IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT NOSKA,

OPINION AND ORDER

Plaintiff,

12-cv-370-bbc

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Robert Noska is seeking review of a decision denying his claim for disability benefits and supplemental security income under the Social Security Act. 42 U.S.C. § 405(g). He contends that no substantial evidence supports the administrative law judge's finding that plaintiff can perform substantial gainful work and that the administrative law judge made three errors in finding to the contrary: he failed to call a medical expert to testify at the hearing and develop the record as it related to plaintiff's knee problems; he ignored plaintiff's complaints of headaches and peripheral neuropathy; and he failed to ask the vocational expert explicitly about plaintiff's limitations of concentration, persistence and pace.

This is not the first case in which a plaintiff has challenged the questioning of a vocational expert about limitations of concentration, persistence and pace. It is one of a depressingly long list of social security appeals that have had to be remanded because the

administrative law judge did not develop the evidence thoroughly. (In the last four months, this court has remanded three cases on this issue: Martin v. Astrue, case no. 12-cv-48-bbc, at 12-17 (W.D. Wis. Nov. 21, 2012); Marchel v. Astrue, case no. 12-cv-47-bbc (W.D. Wis. Nov. 16, 2012); Gillert v. Astrue, cae no. 11-cv-671-bbc, at 14-15 (W.D. Wis. Feb. 11, 2013).) In this instance, the presiding judge failed to ask the vocational expert a question that encompassed plaintiff's limitations of concentration, persistence and pace that a treating neurologist, two consulting psychologists and the neutral medical expert had identified. It is difficult to fathom why, despite the many opinions from the Court of Appeals for the Seventh Circuit on the importance of such questioning, the agency's administrative law judges continue to repeat the same error of omission. I understand that the agency has an enormous case load, but it saves no time or resources to invite remand by ignoring case law.

In this instance, the commissioner will have an opportunity to redo the decision of plaintiff's claim for benefits and make a new determination of the effect of plaintiff's limitations in concentration, persistence and pace on his ability to perform jobs in the national and regional economy. I am not persuaded that plaintiff's complaints about the administrative law judge's treatment of his physical problems would support remand on their own, but so long as the case is being remanded, the commissioner should explain why he did not find that plaintiff's knee problems, headaches and peripheral neuropathy had any effect on his ability to hold substantial gainful employment and why he limited plaintiff to work of medium exertion if the knee problems were not severe.

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

RECORD FACTS

A. Background

Plaintiff was born on September 17, 1963. AR 187. He has past work as a roofer. He applied for supplemental security income and disability insurance benefits on July 21, 2010, alleging disability as of July 12, 2010 because of "neurology, depression, panic attacks, high blood pressure, anxiety and acid reflux." AR 205. His application was denied initially, AR 109-10, and on reconsideration. AR 112-16. On October 13, 2011, he had a hearing before Administrative Law Judge Arthur Schneider, who heard testimony from plaintiff, plaintiff's brother, a neutral medical expert and a neutral vocational expert. AR 44-108.

B. Medical Evidence

Plaintiff has physical complaints of knee and spine pain, headaches, peripheral neuropathy, high blood pressure and acid reflux. In addition, he suffers from depression, panic attacks and alcoholic dementia. In this proceeding, plaintiff does not contend that his depression, panic attacks, anxiety, high blood pressure, spinal problems or acid reflux are disabling. Instead, he bases his claim on his knee problems, his headaches, his peripheral neuropathy and his cognitive deficits as the latter affect his concentration, persistence and pace.

1. Knee pain

On August 6, 2010, plaintiff's primary physician, Dr. Shee-Chang Tang, examined

plaintiff's knees and diagnosed bilateral knee discomfort, a history of bilateral knee arthoscropy for torn menisici, mild effusion of his left knee, full range of motion, stable ligaments, minimal effusion in his right knee and stable ligaments. AR 575. At a followup visit on August 19, 2010, Tang noted that plaintiff had improved with anti-inflammatories and ice; the swelling had largely resolved in both knees; and plaintiff was able to ambulate, albeit "with much difficulty." AR 278.

Almost a year later, on July 8, 2011, Dr. Bradley Boettcher assessed a meniscal tear in plaintiff's left knee, AR 813, and referred plaintiff to Dr. James Johnson, an orthopedist. AR 812. Plaintiff told Dr. Johnson that he had twisted his knee in the bathroom two weeks earlier. AR 1074. An x-ray showed mild degenerative changes and an MRI showed an abnormality of the posterior horn of the medial meniscus that appeared to be a lateral tear, compatible with previous arthroscopic resection. Johnson saw no other ligamentous abnormalities. His impression was that plaintiff had sprained his knee and that he had degenerative arthritis. He saw no reason to do another arthroscopic procedure on the knee at that time and recommended that plaintiff resume his exercises. AR 1075.

On August 12, 2011, Johnson provided a written report on plaintiff to the Social Security Administration. He checked the box for "patient meets listing § 1.02A" and wrote that on his left knee, plaintiff had had two surgeries for meniscal tears and had mild or moderate osteoarthritis; and on his right knee, he had had surgery for a torn meniscus and he had a torn anterior cruciate ligament as well as arthritis. These last two problems contributed to his difficulty in walking. AR 1082.

2. Headaches

The first evidence in the record of plaintiff's headaches is a notation of them by Dr. Tang when he saw plaintiff on June 15, 2010. AR 283. Tang referred plaintiff to Dr. Daniel Sa, a neurologist at the Marshfield Clinic in Marshfield, Wisconsin. AR 473. (Oddly enough, when plaintiff saw Dr. Sa on June 29, 2010, he denied having headaches.) Sa reviewed plaintiff's neurological signs and symptoms and found them unremarkable. AR 474. He ordered an electroencephalogram and MRI and a psychological evaluation by Stuart Waltonen. At a followup visit on September 16, Dr. Sa told plaintiff that alcoholic dementia was the most likely source of his cognitive decline. He did not find evidence of severe depression or a sleep disorder sufficient to cause the symptoms. AR 488.

On October 25, 2010, plaintiff's wife called Dr. Sa, saying that plaintiff was continuing to have headaches and increased confusion. AR 513. Sa recommended a change in plaintiff's medications. AR 514. On November 11, 2011, plaintiff's wife called to say that the amitriptyline had helped. AR 518.

Plaintiff's headache pain took him to the emergency room of the Riverview Hospital in Wisconsin Rapids on a number of occasions. On June 4, 2010, he complained of a right-sided headache. AR 382. On August 1, 2010, he said he had fallen at home and had a headache as well as left side chest and abdominal pain. AR 367-68. The same year, he went to the emergency room for headaches on August 26, AR 673; October 7, AR 648; October 12, AR 640-46; October 23, AR 632-38; October 25, AR 628-33; December 6 (headache and chest pain), AR 621-27; and December 7, AR 614. (He went into the emergency room

on many other occasions in 2010, complaining of problems other than headaches, but these visits are not relevant to his disability claim.) On October 4, 2010, he saw Dr. Scott Ghinazzi, at a walk-in clinic, complaining of a headache and some abdominal discomfort. AR 561. Ghinazzi thought the headaches might be a side effect of the medication plaintiff had begun taking for his dementia.

Plaintiff saw another neurologist, Dr. Paul Atkinson, at the Ministry Medical Group's clinic in Plover, Wisconsin, on November 15, 2010. AR 537. Atkinson noted plaintiff's 30-year history of alcoholism, Dr. Sa's diagnosis of alcoholic dementia, plaintiff's chronic headache for the previous 30 days, AR 534, and his complaints of neuropathy in his fingers. AR 535. With respect to the headaches, Atkinson told plaintiff that he had been on amitriptyline for only a short time and might still obtain benefit from it. Atkinson ruled out using blood pressure medications for the headaches because plaintiff's blood pressure was too low, but thought Gabapentin therapy would work with his other medications. AR 537. He advised plaintiff that it might be 3-6 weeks before he noticed a benefit from the two medications. Id.

At a followup appointment with plaintiff on December 14, 2010, AR 529-33, Atkinson told him he should not continue on dilaudid for his headaches, given his addiction history. AR 532. Instead, Atkinson planned to increase the Gabapentin. Id. In a form completed in February 2011, Atkinson characterized plaintiff's headaches as moderate to severe, with noted improvements with medication, although still chronic and persistent. He added that plaintiff had symptoms of mood changes and mental confusion. AR 757. He

thought plaintiff would sometimes need to take an unscheduled break during a work day for his headache once or twice a week but that he would not be precluded from performing basic work activities because of his headaches and that he was capable of low stress jobs. AR 760.

When plaintiff returned in April 2011, he told Atkinson that he had had a significant improvement with the dosage of Gabapentin that Atkinson had prescribed and that his headaches were diminishing. AR 801.

3. Peripheral neuropathy

Dr. Tang, plaintiff's treating physician, thought plaintiff might have neuropathy, AR 556, and referred plaintiff to Dr. Atkinson, who saw him in November 2010 and afterwards. At a followup visit on December 14, 2010, Atkinson told plaintiff that an MRI of his spine had shown no definitive nerve root impingement, leading Atkinson to think that plaintiff's neuropathy was secondary to his alcohol use. AR 532.

4. Short-term memory problems

At plaintiff's November 2010 appointment, Atkinson noted that plaintiff had significant difficulty with orientation, registration and recall. AR 537. Atkinson's diagnosis was dementia secondary to alcoholism, but he told plaintiff that his depression might also be playing a role in his memory difficulties. AR 538. Plaintiff had no spatial difficulties or difficulty with concentration and attention. AR 537.

Atkinson filled out a mental impairment questionnaire on February 18, 2011, listing

three clinic visits with plaintiff on November 15, 2010, December 14, 2010 and February 15, 2011. AR 754. He found that plaintiff had difficulties in registration, recall and following complex instructions (and two other areas that are indecipherable). AR 754. He could not trace these deficits to headaches rather than to chronic alcoholism. Id. His prognosis for plaintiff was guarded: his headaches were persistent and chronic and he had neuropathy secondary to alcoholism, AR 759, but, as Atkinson noted, the headaches were improving with medication whereas plaintiff's cognitive difficulties would not. AR 755. He added that plaintiff had difficulty thinking or concentrating and had perceptual or thinking disturbances and memory impairment. Id. He assessed moderate restrictions in plaintiff's activities of daily living, in maintaining social functioning and in concentration, persistence and pace, AR 756, and said that it was his belief that these impairments would last at least 12 months.

At a followup appointment in April 2011, Atkinson noted that plaintiff's EEG test did not demonstrate any epileptiform abnormalities and that his memory was not worsening, but might even be improving in some respects. AR 801.

B. State Agency Physical Assessments

Dr. Mina Khorshidi and Dr. Syd Foster each evaluated plaintiff's physical condition. Khorshidi signed her report in October 2010, finding that plaintiff had no severe physical impairments. AR 491. Foster completed his report in April 2011. AR 799. He agreed with Khorshidi that plaintiff had no severe physical impairments and noted that plaintiff's

November 2010 laboratory tests and EEG "were within normal limits in regards to complaints of bilateral hand weakness." Id. He found plaintiff only partially credible because he gave different reports at different times and his self-reports "can be more restricting than would be expected from the objective findings." Id.

C. State Agency Mental Assessments

Susan Donahoo, an agency psychologist, performed a residual functional capacity assessment of plaintiff on October 14, 2010. AR 492-95. She found that plaintiff suffered from the following disorders: organic mental, affective, anxiety-related and substance addiction. AR 496. She assessed plaintiff as moderately limited in the following areas:

- understanding, remembering and carrying out detailed instructions;
- maintaining attention and concentration for extended periods;
- performing activities within a schedule, maintaining regular attendance and being punctual within customary tolerances;
- making simple work-related decisions, completing a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods;
- responding appropriately to changes in the work setting and traveling in unfamiliar places or using public transportation.

AR 492-93. Donahoo found that in all other respects plaintiff was not significantly limited. Id. She believed that if plaintiff continued to abstain from alcohol, within a year he would be capable of meeting the basic mental demands of unskilled work. AR 495.

Another agency psychologist, Edmund Musholt, assessed plaintiff as moderately

limited in all of the areas noted by Donahoo, plus these additional areas:

- traveling in unfamiliar places, and in other areas as well, including the ability to remember locations and work-like procedures;
- accepting instructions and responding appropriately to criticism from supervisors;
- maintaining socially appropriate behavior and adhering to basic standards of neatness and cleanliness;
- being aware of normal hazards and taking appropriate precautions; and
- setting realistic goals or making plans independently of others.

AR 781-82. Musholt believed that plaintiff could sustain the basic mental demands of unskilled work with moderate limitations in concentration, persistence and pace and social skills. AR 783.

D. Neurological Evaluation

In July 2010, Dr. Stuart Waltonen undertook a neuropsychological evaluation of plaintiff on referral from Dr. Sa. AR 481. Waltonen found plaintiff alert and oriented to person, place, time and situation, with attention and concentration within normal limits and no evidence of distractibility. He noted plaintiff's history of drinking 30 beers a day for the preceding 15 years and his acknowledgment of suffering blackouts. AR 482. Waltonen noted that plaintiff said he was not drinking at the time but that his wife said he was drinking about a twelve-pack a day. After testing, Waltonen's assessment was that plaintiff had a pre-existing learning disability with poor reading ability; a perceptual reasoning index in the low average range; a borderline level of mental tracking, cognitive flexibility, reasoning and novel problem-

solving. AR 484-85. In addition, his immediate attention was impaired. AR 484. Overall, plaintiff had significant cognitive impairment. AR 485. Waltonen attributed this primarily to plaintiff's chronic alcohol abuse, although he thought plaintiff's difficulties with language were probably developmental problems. Id. Waltonen advised plaintiff and his wife that if plaintiff continued drinking, his cognitive impairments would not improve, but that they might lessen if he stopped drinking and developed good nutritional habits. Id.

E. Hearing Testimony

Plaintiff was 48 years old at the time of the hearing. His testimony included the following:

- His highest level of education was ninth grade. AR 48-49.
- He was last employed at Boyle's Roofing and Construction in July 2010, roofing and building garages. AR 49-50. He worked there for more than 15 years and at another roofing company for about 14 years before that. AR 51.
- He is prevented from working by headaches that he suffered "all the time"; he has trouble breathing; his knees ache all the time; and he is distracted easily. AR 51-52.
- He cannot read well. AR 52. He cannot read a job application, instructions for doing a job or a blueprint. AR 53. He can add and subtract a little bit but cannot handle multiplication, division or percentages. Id.
- He enjoys being on the computer, looking up things and playing games. If he wants "to look up something [he] usually [has his] wife type it in." AR 54-55.
- He has had one surgery on his right knee and two on his left. AR 55. He has no surgeries planned for the future. AR 55-56.
- He had remained sober for the previous three months and had been sober for a period before that but had relapsed. AR 56.

- He has constant numbness in both hands that prevents him from picking things up from a table, holding a coffee cup or pencil and using a screwdriver. AR 56-57.

- He has problems with his memory and is sometimes disoriented. AR 58. He stopped driving for that reason. AR 59.

- He had been a three-pack-a-day smoker, but cut back to one-half pack a day. AR 60.

- He has trouble with depression and tends to sleep most of the day and night. AR 60. He suffers from panic attacks when he is in a crowded room or around people. AR 62-63. He avoids going to WalMart and goes to the grocery store with his wife early in the morning when there are fewer people. AR 63.

- He rarely talks to friends or leaves the house, except to go somewhere with his wife. AR 60-61. He does not cook, clean, mow the lawn or do laundry. AR 62.

- He could not perform at an eight-hour job because he can neither sit nor stand for eight hours, even if he changes positions. AR 63. He can walk into a grocery store and down an aisle. AR 64.

- Although he takes medication, his knees throb constantly. Id.

Plaintiff's brother, Glen Noska, testified that he checked in on his brother about three times a week. AR 73. He did not see him outside the house much of the time. He acknowledged that his brother had had a significant problem with alcohol in the past, but that he had been sober for six months. AR 74. He found plaintiff to be less able to focus on something, AR 75, and easily distracted. AR 76. In his opinion, plaintiff's mental condition had worsened over the preceding two to three years. AR 79.

Clinical psychologist Larry Larrabee testified as a medical expert. He asked plaintiff about why he had not been working since July; plaintiff told him that his doctors had taken him off work because of his dementia. AR 82-83. In response to additional questions from

Larrabee, plaintiff said that he had been taking Vicodin for about three weeks for back problems and that in a typical day, he got up, took his pills, listened to the radio, fell asleep again, got up, took more pills, watched television for a while, fell asleep again, woke up at 7:00 pm, watched TV and fell asleep. AR 83. (Despite this testimony about back problems, plaintiff is not seeking disability on that basis.) He no longer played video games because he lacked the ambition to hook them up and he had not found any medication that eased his depression. AR 84. He had no interest in doing anything on his computer. AR 85.

Larrabee testified that the following categories applied to plaintiff: 12.02, organic mental disorder; 12.04, affective disorder; 12.06, anxiety-related disorder; and 12.09, substance addiction disorder. AR 88. Without the influence of alcohol, plaintiff had mild restrictions of daily living; mild to moderate difficulties in maintaining social functioning and sustaining concentration, persistence and pace, AR 89-90, and no repeated episodes of decompensation. AR 90. As for plaintiff's residual functional capacity, he would have limited ability to

- understand and remember very short and simple instructions, AR 92;
- carry out very short and simple instructions, id.;
- maintain regular attendance and be punctual within strict tolerances, id.;
- work in coordination with or in proximity to others without being unduly distracted, id.;
- make simple, work-related decisions, id.;
- complete a normal work day and work week without interruptions from psychologically-based symptoms, id.;

- ask simple questions or request assistance, AR 93;
- respond to changes in routine work settings, id.;
- deal with normal work stress, id.; and
- be aware of normal hazards and take appropriate precautions. Id.

Larrabee thought plaintiff would be seriously impaired in maintaining attention and concentration for two-hour segments, AR 92, and that he would be able to perform three simple steps, but even then, he would omit one occasionally. AR 95. He believed that plaintiff's cognitive abilities would improve if he could maintain sobriety for 12 to 18 months. Id. In response to a question from plaintiff's attorney, Larrabee testified that headaches could affect plaintiff's concentration, but that he had not taken them into account in making his assessment, both because he was doing "a global assessment" and because he had the impression from the medical record that plaintiff's headaches were a minor issue. AR 97.

Certified rehabilitation counselor Robert Neuman testified as a neutral vocational expert. He said that he was familiar with the contents of the exhibits in the case and had been present for the hearing. After determining from plaintiff that the heaviest weight he had lifted while working as a roofer was a 100-pound roll of roofing that he carried up a ladder, Neuman testified that plaintiff's past roofing work was classified as "heavy exertional, unskilled." AR 100-01.

The administrative law judge asked Neuman what type of work could be performed by an individual of plaintiff's age, education and work experience, with no limits on the

amount of exertion required but available only for simple, routine and repetitive work. He defined "simple, repetitive work" as being able to understand, carry out and remember simple instructions, respond appropriately to supervisors, coworkers and the public and adjust to routine changes in the work setting. Neuman responded that such a person could perform plaintiff's past relevant work and could handle jobs such as custodian, dishwasher and hand packer that existed in large numbers in the economy. AR 102-03. Neuman testified that, if everything else remained the same but the exertional level were changed to medium, the same kind of jobs would be available within Wisconsin. AR 103.

In response to another question about an individual whose standing was limited to two hours a day and sitting was limited to six hours, and everything else remained the same, Neuman testified that no work would be available at the medium exertional level, AR 103, but there would be sedentary jobs that plaintiff could perform, such as production worker, production inspector, information clerk and surveillance monitor. AR 104. If the work involved fine and gross manipulation that plaintiff could do only 20% of the day, no jobs would be available. AR 105-06. In addition, none of the jobs that Neuman listed would be available to a person who needed more than one day's absence a month or unscheduled breaks during the day. AR 106.

Answering a question from plaintiff's counsel, Neuman testified that there would be no jobs available for an individual who was limited in remembering work-like procedures, understanding, remembering and carrying out short instructions, maintaining regular attendance and being prompt, maintaining an ordinary routine without special supervision,

working in coordination or in proximity with others without being distracted, making normal work decisions, completing a normal workday or work week, asking questions or seeking assistance, responding to changes in the workplace, dealing with normal work stress and taking precautions for hazards. AR 107.

F. Administrative Law Judge's Decision

The administrative law judge followed the usual five-step evaluation, making the following findings:

Step one: Plaintiff was not engaged in substantial gainful activity and had not been so engaged since July 12, 2010, his alleged onset date. AR 24.

Step two: Plaintiff had the severe impairments of organic mental disorder, mood disorder, anxiety disorder and substance abuse disorder (in recent remission). Id.

Step three: Whether considered independently or in combination, none of plaintiff's impairments met or medically equaled the severity of a listed impairment. The administrative law judge found in particular that plaintiff's alleged knee impairment did not equal a listed impairment because he did not require a hand-held assistive device that limited the functioning of both upper extremities, which is one of the criteria for the listing. AR 26. Although plaintiff could not walk long distances, the administrative law judge attributed this to shortness of breath and not to his knee problems. In addition, plaintiff could drive a car, go shopping and mow his lawn. The administrative law judge rejected Dr. Johnson's opinion that plaintiff's knee problems met the criteria for the listing, pointing out that Johnson merely

checked a box on a form for needing an assistive device.

The administrative law judge considered whether any of plaintiff's mental impairments met the criteria of a listing. In doing so, he considered Listing 12.09, which recognizes that nine specific behavioral or physical changes associated with the regular use of alcohol (or other substances that affect the central nervous system) can be of sufficient severity to meet the requirements of a listing. 20 C.F.R. Part 404, Subpart P, App. 1, § 12.09. He focused on the impact of plaintiff's substance abuse on his organic mental disorder and memory impairment, depression and anxiety. He found that the Paragraph B criteria were not satisfied because plaintiff had only mild to moderate restrictions in activities of daily living, moderate restrictions in social functioning and in concentration, persistence and pace and, although he had had multiple episodes of decompensation while intoxicated, he had had no extended episodes of decompensation. AR 26-27. He found also that plaintiff's mental impairment did not meet the paragraph C criteria.

The administrative law judge explained that he had considered plaintiff's diagnoses of learning disorder, depression, anxiety and panic disorder. Plaintiff's depression had been treated with Cymbalta; his anxiety and panic disorder had been present well before his alleged onset of disability; and, in any event, that along with alprazolam, the Cymbalta was helping plaintiff control his depression and anxiety. Plaintiff had reported episodes of confusion, memory loss and fatigue to Dr. Waltonen at a neurological evaluation in July 2010, but Waltonen found him alert and oriented, his attention and concentration within normal limits and showing no evidence of impaired reasoning or executive function. AR 28-29. Plaintiff

had reported in his function report that he helped care for his wife and family pet, mowed the law when he could, helped with dishes, used the computer and made simple meals. He went out by car or on foot and texted and telephoned friends. This report was in some tension with his testimony at the hearing, when he said he had memory problems, no longer drove, slept a lot because of his depression and rarely left the house, never mowed the lawn or cooked or cleaned and did not play computer games or work on the computer because he had difficulty using his hands. AR 29-31.

Step four: The administrative law judge determined plaintiff's residual functional capacity after considering the opinions of Dr. Atkinson, a neurologist, Dr. Larrabee, a clinical psychologist, and state agency psychologists Susan Donahoo and Edward Musholt. He gave controlling weight to Dr. Atkinson's assessment of moderate restrictions for plaintiff in mental health functioning, except as to his estimate that plaintiff would be absent from work about four times a month. He found this estimate unsupported by any medical rationale or treatments notes. He gave "considerable weight" to Larrabee's assessment of mild to moderate limitations of social functioning and concentration, persistence and pace, noting that the "influence of alcohol abuse is reflected in moderate to marked limitations in concentration, persistence and pace," but he deferred to the "treating physician's" opinion that plaintiff was moderately limited in activities of daily living. He did not identify the treating physician but I understand him to be referring to Dr. Atkinson, who checked this box on the questionnaire he completed. AR 754-61.

The administrative law judge gave great weight to Donahoo's and Musholt's

assessments that plaintiff would be capable of performing the basic demands of unskilled work so long as he abstained from alcohol. As in step three, he gave no weight to Dr. Johnson's opinion that plaintiff's physical impairments met Listing 1.02, noting at this step that both agency consultants Mina Korshidi and Syd Foster had found that plaintiff did not have a severe physical impairment. Despite those opinions, the administrative law judge incorporated a "precautionary limitation" to medium unskilled work in his hypothetical questioning of the vocational expert. AR 32.

The administrative law judge's conclusion in step four was that plaintiff had the residual functional capacity to perform less than the full range of medium work; he could lift or carry 50 pounds occasionally, 10 pounds frequently; and he could sit, walk or stand for six hours out of an eight-hour day. He could perform simple, routine and repetitive work; understand, remember and carry out simple instructions; respond appropriately to supervisors, co-workers and the public; and adjust to routine changes in the work place. AR 27.

Step five: the administrative law judge found that plaintiff was unable to perform any of his past relevant work as a roofer in construction, which is categorized as "very heavy." He concluded, however, that plaintiff could preform the requirements of medium unskilled jobs such as custodian, dishwasher and hand packer and that these jobs existed in large numbers in the state. AR 33.

In reaching his conclusions, the administrative law judge found that plaintiff's medically determinable impairments could reasonably be expected to produce the symptoms

plaintiff had alleged but did not find plaintiff's "statements about the intensity, persistence and limiting effects of the symptoms to be credible to the extent they are inconsistent" with the residual functional capacity he had determined. AR 30. His credibility determination took into account plaintiff's history of alcohol consumption and its impact on plaintiff's overall functioning as well as the contradictory nature of plaintiff's reports of his daily activities, such as testifying at the hearing that he searched for things online and played computer games but then telling Dr. Larrabee he could not play computer games because of his difficulty using his hands, and saying in the Function Report he filed with the agency that he helped his wife with the dishes and sometimes mowed the lawn, but testifying that he did nothing around the house and his wife mowed the lawn. AR 30-31.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). The administrative law judge "need not discuss every piece of evidence," but he "must evaluate the record fairly" and "may not ignore an entire line of evidence that is contrary to the record." Golembiewski v. Barnhart, 322 F.3d 912, 917 (7th Cir. 2003). In addition, the administrative law judge must build a logical and accurate

bridge from that evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001). Appellate review is confined to those rationales offered by the administrative law judge, so a court may not affirm based on post-hoc justifications offered by the commissioner's lawyers. Spiva v. Astrue, 628 F.3d 346, 348 (7th Cir. 2010).

B. Concentration, Persistence and Pace

Plaintiff's first challenge is to the adequacy of the administrative law judge's hypothetical question to the vocational expert. The administrative law judge asked Neuman to consider a hypothetical individual who could perform only simple, routine and repetitive work; understand, remember and carry out only simple instructions; respond appropriately to supervisors, coworkers and the public; and adjust to routine changes in the work setting. Plaintiff contends, correctly, that this hypothetical was flawed because merely limiting an individual to simple, routine and repetitive work is not an adequate substitute for a question about specific deficiencies in concentration, persistence and pace.

The Court of Appeals for the Seventh Circuit has held in a number of cases that the administrative law judge must "orient the [vocational expert] to the totality of a claimant's limitations," *including* "limitations of concentration, persistence and pace." O'Connor-Spinner v. Astrue, 627 F.3d 614, 619 (7th Cir. 2010) (emphasis added) (citing Stewart v. Astrue, 561 F.3d 679, 684 (7th Cir. 2009) (restricting inquiry to "simple routine tasks that do not require constant interactions with coworkers or general public" insufficient to account for plaintiff's limitations of concentration, persistence and pace); Kasarsky v. Barnhart, 335

F.3d 539, 544 (7th Cir. 2003) (administrative law judge erred in failing to ask vocational expert whether individual with frequent deficiencies in concentration, persistence and pace could perform jobs identified by expert)). When an administrative law judge is questioning a vocational expert about jobs that could be performed by a claimant found to have moderate limitations of concentration, persistence and pace, a hypothetical question that limits the claimant to routine, repetitive tasks with simple instructions does not orient the expert to the totality of the claimant's limitations. Id. See also Craft v. Astrue, 539 F.3d 668, 675-76 (7th Cir. 2008) (administrative law judge must consider all medically determinable impairments, physical and mental, severe or not, when determining residual functional capacity and must include all relevant limitations when asking vocational expert to give opinion on jobs claimant can perform).

The court of appeals recognized in O'Connor-Spinner that the general rule of setting out all of the claimant's limitations has exceptions. One applies to a situation in which the vocational expert "independently reviewed the medical record or heard testimony directly addressing those limitations," unless the administrative law judge poses a series of hypothetical questions that do not include the limitations. "[I]n such cases we infer that the [vocational expert's] attention is focused on the hypotheticals and not on the record." Id. A second exception applies when it is clear that the administrative law judge's questions specifically excluded tasks that a person with the claimant's limitations could not perform. Id.

In this case, the vocational expert stated on the record that he had reviewed the

records and had been present for the entire hearing, but his attention was not drawn to the full record. Instead, the administrative law judge posed a series of increasingly restrictive questions, each of which included the findings that plaintiff

- could perform only simple, routine and repetitive work;
- could understand, remember and carry out simple instructions;
- was able to respond appropriately to supervisors, coworkers and the public; and
- could adjust to routine changes in the work environment.

However, the administrative law judge did not ask about any other limitations of concentration, persistence and pace, despite saying that he was giving weight to the opinions of four medical sources that had included such limitations. Plaintiff's treating physician, Dr. Atkinson, had stated that plaintiff had moderate limitations of concentration, persistence and pace; Donahoo and Musholt found that plaintiff was moderately limited in a number of specific areas related to concentration, persistence and pace not incorporated into the administrative law judge's hypothetical questions, and Larrabee had testified about plaintiff's limitations, in particular, that plaintiff would be seriously impaired in maintaining attention and concentration for two-hour segments. This might not have been a problem had the administrative law judge explained why the other limitations were not supported by the record evidence.

Under O'Connor-Spinner, 627 F.3d 619, Stewart, 561 F.3d 679, Craft v. Astrue, 539 F.3d 668, and Kasarsky, 335 F.3d 539, this case must be remanded to the commissioner. On remand, the administrative law judge should explain his finding that plaintiff's mental

impairments impose "*mild* to *moderate* limitations of concentration, persistence and pace," when Dr. Atkinson found that plaintiff had *moderate* limitations of concentration, persistence and pace, AR 756, and the administrative law judge had said he was giving "controlling weight" to opinions in this area. AR 31. In addition, he should explain his statement that "[t]he influence of alcohol abuse is reflected in moderate to marked limitations in concentration, persistence and pace." AR 31. Does he mean that plaintiff would not have moderate to marked limitations in those areas if he refrained from drinking and, if so, what is the evidence on which he is relying? Whatever limitations, if any, the administrative law judge determines plaintiff has in concentration, persistence and pace, he should include those limitations expressly in the hypothetical posed to the vocational expert.

C. Plaintiff's Headaches and Peripheral Neuropathy

Plaintiff criticizes the administrative law judge's failure to discuss his headaches and his peripheral neuropathy. Although this omission would not require remand on its own in light of the evidence in the record that plaintiff's headaches were subsiding in April 2011 and the absence of any medical evidence in the record that plaintiff had severe neuropathy, the record would be improved if the administrative law judge addressed these two problems.

D. The Administrative Law Judge's Failure to Call a Medical Expert

Plaintiff's last complaint concerns the alleged inadequacy of the administrative law judge's consideration of plaintiff's knee problems and his failure to call a medical expert on

the subject. Plaintiff says that the administrative law judge "played doctor" when he found that the knee problems did not amount to a severe impairment. He finds it perplexing that the administrative law judge limited plaintiff to "medium" work without any explanation or any citation to the record and argues that this shows that the administrative law judge was concerned about plaintiff's knees and should not have tried to resolve the concern by simply deciding that plaintiff could perform work of medium exertion. Instead, he should have called a medical expert to review the records and hear plaintiff's testimony.

Now that the case is being remanded, the administrative law judge can explain the basis for his limitation of plaintiff to medium work and why he believed plaintiff could perform the necessary walking such a job would require. If, as he said in his decision, he believed that plaintiff's walking difficulties are related to his shortness of breath and not to his knee problems, he should explain why the cause of the difficulties makes a difference in his conclusion that plaintiff can still perform medium work.

ORDER

IT IS ORDERED that plaintiff Robert Noska's motion for summary judgment is GRANTED and this case is remanded to defendant Michael J. Astrue for further

consideration of plaintiff's application for disability benefits and supplemental security income.

Entered this 13th day of March, 2013.

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