptively disabling impairments in 20 C.F.R. § 404, Subpt. P, App. 1 (commonly known as the "Listings").

[13] "Residual functional capacity" or RFC generally means "the most [the claimant] can still do despite [her] limitations." *Weatherbee v. Astrue*, 649 F.3d 656, 659 n.2 (7th Cir. 2011) (quoting 20 C.F.R. §§ 404.1545(a), 416.945(a)). An RFC assessment considers the claimant's ability to perform sustained, work-related physical and mental activities in light of his or her impairments. Social Security Rule (SSR) 96-8p. A claimant's RFC is frequently expressed in terms of that is classified in terms of exertional (physical) and non-exertional (mental) levels. 20 C.F.R. § 404.1567. As it pertains to this case, the five increasingly difficult exertional levels of work are characterized as sedentary, light, medium, heavy, and very heavy. *Id.* at § 404.1567(a)-(e).

to the level of "substantial gainful activity." *Id.* At step two, the ALJ concluded that Hoeft had the following combination of impairments that qualified as severe: osteoarthritis, fibromyalgia and chronic pain. *Id.* At step three, the ALJ found that Hoeft did *not* have an impairment or combination of impairments that met or medically equaled any impairment listed in the governing regulations. AR 47 (citing 20 C.F.R. § 404, Subpart P, Appendix 1).

After completing step three, the ALJ paused to determine Hoeft's residual functional capacity by considering the level of work activities that she could perform on a sustained basis despite her limitations. AR 45, 47. In making this determination, the ALJ summarized the medical records and reports of several physicians at length and evaluated Hoeft's testimony about her limitations. AR 47-50. After considering "the entire record," the ALJ found that Hoeft had the residual functional capacity to perform "the full range of sedentary work." AR 47 (citing 20 C.F.R. §§ 404.1567(a), 416.967(a)).

At step four, the ALJ concluded summarily that Hoeft was capable of performing "past relevant work as a bookkeeper, accounts receivable, customer service representative and insurance agent," which are "all jobs sedentary in exertional capacity." AR 50. The ALJ added, with no further explanation, that these jobs did not require the performance of work-related activities precluded by Hoeft's residual functional capacity. Therefore, the ALJ ended the inquiry at step four of the five-step analysis and determined Hoeft was not disabled under the Social Security Act. AR 50-51.

On appeal, Hoeft presented 26 pages of additional medical records from Watertown Regional Medical Center, where she received physical therapy and treatment for pain in 2010. AR 663-88. On December 2, 2010, the Appeals Council affirmed the ALJ's decision

that Hoeft was not disabled. AR 1-5, 7. This affirmance constitutes the final decision of the Commissioner of Social Security. *Getch v. Astrue*, 539 F.3d 473, 480 (7th Cir. 2008).

OPINION

A. Standard of Review

A federal court reviews an administrative disability determination with deference and will uphold a denial of benefits unless the ALJ's decision is not supported by substantial evidence or is based on an error of law. 42 U.S.C. § 405(g); *Terry v. Astrue*, 580 F.3d 471, 475 (7th Cir. 2009). 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). "Where conflicting evidence allows reasonable minds to differ about whether a claimant is disabled, the responsibility for that decision falls on the [C]ommissioner, or the [C]ommissioner's designate, the ALJ." *Herr v. Sullivan*, 912 F.2d 178, 181 (7th Cir. 1990) (quoting *Walker v. Bowen*, 834 F.2d 635, 640 (7th Cir. 1987) (citation omitted). Thus, a reviewing court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the ALJ. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

Even so, a federal court must conduct a "critical review of the evidence" before affirming a decision to deny benefits. *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011) (citing *Lopez ex rel. Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003)). While the ALJ need not mention every piece of evidence, *Craft v. Astrue*, 539 F.3d 668, 673 (7th Cir. 2008), he must adequately discuss the issues and must build "an accurate and logical bridge"

between the evidence and his conclusion that the claimant is not disabled. *McKinzey*, 641 F.3d at 889 (citation omitted). 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).

B. Administrative Disability Determinations

The Social Security Act defines "disability" to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.905. To meet this criteria, a claimant must "not only [be] unable to do [her] previous work, but [must be unable], considering [her] age, education, and work experience, [to] engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A).

Under the five-step sequential evaluation process, "[a]n affirmative answer leads either to the next step or, on [steps three] and [five], to a finding that the claimant is disabled. A negative answer at any point, other than [step three], ends the inquiry and leads to a determination that a claimant is not disabled." *Zurawski v. Halter*, 245 F.3d 881, 886 (7th Cir. 2001) (quoting *Zalewski v. Heckler*, 760 F.2d 160, 162 n. 2 (7th Cir. 1985) (citation omitted)). The claimant bears the burden of proof in steps one through four. *Knight*, 55 F.3d at 313. If the claimant satisfies his burden at step four, then the burden shifts to the Commissioner at step five to prove that the claimant is capable of performing work in the national economy. *See Knight*, 55 F.3d at 313.

C. Hoeft's Claims

In this case, Hoeft contends that the ALJ erred by improperly discounting a medical opinion offered by one of her treating physicians, Dr. Greg Gehred, regarding her residual functional capacity to perform work. Hoeft also faults the ALJ for refusing to credit her testimony regarding the nature of her impairments. Hoeft contends further that the ALJ improperly determined that she could perform her past relevant work and that she was not disabled at step four of the sequential analysis. The court addresses these arguments in turn.

1. Residual Functional Capacity - - Treating Physician's Opinion

Hoeft contends that the ALJ erred in finding that she had the residual functional capacity to perform sedentary work. Hoeft argues that, in assessing the medical evidence, the ALJ improperly discounted the opinion given by Dr. Gehred that Hoeft had no the capacity to function in a competitive workplace at the onset of her disability in April of 2003. Hoeft maintains that, as a treating physician, the ALJ failed to afford sufficient weight to Dr. Gehred's opinion or to offer "good reasons" for discounting the opinion of a claimant's treating physician. *Larson v. Astrue*, 615 F.3d 744, 751 (7th Cir. 2010); *Bauer v. Astrue*, 532 F.3d 606, 608 (7th Cir. 2008).

Although an ALJ 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 ALJ has no basis on which to refuse to accept the opinion. *Id.* When the record contains well supported

contradictory evidence, however, the treating physician's opinion "is just one more piece of evidence for the ALJ to weigh," taking into consideration the various factors listed in the regulation. *Id.* (citing 20 C.F.R. § 404.1527(d)(2)). 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 determining Hoeft's residual functional capacity, the ALJ summarized the medical reports and records at length, including the opinion offered by Dr. Gehred in 2008. AR 47-51. The ALJ found that Dr. Gehred's opinion about Hoeft's ability to work contained "inconsistencies" and was "less persuasive" than reports from the consulting physicians. AR 50. The ALJ noted that those reports supported a finding that Hoeft could perform light work, which was consistent with the duties performed at Hoeft's "past office jobs." AR 50, 532-38, 552-58.

The ALJ also found that Dr. Gehred's opinion was entitled to "very little weight" for purposes of determining the extent of Hoeft's limitations because he only saw her a few times. The ALJ pointed out that Dr. Gehred's signature appeared only four or five times on Hoeft's treatment notes. AR 50. In addition, the ALJ found no basis for Dr. Gehred's conclusion that Hoeft's restrictions dated back to the alleged disability onset date of April 23, 2003, because Gehred did not begin treating her until August 2007. The ALJ noted that Dr. Gehred's opinion that Hoeft could not work at all was contradicted by the consulting physicians and by the orthopedic specialist (Dr. Grossman), who treated Hoeft's broken ankle and concluded that she was fit to perform medium work. AR 49-50, 319, 321, 532-

38, 552-58.

An ALJ may reject a treating physician's opinion if it is internally inconsistent, or inconsistent with other medical evidence in the record, such as opinions from consulting physicians. *See Dixon v. Massanari*, 270 F.3d 1171, 1176-78 (7th Cir. 2001); *Books v. Chater*, 91 F.3d 972, 979 (7th Cir. 1996); *Knight v. Chater*, 55 F.3d 309, 313-314 (7th Cir. 1995). In this instance, the record supports the ALJ's conclusion that Dr. Gehred's opinion was founded on limited, even dated information, suspect in its purporting to opine on Hoeft's condition four years before he started seeing her, and inconsistent with the other medical evidence. To the extent that Dr. Gehred's opinion seems to be based on his assessment of Hoeft's subjective complaints, rather than objective medical evidence, the ALJ had even further reason to accord it little weight. *White v. Barnhart*, 415 F.3d 654, 659 (7th Cir. 2005); *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995). Because the ALJ gave good reasons for discounting Dr. Gehred's opinion, this court has no basis to overturn that determination.

2. Credibility

Hoeft also contends that the ALJ erred when he determined that she had the functional capacity to perform sedentary work because he improperly discounted her testimony about the nature of her symptoms. Indeed, the ALJ found that the symptoms that she described were consistent with her underlying physical impairments, referencing her ankle injury, fibromyalgia and osteoarthritis. AR 47. The ALJ found, however, that Hoeft's testimony "concerning the intensity, persistence and limiting effects" of her symptoms was "not credible," because the description of her limitations was "internally inconsistent with the existing medical evidence." *Id.* Hoeft maintains that the ALJ did not give a sufficient

reason to discount the credibility of her testimony that she was unable to work because of her impairments.

An ALJ may not reject a claimant's testimony regarding her symptoms on the sole ground that her statements are not substantiated by objective medical evidence. *See Arnold v. Barnhart*, 473 F.3d 816, 822 (7th Cir. 2007) (discussing SSR 96-7p). Nor did the ALJ do that here in finding her descriptions were supported by the medical evidence, at least as to her underlying impairments.

On the other hand, the ALJ must consider the entire case record to determine whether the claimant's statements are credible. *See Arnold*, 473 F.3d at 822 (citing 20 C.F.R. § 404.1529; SSR 96-7p). Relevant factors include: the claimant'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. *See* 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.

In finding that Hoeft was not fully credible, the ALJ pointed to an array of medical records and reports that contradicted the testimony she gave about the extent of her limitations. Although Hoeft claimed to have debilitating symptoms after April 23, 2003, the ALJ noted that her broken ankle had healed and that her treating physician cleared her to return to work by July, 2003. AR 47. By November 2003, her treating physician indicated

that her recovery was "going well." AR 48. This assessment was supported by the functional capacity evaluation conducted in February 2004, which found that while Hoeft should not walk, stand or climb stairs more than 10 minutes per hour, she could do medium work with no crouching or crawling. *Id.*

After she recovered from her ankle injury, the ALJ further found there were significant gaps in Hoeft's history of treatment for joint pain. AR 48-49. For example, the ALJ pointed to treatment notes from March 2005, which indicated that Hoeft was doing "relatively well." And while Hoeft reported in April of 2006 that she experienced stiffness in the mornings -- and that her joint pain was made worse with standing, walking and bad weather -- her musculoskeletal examinations were relatively normal and she was encouraged to exercise. In November 2006, Hoeft herself reported doing "relatively well." While Hoeft again reported chronic pain in October 2007, the rheumatologist who examined her (Dr. Hirsch) advised her to quit smoking and to engage in a gentle, progressive aerobic exercise program in order to relieve her arthritis pain, which was reportedly "mild." AR 49.

In addition, the ALJ noted Hoeft's claim that she was unable to work at all was undercut by the fact that (1) she had engaged in regular, sedentary work *after* her alleged onset date and (2) she described daily living activities that "showed a physical capacity for at least sedentary work on a full-time basis." AR 49. Similarly, while Hoeft complained of debilitating joint pain, there were few objective tests indicating incapacitating symptoms and Hoeft's treatment for these symptoms had been inconsistent, with some appointments focused more on completing disability forms than obtaining treatment. *Id.* The medical evidence also indicated to the ALJ that Hoeft was "not treatment compliant" because she did

not follow through with recommendations to engage in regular exercise to relieve pain and continued to smoke despite recommendations that quitting would improve her health overall. *Id.*

Credibility findings made by the ALJ are entitled to special deference because that judge is in the best position to see and hear the witness and to assess their forthrightness. *See Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) (citing *Nelson v. Apfel*, 131 F.3d 1228, 1237 (7th Cir. 1997)); *see also Schenk v. Barnhart*, 357 F.3d 697, 703 (7th Cir. 2004). The court will affirm a credibility determination as long as the ALJ gives specific reasons that are supported by the record. *Skarbeck v. Barnhart,* 390 F. 3d 500, 505 (7th Cir. 2004). Because the reasons articulated by the ALJ in Hoeft's case are amply supported by the record, this court will uphold the ALJ's credibility determination 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.").

The only pertinent objection that Hoeft raises to the ALJ's comments concern her failure to quit smoking as directed by her physicians.[14] Noting that there was no evidence of any link between her disabilities and smoking, Hoeft contends that her failure to quit was an improper basis on which to rest a credibility determination. The Seventh Circuit has recognized that a claimant's failure to quit smoking cannot be construed as a sign of "non-compliance with treatment" unless there is evidence that a claimant could return to work if

[14] Hoeft also argues that the testimony about her limitations was supported by the functional capacity assessment made by Dr. Gehred. As discussed previously, however, Hoeft's argument on this point is unavailing because the ALJ was entitled on this record to find that Gehred's opinion was unpersuasive and entitled to less weight.

she followed the prescribed treatment. *See Schramek v. Apfel*, 226 F.3d 809, 812 (7th Cir. 2000) (discussing the regulation on non-compliance with prescribed medical treatment in 20 C.F.R. § 404.1530(a)). Likewise, unless there is evidence that a claimant would be restored to a non-severe condition if she quit smoking, the failure to quit is "an unreliable basis on which to rest a credibility determination." *Schramek*, 226 F.3d at 813 (citing *Rousey v. Heckler*, 771 F.2d 1065, 1070 (7th Cir. 1985)).

The record reflects Hoeft smoked up to a pack of cigarettes a day and that her physicians repeatedly advised her to quit because smoking was detrimental to her osteoarthritis. *Multiple* providers, including Dr. Grossman,[15] Dr. Cochrane and Dr. Hirsch urged Hoeft to quit smoking and to exercise regularly because doing so would ease the symptoms of her arthritis and reduce her pain. AR 48-49, AR 476, AR 475, AR 621-22. Based on this record, the ALJ was entitled to find that Hoeft's condition may well have been improved, if not her health restored, but for her failures or inability to follow her doctors' advice to quit smoking.

Even assuming that the ALJ erred in considering this evidence, the isolated reference to Hoeft's failure to quit smoking is harmless in this instance because the ALJ did not rely exclusively on this fact when determining her credibility. From from it, the ALJ based his credibility finding on several other factors, including: the overall medical evidence;

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[15] The American Medical Association has recognized that smoking can interfere with proper healing post-surgery. AMERICAN MEDICAL ASS'N, COMPLETE MEDICAL ENCYCLOPEDIA 1139 (2003) (observing that smoking causes reduced circulation of oxygen in the body, among other things, which results in slower wound healing after surgery or an accident). Hoeft's broken ankle was slow to mend in this case. On July 9, 2003, x-rays of Hoeft's surgically repaired ankle showed a "delayed union" or non-union of the fracture and evidence of "significant articular damage in the ankle." AR 325. Thereafter, Dr. Grossman prescribed Zyban to help Hoeft quit smoking. AR 325.

significant gaps in treatment; Hoeft's own testimony about her daily activities; Hoeft's record of part-time work at sedentary office jobs; as well as the medical opinions of Dr. Grossman, her rheumatologists, and the consulting physicians employed to conduct Hoeft's disability evaluation, who concluded that she could work at some level and was not disabled. Thus, in addition to considering the medical evidence, the ALJ specifically supported this credibility determination with evidence from the record. AR 47-50.

Finally, Hoeft has not demonstrated that this is one of those rare occasions in which the court should disturb the ALJ's credibility findings. On the contrary, the ALJ built an accurate and logical bridge between the evidence and his conclusion that Hoeft's view of her own limitations was not fully credible. In doing so, the judge properly and expressly took into consideration the medical evidence and Hoeft's testimony. Based on this record, the court concludes that this administrative determination was not patently wrong.

3. Step Four: Ability to Perform Past Relevant Work

At step four of his analysis, the ALJ was required to compare Hoeft's residual functional capacity to perform the full range of sedentary work with the "physical and mental demands" of her past relevant work experience. Here, the ALJ summarily concluded that Hoeft could perform past relevant work as a bookkeeper, an accounts receivable clerk, a customer service representative and an insurance agent. AR 50. Hoeft maintains that the ALJ erred because none of these jobs meet the legal definition of "past relevant work."

The Social Security regulations define this term to be work performed "within the past 15 years, that was substantial gainful employment, and that lasted long enough for [the claimant] to learn to do it." 28 C.F.R. § 404.1560(b)(1). Stated another way, past relevant

work is defined as substantial gainful employment performed in the not too remote past.[16] *Smith v. Barnhart*, 288 F.3d 251, 252 (7th Cir. 2004) (quoting 20 C.F.R. §§ 404.1560(b)(1), 404.1565(a)). "To determine whether a claimant can perform his past relevant work, an administrative law judge must compare the demands of the claimant's past occupation with his or her present capacity." *Steward v. Bowen*, 858 F.2d 1295, 1299-1300 (7th Cir. 1988); Social Security Ruling 82-62 (administrative law judge must obtain sufficient information about skill level, exertional demands and nonexertional demands of claimant's past work to permit decision as to whether claimant can return to that work).

Hoeft argues that she did not engage in the employment identified by the ALJ (bookkeeper, accounts receivable clerk, customer service representative and an insurance agent) until after she became disabled in 2003. The ALJ found that the work Hoeft performed after 2003 did not constitute "substantial gainful activity" for purposes of her work history. Because employment must be performed at a substantially gainful level in order to qualify as past relevant work, Hoeft argues that the ALJ erred in finding that she could perform these jobs.

The Commissioner concedes that the bookkeeper, accounts receivable and insurance agent positions identified by the ALJ do not meet the definition of past relevant work in the regulations. The Commissioner notes, however, that Hoeft worked previously as a customer service representative at a bank call center from 1990 to 1992. In her application for benefits, Hoeft indicated that she remained seated for 7.5 hours of the work-day with limited

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[16] Work performed in the "not too remote past" means past relevant work performed within the past 15 years. 20 C.F.R. § 404.1560(b)(1). Additionally, to constitute substantial gainful employment, an applicant must have earned a specified minimum amount from that past work. *Kangail v. Barnhart*, 454 F.3d 627, 630 (7th Cir. 2006).

standing, no walking, kneeling, crouching or crawling, and no lifting. AR 220-21. Because this qualifies as a sedentary job under the Social Security regulations, *see* 20 C.F.R. § 1567(a), the Commissioner argues that the ALJ correctly determined that Hoeft could return to this past relevant work.

Hoeft argues that the work she performed as a customer service representative at the bank call center could not be considered relevant because it was outside the 15-year time limit found in the regulations and in SSR 82-62. Hoeft argues, in particular, that the 15-year time-period runs from the date of the ALJ's decision, which issued in 2010. Hoeft maintains, therefore, that the ALJ could not consider work performed before 1995.

This argument is without merit. Forms used by the Social Security Administration direct claimants to provide information for all jobs held within 15 years of the alleged disability onset date. AR 206 (SSA Form 3368, Section Three - Information About Your Work"); AR 215 (SSA Form 3369 "Work History Report"). Because Hoeft alleged that she became disabled on April 23, 2003, the ALJ could have properly considered work dating as far back as 1988.[17]

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[17] Even assuming that the work Hoeft performed between 1990 and 1992 exceeded the 15-year time-frame, other courts have recognized that the 15-year guideline found in the regulations and SSR 82-62 is only that - - a guideline. *Smith v. Sec. of Health & Human Services*, 893 F.2d 106, 109 (6th Cir. 1989) ("By the very terms of this regulation, fifteen years is not a bright line rule but a 'guide' intended to help the Secretary avoid concluding that a claimant who has worked in a job requiring marketable skills retains marketable skills after the workplace changed in its requirements."); *Lichtsinn v. Astrue*, 683 F. Supp.2d 811, 819-20 (N.D. Ind. 2010). Thus, work performed outside of the 15-year period is not disqualified from consideration. Rather, the guideline is intended to prevent past work that is so remote that it may no longer have transferable skills from being considered. *Barnes v. Sullivan*, 932 F.2d 1356, 1359 (11th Cir. 1991) ("The fifteen-year limitation does not prohibit considering work outside that period, but merely creates a presumption of inapplicability of skills and abilities acquired in work performed outside the 15-year period."). "Indeed, SSR 82-62 specifically authorizes the (continued...)

The real difficulty is that the ALJ made no specific reference to any particular customer service position. AR 41-51. This is problematic because Hoeft held more than one such position and it is unclear which one the ALJ may have considered.

The record shows that Hoeft worked as a customer service representative at Ixonia State Bank from 1992 through 2003. However, the demands of that job included prolonged standing and lifting up to fifty pounds on occasion. Because the nature of those duties exceed the description of sedentary work, it is unlikely that the ALJ considered this position as past relevant work that Hoeft could perform.

Hoeft reportedly worked as a customer service representative at a "bank call center" between 1990 and 1992. AR 206, 215. Hoeft described the nature of this work as primarily sitting with limited standing and no lifting, carrying, crouching, kneeling or crawling. AR 221. Thus, the ALJ *may* have considered this position as one that could meet the definition of sedentary work. It is unclear from the ALJ's decision, which appears to mention only the work activity or "office jobs" that were performed "after the alleged onset [of disability]" on April 23, 2003. AR 46, 49. Thus, it is also possible that the ALJ's reference to customer service work referred to Hoeft's part-time employment at Speedy Loan in 2007, where she was employed at the time of her administrative hearing.

Because the ALJ failed to articulate adequately a logical bridge between Hoeft's past relevant work and her residual functional capacity to perform that work at a sedentary level, this case must be remanded to the Commissioner for additional findings at step four to be

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[17](...continued)
ALJ to consider work beyond the 15-year guideline when 'a continuity of skills, knowledge, and processes can be established between such work and the individual's more recent occupations.'" *Lichtsinn*, 683 F. Supp. 2d at 820 (quoting SSR 82-62).

followed, if necessary, by a step-five finding to determine whether there is other work that Hoeft can perform in the national economy.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of the Social Security Administration, denying plaintiff Linda A. Hoeft'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 further proceedings consistent with this opinion.

Entered this 22nd day of January, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge