IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LILLY GRIFFITH,

OPINION AND ORDER

Plaintiff,

12-cv-286-bbc

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Lilly Griffith is seeking judicial review of the adverse decision of defendant Michael Astrue, Commissioner of Social Security, denying her application for supplemental security income. The case is before the court on her motion for summary judgment.

Plaintiff alleged disability from September 17, 2006, based upon myriad severe impairments, including major depressive disorder, generalized anxiety disorder with panic attacks, fibromyalgia, polydrug abuse and history of alcohol abuse. She is asking for a remand of the case to the Commissioner for a new determination, contending that the administrative law judge who heard her appeal erred in four respects: he provided the vocational expert an incomplete hypothetical question that failed to apply his own finding that plaintiff had moderate deficiencies in concentration, persistence and pace; he rejected the physical assessment of plaintiff's treating physician in violation of the treating physician rule; he violated the same rule again when he rejected the mental health assessment of

plaintiff's treating psychiatrist and he failed to assess her fibromyalgia.

No remand is warranted in this case. The administrative law judge made it clear in his decision why he was denying plaintiff's appeal. Plaintiff's objections are unsupported, first, because the administrative law judge was not required to pose a complete hypothetical question to the vocational expert at the point in the process at which plaintiff's application was rejected. Second, it was appropriate for the administrative law judge to give no weight to the assessments of the treating physicians because the assessments were not supported by the record evidence and neither doctor explained why he made the assessment he did. Third, the administrative law judge did not fail to assess plaintiff's fibromyalgia. Although his discussion could have been both more focused and more detailed, he included plaintiff's diagnosis of fibromyalgia when he explained in his decision that examinations of plaintiff have found little evidence of abnormality aside from tenderness and that plaintiff had frequently exaggerated her symptoms to obtain narcotics. This is a minimally adequate explanation to support his finding and well supported by the record. It would exalt form over substance to remand the case for another hearing on this point.

RECORD FACTS

A. Plaintiff

Plaintiff Lilly Griffith was born on October 2, 1961. She graduated from high school and worked as a bakery worker, a house cleaner and a press operator in a printing company. She last worked in 2006, when she was fired from her bakery/deli job for coming to work

intoxicated. Hrg. Trans., AR 8-2, at 62-64. She applied for supplemental security income in December 2008, alleging that she was disabled. AR 169.

Plaintiff has a history of alcohol abuse, which led to a jail term in 2006 for a fifth conviction of driving while intoxicated. She attended Alcoholic Anonymous meetings, but reverted to drinking after her sister died in 2008. At the time she applied for benefits, she was attending AA meetings frequently and living with her boyfriend. He helped her with housework, but she was able to shop, care for her pet, cook some meals and walk. She had no trouble handling her finances, but had problems with her memory and her social interaction was limited by pain and depression. She found it difficult to handle stress and changes in her routine. AR 186-97.

B. Written Reports of Medical Visits

Between August 8, 2008 and May 27, 2010, plaintiff made many visits to medical facilities in Richland Center, Wisconsin: Advanced Pain Management; a free community clinic; the Richland Center Clinic; the Richland Hospital; and an urgent care clinic. A summary of those visits follows.

1. Advanced Pain Management Clinic

The record contains reports from five visits that plaintiff made to this clinic between September 26, 2008 and June 3, 2009. At the September 26, 2008 visit, she saw Dr. Maher Fattouh for complaints of neck, back, bilateral shoulder and bilateral knee pain that was

burning, sharp and throbbing. AR 268. She told Fattouh that the pain had increased progressively since a motor vehicle accident in 2004. On examination Fattouh observed that plaintiff's Waddell signs were positive for distraction, overreaction, regionalization, simulation and tenderness. AR 269. (Waddell's signs may indicate a non-organic or psychological component to chronic low back pain. "Waddell's signs," Wikepedia (visited on Jan. 10, 2013)). Fattouh found plaintiff's reactions "highly inconsistent," with variable weakness and areas of sensory deficit. Plaintiff was "able to rise from [a] chair and walk around the room with no difficulty" and demonstrated "abnormal pain behavior." Id. He "highly" recommended pain counseling and suggested a referral to physical therapy and medical imaging of her lumbar area. AR 270.

On subsequent visits to the clinic, plaintiff complained of mid to low back pain and bilateral back pain that interfered with her daily activities and sleep. AR 256. She reported pain in her joints, neck, mid back and low back, along with anxiety, depression and suicidal thoughts. She described her pain as "all over" but most severe in her lower back and in both knees. A fibromyalgia survey was positive in 17 of 18 tender points. She told physician assistant Tamera Berget that in the past she had suffered from anxiety, bilateral carpal tunnel syndrome, depression, fibromyalgia, gastric ulcer and chronic hepatitis C.

Berget noted that plaintiff's magnetic resonance imaging findings showed no serious problem, that a lumbar MRI demonstrated an old, stable compression, that plaintiff was positive for four Waddell signs and that she exhibited histrionic behavior. Her magnetic resonance imaging showed no serious problem. Berget told plaintiff that narcotics were not

indicated and that going to the emergency room for morphine was not justified and only perpetuated plaintiff's label of "drug seeking." AR 257.

Two weeks later, on December 3, 2008, plaintiff returned for a followup visit, reporting that her low back pain and bilateral knee pain had intensified, that the pain was interfering with her daily activities and her sleep and that it was making her feel depressed, frustrated and angry. AR 259-61. Plaintiff came back again on March 4, 2009 with continuing complaints of low back pain and saw physician assistant Leslie Liegel. AR 262. She told Liegel that she was going to the local emergency room one to two times a month for a shot of morphine because her other medicine was providing only mild relief. Id. She said she was still experiencing depression and suicidal thoughts. AR 263. Liegel prescribed morphine sulfate "reluctantly" and only for extreme pain. AR 264.

Plaintiff returned to the clinic two weeks later and again on June 3, 2009, with no complaints other than of back pain. AR 265, 306. At the second visit, Liegel noted plaintiff's normal mood and affect and gave her 20 tablets of morphine, 15 mg, to last a month. AR 307.

2. Free Community Clinic

The record contains reports of 30 visits by plaintiff to either the Free Community Clinic in Richland Center of the Richland Center Clinic between August 1, 2008 and January 1, 2010. On most of these visits, she saw Dr. Neil Bard, whether at one clinic or the other. On 18 of those visits, plaintiff asked for pain medication, usually in connection with

complaints of back pain, although on one occasion she complained of increased pain from fibromyalgia. AR 497. (This is the only record of any fibromyalgia-related complaint of pain that plaintiff made to Dr. Bard.) I have summarized a few of the visits.

On an August 11, 2008 visit, at a time when plaintiff was still serving her sentence for driving while intoxicated, Dr. Bard observed that her pain was "way out of proportion to her condition." AR 467. He encouraged her to engage in physical therapy once she was out of jail.

Plaintiff saw Dr. Bard on September 12, 2008 visit to follow up on a visit she had made to the emergency room on September 1, 2008. AR 465. She told Dr. Bard that she had been on morphine while living in Illinois for the previous few years. Bard noted that her back pain was lower than the site of her old compression fracture. He noted also that although she had been observed waiting for her appointment without any visible distress, she was unable to sit or stand in the examination room without demonstrating severe back pain. AR 466. Bard examined plaintiff and found she had no atrophy or neurological deficit, full, symmetrical reflexes and nontender bones in her back and hips. Id. He noted that she had been working under the Huber Law while serving a jail term.

On October 16, 2008, plaintiff came to the free clinic complaining about chronic, non-stop lower back pain. AR 464. At the time her gait appeared normal. She was able to flex forward although she had pain with flexion. Dr. Bard arranged for her to start physical therapy. He gave her trazodone (trazodone hydrochloride is an antidepressant used to treat major depression episodes, Dorland's Illustrated Medical Dictionary, 32d ed. at 1957) and

he refilled her prescription for Clonazepam (a benzodiazepine used as an antipanic agent in the treatment of panic disorders, id. at 373).

On March 24, 2009, plaintiff came to the free clinic to review her medical condition after trying Lyrica for two months. AR 336. (Lyrica is the trademark for a preparation of pregabalin, which is used for the treatment of neurophathic pain. Dorland's at 1088, 1509.) She was crying and saying that she was very depressed. Id. Dr. Bard told her that the only narcotic she could have was tramadol and encouraged her to be active, engage in regular physical therapy and continue to see Dr. Nevers. AR 337.

On May 12, 2009, plaintiff came to the free clinic with complaints of chronic pain. Her requests for morphine were denied. AR 404.

On September 24, 2009, plaintiff came to the free clinic, complaining of blackout spells in which she had suffered facial burns without knowing how they happened. AR 449. Dr. Bard noted her fibromyalgia, saying that it "is a chronic condition" and that "[her] behavior now is totally focused on acute care and injections." AR 450. He told plaintiff that her medications were causing abnormal mental activity and persuaded her to enter into a chronic pain contract, AR 457, one of the provisions of which was that she was not to go to the emergency room or urgent care clinic unless she had a life-threatening problem. AR 450.

On October 23, 2009, Bard declared the contract null and void after plaintiff had experienced a number of falls, had refused blood testing on October 6, 2009 and would not agree to limit other medications she was taking. AR 447, 506. He refused to give her any further narcotics and encouraged her to try drug detoxification. AR 446.

On November 12, 2009, plaintiff came to the clinic for a followup from visits she had made to the emergency room after falling. AR 443. Dr. Bard talked to her about his concern that many of her symptoms were drug related. She was unwilling to give up Clonazepam or Tramadol, despite Bard's telling her that they may be the cause of her ataxia and falls. AR 444.

On December 29, 2009 came to the free clinic to follow up on a visit she had made to the emergency room, where she had been given Toradol, lorasepam and pherergan. AR 497. She was in tears, pleading for medication. Dr. Smith gave her an injection of Toradol.

Nothing in the record shows that the doctors who saw plaintiff at the free clinic found evidence of any medical reason for plaintiff's complaints of back and joint pain. On the occasions when the doctors gave her physical tests of her leg lifting and ability to walk, they observed no problems.

3. Richland Hospital Emergency Room

The record contains evidence of six visits plaintiff made to the emergency room in 2008 and 2009, although it appears that there were other visits for which records are lacking. For example, on November 3, 2009, plaintiff was seen at the Richland County Clinic for a "recheck from the ER" where she had been found to be dehydrated; on November 12, 2009, she was seen at the clinic for a followup from her ER visits after she had fallen and bumped her head. AR 443. On an September 15, 2009 visit to Urgent Care, Dr. Richardson wrote that plaintiff had had several trips to the emergency room in August.

On August 23, she was given morphine and Toradol; on August 14, she was given Toradol; the week before that, she had nausea and was given IV fluids; two weeks before that, she was given Toradol for back pain. AR 455.

On December 22, 2008 and again on August 14, 2009, plaintiff told the attending doctors at the emergency room that she had fallen and injured herself. On the other four visits that are in the record—April 11, 2009, April 30, 2009, May 16, 2009 and July 28, 2009—she complained of back pain. On each visit, she received pain medication in the form of morphine or Toradal (the trade name for preparations of ketorolac tromethamine, a nonsteroidal antiinflammatory drug administered for the short-term management of pain. Dorland's at 1940, 984.) At her July 28, 2009 visit, Dr. Miyares tried to examine plaintiff but found it difficult because "she was just not allowing it and overexaggerating her pain during the exam." AR 387.

4. Urgent Care Clinic

The record shows that plaintiff visited the urgent Care Clinic on August 5, 2008, September 15, 2009 and January 7, 2010. At the first visit, she complained of neck and back pain; on the second visit she complained of back and leg pain and was given Toradal but she would not allow the doctor to examine her. AR 455. At the second visit, she complained of pain in her right leg but was refused any pain medication because she had broken her pain contract. AR 439.

5. Mental health care

On March 23, 2009, plaintiff had an outpatient psychiatric evaluation by Dr. Chris Nevers, staff psychiatrist with Richland County Health and Human Services. AR 323. He diagnosed major depressive disorder, recurrent, severe; generalized anxiety disorder and post traumatic stress disorder, with a global assessment of functioning of 50. AR 324.

In notes of meetings with plaintiff, Nevers wrote on September 22, 2009, that she appeared very depressed "with some psychomotor slowing." AR 547. She said she had had suicidal thoughts but was doing a bit better. Id. To Nevers, she appeared "a bit sluggish this morning as if she was sleepy or excessively sedated." Id. On December 7, 2009, he noted that plaintiff was complaining of pain and poor memory and that she had had panic attacks and was terrified to leave her apartment. AR 544. She told Nevers she had had both Adderall and Clonazepam stolen from her. AR 544. (Adderall is a "trademark for a combination preparation of amphetamine and dextroamphetamine." Id. at 26.)

On February 1, 2010, Nevers wrote that plaintiff had called saying that she had increased symptoms fo panic attack and wanted her Clonazepam back, but that since she "has had significant issues with drug misuse in the past and so I am extremely reluctant to resume Clonazepam." AR 541. On May 10, 2010, he wrote that plaintiff was "doing poorly" in the absence of Clonazepam and Adderall and he agreed to give her prescriptions for the two medications, one month at a time. AR 536. On May 17, 2010, he wrote that plaintiff had thanked him and told him she felt "dam [sic] good" after resuming the medications. AR 534.

Plaintiff saw Irv Balto, a social worker, from January 7, 2010 to March 11, 2010.

C. Diagnostic Records

Plaintiff had medical imaging of her lumbar spine on October 3, 2008. AR 492. The results showed a chronic L1 compression fracture deformity without significant spinal canal stenosis and no disc herniation or spinal stenosis. Id. & AR 493.

Plaintiff had medical imagining of her brain on November 13, 2009. The results showed that she had a few nonenhancing foci of altered signal intensity in the white matter, but that the examination was generally negative. AR 490.

D. Reports from Treating Physicians

1. Dr. Neil Bard

On March 24, 2011, Dr. Bard submitted a report to Social Security in which he said that plaintiff's diagnosis was "severe pain" and that her prognosis was "poor." AR 616-17. He thought her disability would be expected to last at least 12 months and that she could walk or stand 0-2 hours in any day, sit for 0-2 hours, rarely lift 10 pounds or more, occasionally lift less than 10 pounds, could never crouch or stoop but could frequently finger, grasp or handle things. He thought she would experience frequent occasions when her pain was severe enough to interfere with her attention and concentration. He said that her straight leg raising test was positive, she had impaired sleep, illicit substance abuse, depression, sensory loss and muscle weakness, she had anxiety and reduced range of motion

and would need a cane or other walking device. AR 617-18. He added that she would be absent from work more than four days a month because of her impairments or for treatment. AR 618.

2. Dr. Nevers and Irv Balto

Social worker Irv Balto wrote in a medical source statement for Social Security that plaintiff had anhedonia, appetite disturbance, weight change, decreased energy, thoughts of suicide, generalized persistent anxiety, difficulty thinking or concentrating, emotional withdrawal or isolation and memory impairment. AR 528-33. He found that she was unable to meet competitive standards in any area of mental abilities and aptitudes needed to do unskilled work, semiskilled or skilled work because her anxiety, panic and depression were totally incapacitating. AR 437. He also noted that her psychiatric condition exacerbated her fibromyalgia. Id.

On July 12, 2010, Dr. Nevers wrote in a medical source statement that plaintiff was currently disabled and was expected to remain disabled for the next 12 months. He added that any drug and alcohol abuse was not a contributing factor to his determination of disability; absent any such abuse she would still be limited from performing any substantial gainful activity on a sustained basis. AR 438. Nevers gave no reasons for finding plaintiff disabled or for his opinion that her drug or alcohol abuse was not a factor contributing to her inability to work.

E. Reports of Agency Consultants

1. Dr. William Snyder

On April 22, 2009, an agency consultant, William Snyder III, completed a Psychiatric Review Technique Form for plaintiff. AR 347. He based the medical disposition on affective disorders, anxiety-related disorders and substance addiction disorders. He found that plaintiff had a mood disturbance, specifically depressive syndrome, characterized by anhedonia or pervasive loss of interest in almost all activities, decreased energy, feelings of guilt or worthlessness and difficulty concentrating or thinking, AR 350, and that she had generalized persistent anxiety accompanied by motor tension, apprehensive expectation, vigilance and scanning, AR 352, and behavioral changes associated with the regular use of substances that affect the central nervous system in the form of affective disorders and anxiety-related disorders. AR 355. Sydner concluded that plaintiff had moderate restrictions in the activities of daily living, in managing social functioning and in maintaining concentration, persistence or pace. AR 357.

Snyder concluded that plaintiff's mental impairments were severe but that they did not meet or equal listing level severity. AR 359. He assessed plaintiff as cognitively intact as of March 23, 2009, with no evidence of thought disorder observed by Dr. Nevers at his examination. AR 363. Snyder noted that Nevers had reported limitations with respect to concentration, persistence and pace "in regard to maintaining regular attendance & completing a normal workweek without interruptions from psychologically based depressive and anxiety symptoms." Snyder found that these limitations were less than substantial and

did not preclude plaintiff "from understanding, remembering and following through with two and three step instructions or tasks." Id. He did not think her limitations in being able to respond appropriately to criticism from supervisors and in maintaining her grooming and personal appearance were typical of her interactions with other people (he assessed them as "less than substantial"), assuming she could maintain her current sobriety. Id.

2. Dr. F. Malek

F. Malek, a consulting surgeon, analyzed plaintiff's case for the state agency and concluded that plaintiff's reports of pain were not credible, in light of the number of positive Waddell signs, the inconsistency between her subjective complaints and the objective findings and the possibility that she was abusing pain medications. AR 367. Malek noted that plaintiff was a regular user of the emergency room for complaints of back and bilateral knee pain, but the medical images were "inconclusive" for any lower back or knee pathology. Id.

3. Dr. Syd Foster

Dr. Foster undertook a Residual Functional Capacity assessment of plaintiff and concluded that she was capable of lifting and carrying 20 pounds occasionally (10 pounds frequently); standing and walking about 6 hours in 8-hour work day; and unlimited pushing or pulling other than as shown for lifting and carrying. AR 424. He found that plaintiff had no postural limitations (stooping, climbing, etc.), AR 425, and no manipulative, visual,

communicative or environmental limitations, AR 426. Foster concluded that plaintiff had chronic pain but no evidence of stenosis or structural deficits in her lumbar area. AR 430. She was alert and oriented and her cognition, mood, gait and neurologic state were normal. She had 17 out of 18 tender points for fibromyalgia, but the intensity of her symptoms and their effect on her functioning were not fully consistent with the overall evidence. He found that a rating of "light" for her residual functional capacity was reasonable, taking plaintiff's chronic pain into account. Id.

4. Jack Spear, Ph.D.

In a case analysis, disability evaluator Jack Spear, Ph.D., found that plaintiff was clearly depressed but had no thought disorder; she was consistently noted to have intact cognition and appropriate mood by medical treating sources; she had no psychosis; she had no cognitive symptoms; and she had no substantive evidence of inability to do unskilled work. AR 431.

5. Dr. Fountain

Dr. M. Fountain, a rheumatologist, found that plaintiff's fibromyalgia was not severe, for two reasons: first, plaintiff rarely alleged that she was experiencing the generalized pain that is diagnostic of fibromyalgia, although almost all of her physical examinations documented 17 our of 18 of the tender points. Second, plaintiff's other impairments, hepatitis C, depression and low back problems reasonably explained her allegations of pain

and most of the physical findings. AR 365.

F. Hearing before the Administrative Law Judge

At the February 17, 2011 hearing before the administrative law judge, plaintiff testified that she had worked part-time at a bakery around 2006 or 2007 (she could not remember the exact dates), that she was fired from her job because she came to work inebriated on one occasion and that she had not worked since then. AR 63-64. She said she did not go back because her fibromyalgia was exacerbated by the need to make trips into and out of the freezer, she was in an automobile accident and her depression worsened. AR 65. (She testified that the accident happened in "about 2006." Id.) She applied for SSI because she was tired of hurting and depressed and did not believe she could be productive. Id. She said that she was having problems with losing her balance and falling, AR 64-65, and that she was using a cane because her pain medication caused her body to feel twisted. AR 65.

Plaintiff told the administrative law judge that she had pain all over, that she was unable to see her doctor at the clinic, and that she had problems with her memory. AR 66. She said she had stopped drinking after her release from prison and that her last liver test showed that she did not need any treatment for her hepatitis C. AR 67-68. She told the administrative law judge that she went to the emergency room for morphine injections, but had not done that for at least a month, AR 69, and had been taking Tramadol for the previous few days. AR 71. Before that, she said, she had been going to the emergency room at least twice a month for pain medication. Id.

Plaintiff said that her boyfriend helped her in and out of the bathtub because she has fallen in the tub at times, AR 72, that she fell often, AR 73, and that she can vacuum on good days, go grocery shopping "sometimes" and cooks "but not like [she] use to." Id. She does not drive and has not driven for a number of years. Id.

Plaintiff testified that she had been hospitalized for depression about 25 years earlier, once after her second son was born, AR 74, and once when she was going through a divorce. AR 75. At the time of her son's birth, she had been given a dual diagnosis of alcoholism and depression. She has anxiety attacks when she leaves her apartment, AR 76, although she is on antianxiety medication. AR 77. She finds it difficult to find a comfortable position for sitting or lying down. Id.

Plaintiff's boyfriend, James Tulley, testified that he helps plaintiff into the tub or shower, helps wash her up and gets her out of bed because she has balance problems. AR 80. Plaintiff was walking with a cane when he met her in 2009, AR 80, and had gotten "a lot worse over time." AR 81. He testified that she cannot stand up to do dishes or sit for a long time, even in her recliner, and that her depression is getting worse. AR 81. They go out "once in a while" but not often because plaintiff is afraid to go outside. Id. He thinks her pain worsened in 2010 because that was when she began to lose her balance, fall down and have problems remembering things. AR 84.

David Osward testified as a vocational expert. AR 86. He identified plaintiff's past relevant work: her bakery/deli work was medium, unskilled work and her press operator work was light, unskilled. AR 86-87. (She had other previous work as a sewing machine operator

and light assembly but had not held either job for more than six months, so he did not consider them. AR 87.) He found that plaintiff had no transferable skills to other jobs. Id. He believed that plaintiff would be unable to handle the stress of working with the public but could handle a bakery or deli job if her work was confined to the back area. Id. She could handle the press operator job because those jobs had built-in rest periods while the operator was waiting for equipment or parts. AR 87-88. Such a job would allow an absentee rate of one day a month. AR 88.

G. Decision of Administrative Law Judge

The administrative law judge denied plaintiff's claim for benefits after finding that she had not met the fourth step of the five-step evaluation process, 20 C.F.R. § 404.1520(a)(4). The agency has a sequential, five-step inquiry that is used to determine a claimant's eligibility for benefits. The administrative law judge must ask (1) whether the claimant is engaged in substantial gainful activity and if not, (2) whether the claimant has a severe impairment or combination of impairments. If the answer to this second question is yes, the administrative law judge must then determine (3) whether the impairments meet or equal one of the impairments listed by the Commissioner as presumptively disabling. If they do not, the administrative law judge proceeds to the next question (4), which is whether the claimant has the residual functional capacity to perform his or her past relevant work. If the answer to the fourth question is no, the administrative law judge must determine (5) whether the claimant is capable of performing work in the national economy. 20 C.F.R. §§

404.1520, 416.920; Knight v. Chater, 55 F.3d 309, 317 (7th Cir. 1995).

In this case, the administrative law judge found that plaintiff had not worked since her alleged onset date in 2006 (step one); she had the severe impairments of fibromyalgia; major depressive disorder; recurrent, generalized anxiety disorder with panic attacks and agoraphobia; post traumatic stress disorder, attention deficit hyperactivity disorder; polydrug abuse and addiction; and history of alcohol abuse in remission (step two); her impairments, separately or in combination, did not meet or equal a listed impairment (step three); and she had the residual functional capacity to perform light work as defined in the regulations except for the restriction to unskilled work because of her mental limitations (step four). In making this last finding, the administrative law judge relied on the evaluations of Dr. Snyder, who found that plaintiff's limitations were less than substantial and did not preclude her "from understanding, remembering and following through with two and three step instructions or tasks." Id. Because the administrative law judge found that plaintiff could perform her past relevant work, he did not proceed to step five of the analysis. The Appeals Counsel refused plaintiff's request for a review of the decision.

OPINION

Plaintiff argues that this case should be remanded because of three alleged errors by the administrative law judge: (1) providing the vocational expert an incomplete hypothetical question; (2) rejecting the physical assessment of plaintiff made by her treating physician; and (3) rejecting the mental assessment of plaintiff made by her treating psychiatrist. She

also argues that the administrative law judge failed to assess her fibromyalgia.

In her reply brief, plaintiff says in response to defendant's brief objecting to her characterization of the question to the vocational expert as a hypothetical that it was not technically a hypothetical question, but it was "more or less" one. Reply Br., dkt. #32, at 1. She goes on to say that the central issue is whether the administrative law judge adequately addressed plaintiff's limitations in concentration, persistence and pace when he denied her benefits. (The Commissioner covered this topic in his responsive brief, so I may consider it.)

The Commissioner suggests in his brief that the central question is a somewhat broader one: whether the administrative law judge had evidence to support his conclusion that plaintiff's moderate limitations would not preclude her from working at her former light, unskilled job as a press operator. Resp. Br., dkt. #31, at 11-12. The answer to that rests in large part on whether it was permissible for him to rely on the evaluation of Dr. Snyder, who concluded that plaintiff's limitations in concentration, persistence and pace would not keep her from understanding, remembering and carrying out two to three-step instructions. AR 28, 363. Such reliance is reasonable if the consulting physician's opinion is the only one in the record. Johansen v. Barnhart, 314 F.3d 283, 289 (7th Cir. 2002) (reasonable for administrative law judge to rely on opinion of consulting doctor who was only doctor to make determination of claimant's residual functional capacity). In this case, two treating doctors made determinations of plaintiff's limitations, but, as the administrative law judge found, neither of those determinations is supported by the evidence. Because the

credibility and adequacy of those determinations play a large role in assessing the adequacy of the administrative law judge's determination and his reliance on Dr. Snyder's opinions, I will turn to their determinations.

Although plaintiff argues that the administrative law judge gave little explanation for his rejection of Dr. Bard's evaluation of plaintiff's ability to work, she is wrong. In fact, he gave a thorough explanation for his decision: Bard's assessed limitations were inconsistent with his progress notes; Bard did not pursue a course of treatment with plaintiff that was consistent with what one would expect had plaintiff been truly disabled; both Bard and the pain clinic had consistently recommended conservative treatment such as physical therapy and exercise for plaintiff; examinations revealed little evidence of abnormality aside from tenderness; and plaintiff's medical imaging report showed only a old, stable compression fracture in her lumbar spine and mild diffuse facet arthropathy. AR 26. The administrative law judge's explanation was sufficient to inform the reader of the bases for his conclusion.

As for Nevers's psychiatric opinion, the administrative law judge acknowledged Nevers's diagnoses of depression and anxiety, but added that plaintiff's "drug misuse and substance addiction contribute[] significantly to her problems." AR 27. He explained that he was unpersuaded by Nevers's July 2010 evaluation of plaintiff as disabled and unable to work, because the objective medical evidence did not support that conclusion. AR 28. Not only had Nevers noted in May 2010 that plaintiff was doing well, but he never addressed the severity of plaintiff's drug addiction in reaching his conclusion that she was totally disabled. Id.

The administrative law judge explained that he had discounted Irv Balto's assessment that plaintiff was unable to meet the competitive standards of even unskilled work because the assessment was inconsistent with the overall evidence in the record as well as plaintiff's testimony that she could care for her personal needs and perform routine household tasks, including grocery shopping. He added that "while Balto states the claimant's substance abuse is in remission, the overall evidence clearly indicates the claimant's drug seeking behavior continued well after his assessment was completed." AR 27. He did not believe that Balto was in a position to attest to a "medically documented history of a chronic mental, schizophrenic, etc. or affective disorder of at least 2 years duration" when he had treated plaintiff for only three months. Id. Finally, Balto had made no mention of the severity of plaintiff's drug addiction in his report. Id.

As plaintiff acknowledges in her initial brief, the social security regulations "require that the findings of the treating physician as to the severity of an impairment be accorded controlling weight if they are well-supported by medically accepted clinical and laboratory diagnostic techniques and are not inconsistent with the other substantial evidence in the record." Dkt. #27 at 14 (citing 20 C.F.R. § 404.1527(d); Bauer v. Astrue, 532 F.3d 606, 608 (7th Cir. 2008)). In her case, the findings of the treating physicians in their medical source reports are not well supported and they are inconsistent with other substantial evidence in the record. Therefore, it was reasonable for the administrative law judge to conclude that the reports of the treating physicians and social worker were neither helpful nor reliable, given the lack of support in the record for their conclusions. Without them,

there was no evidence of any medical reason for plaintiff's complaints of physical pain and only Dr. Snyder's assessment of plaintiff's mental and emotional impairments. The administrative law judge did not err in relying on that assessment in concluding that plaintiff had only moderate limitations in concentration, persistence and pace that would not preclude her from understanding, remembering and following through with two and three step instructions or tasks.

Plaintiff says that even if the administrative law judge was not asking the vocational expert a hypothetical question, he erred in accepting the expert's opinion that plaintiff could perform her past relevant work as a press operator without asking the expert whether such a job would accommodate plaintiff's limited ability to maintain regular attendance and complete a normal workweek. (She also says that the expert should have been asked about her severe pain, but the evidence in the record does not support a finding that she suffered severe pain.) The vocational expert testified that plaintiff's past relevant job of press operator was light, unskilled and generally simple and routine except in instances in which the worker had to keep up with production rates. He added, however, that most of the jobs were piece rate and allowed for downtime every hour and an absentee rate of one day a month. This was a sufficient answer to allow the administrative law judge to decide whether plaintiff could continue to perform the work she had done before. She concluded that the intensity, persistence and limiting effects of plaintiff's medically determinable impairments were not credible and that Dr. Bard's assessment that plaintiff would need to miss more than four days of work each month was not supported by the record evidence. She accepted the

findings of the state agency physicians that plaintiff retained the residual functional capacity for light work because those findings were well supported by the objective medical evidence.

As for plaintiff's contention that the administrative law judge failed to assess her fibromyalgia, the record contains no evidence that plaintiff's fibromyalgia caused her the type of severe pain characteristic of the condition. Despite the many visits plaintiff made to doctors and clinics during 2008 and 2009, she mentioned experiencing pain from fibromyalgia on only or two occasions. The fact that she was observed to have 17 out of 18 trigger points and "tenderness" does not support a finding that she was suffering severe pain from the condition. All indications were that she was exaggerating her pain in an effort to obtain drugs. Even assuming she had widespread pain in all quadrants of her body and axial skeletal pain of at least three months at one time in her life so as to support a diagnosis of fibromyalgia, the administrative law judge did not err in omitting this disorder from his determination, when there was no credible evidence that the condition was a problem for her during the time at issue.

At step four, the claimant has the burden of showing that she cannot perform her past relevant work. Knight v. Chater, 55 F.3d 309, 313 (7th Cir. 1995) ("If a claimant satisfies steps one, two, and three, she will automatically be found disabled. If a claimant satisfies steps one and two, but not three [that her impairments meet or equal one of the impairments listed by the social security administration], then she must satisfy step four."); see also Clifford v. Apfel, 227 F.3d 863, 868 (7th Cir. 2000) ("[O]nly at step five does the burden shift to the Commissioner."). She has not met that burden. The record evidence

does not support her contention that she cannot perform her past work as a press operator.

ORDER

IT IS ORDERED that plaintiff Lilly Griffith's motion for summary judgment, dkt. # 26, is DENIED and the decision of Michael J. Astrue, Commissioner of the Social Security Administration, denying plaintiff's application for supplemental security income is AFFIRMED.

Entered this 11th day of January, 2013.

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