IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RONALD WAYNE MARTIN,

OPINION and ORDER

Plaintiff,

12-cv-48-bbc

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

- -

Plaintiff Ronald Wayne Martin contends that he has been disabled by back and neck pain, headaches, polysubstance abuse, hand numbness, anxiety, memory loss and impaired cognition since 2001. His application for disability insurance benefits and supplementary insurance income was rejected by an administrative law judge on March 23, 2011. The administrative law judge concluded that plaintiff suffered from severe impairments related to degenerative disc and joint disease, a history of polysubstance abuse, depression and anxiety disorder, but concluded that he was not disabled because he could perform a significant number of jobs in the national economy. Plaintiff seeks review of that decision under 42 U.S.C. § 405(g), contending that the case should be remanded so that the administrative law judge may consider "new evidence" regarding plaintiff's mental health. Additionally, plaintiff contends that remand is appropriate because the administrative law judge erred by (1) failing to give adequate consideration to a treating physician's opinion regarding plaintiff's limitations; (2) failing to incorporate plaintiff's memory and cognitive impairments into his mental residual functional

capacity assessment; (3) concluding that plaintiff's headaches and hand numbness were not severe impairments; (4) making a flawed assessment of plaintiff's credibility; and (5) failing to consider the conflicts between the vocational expert's testimony and the Dictionary of Occupational Titles. Because I agree with plaintiff regarding his second, third and fourth arguments, I am remanding the case to the commissioner for a new determination.

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

FACTS

A. Background

Plaintiff Ronald Wayne Martin received disability insurance benefits from January 19, 2001 until December 1, 2007. AR 37. His benefits were terminated in September 2007 because he failed to show up for a consultative exam. AR 528. Plaintiff may have been in prison at the time that exam was scheduled, as he was incarcerated in the Wisconsin prison system from 2007 to 2009. AR 722. On March 3, 2009, while he was still in prison, plaintiff filed applications for disability insurance benefits and supplementary insurance income, alleging disability beginning in 2001. AR 37, 214. Plaintiff's claim was denied initially on November 5, 2009 and upon reconsideration on January 26, 2010, and plaintiff filed a request for a hearing.

On April 27, 2010, plaintiff was riding his bike when he was struck by a car and suffered a head injury. After the April 2010 bike accident, plaintiff's neck pain continued and he suffered balance and dizziness problems, as well as cognitive impairments, with symptoms of fatigue, slurred speech and memory loss. Plaintiff received cognitive therapy, physical therapy

and speech therapy during the summer and early fall of 2010.

Also in the summer of 2010, plaintiff worked part-time as a donation attendant for Goodwill Industries, a position he obtained through the Department of Corrections. He worked for 12 weeks, between May 2010 and August 2010. AR 80-81.

A hearing was held before an administrative law judge on January 26, 2011; the administrative law judge denied plaintiff's claim on March 23, 2011.

B. Medical Treatment

Before the April 2010 bike accident, plaintiff received treatment for mental health problems and suicide attempts, AR 288-90, 318-20, 332, 347, 420, 474, as well as for back and neck pain. AR 310, 335, 489-90. After the accident, plaintiff's primary treating physician was Dr. Jeffrey Derr of Gundersen Lutheran in La Crosse, Wisconsin, a specialist in physical medicine and rehabilitation. Dr. Derr saw plaintiff four times in the summer and fall of 2010. AR 723-25 (5/24/10), AR 719 (6/15/10), AR 717-18 (7/9/10), AR 713 (8/6/10).

Plaintiff also saw a neuropsychological specialist, AR 715-16 (7/30/10), AR 759-60 (10/1/10), a headache specialist, AR 707-08 (8/26/10), a cognitive and speech therapist, AR 689-90 (9/27/10), AR 694-96 (9/22/10), AR 697-99 (9/15/10), 701-02 (9/9/10), AR 703-06 (9/3/10), and a physical therapist, AR 691-93 (9/27/10). Plaintiff missed several appointments at Gundersen Lutheran, AR 660, 687, and ultimately was discharged from physical therapy for missing too many appointments. AR 733.

C. Physician and Consultant Opinions

In August 2009, Dr. Gary Ludvigson, a consulting psychologist, completed a consultative examination and clinical interview of plaintiff. AR 492-99. He found that plaintiff had an anxiety disorder, obsessive-compulsive and panic symptoms, alcohol and cannabis abuse (in apparent remission) and an undefined personality disorder. AR 498. Additionally, he found that plaintiff could understand, remember and carry out simple instructions, could respond appropriately to supervisors and coworkers, could withstand routine work stressors and adapt to ordinary changes and "could maintain concentration, attention, and work pace." Id.

In October 2009, Kyla King, a state agency consulting psychologist, completed a mental residual functional capacity assessment. AR 503-06. She found that plaintiff had moderate limitations in social functioning and mild limitations in the activities of daily living and concentration, persistence and pace. She found also that he had moderate limitations in his ability to understand, remember and carry out detailed instructions, work in coordination with or proximity to others without being distracted by them and to interact appropriately with the general public. AR 503-18. On January 25, 2010, Dr. Jack Spear, another agency consultant, concurred with King's opinion. AR 598.

In November 2009, a state agency consulting physician, Dr. Philip Cohen, completed a physical residual functional capacity assessment, finding that plaintiff was limited to light exertional limitations of lifting 20 pounds occasionally and 10 pounds frequently, sitting six of eight hours and standing six of eight hours in a workday. AR 519-26. On January 22, 2010, Dr. Pat Chan, another agency consulting physician, concurred with Cohen's opinion. AR 597.

On January 13, 2011, Dr. Derr completed a physical residual functional capacity

assessment for plaintiff. AR 738-42. It was Derr's opinion that plaintiff would be limited to, among other things, lifting 10 to 20 pounds occasionally and standing or walking four hours in an eight-hour workday. AR 739-40. Derr also stated that plaintiff would need to take an unscheduled break every 60 minutes to walk around for about two minutes. AR 740.

D. Hearing

A video hearing was held on January 26, 2011, before Administrative Law Judge Arthur Schneider. Plaintiff was represented by counsel. Plaintiff stated that his mental anxiety and spinal issues precluded him from working. AR 84. He said that he had problems with his upper spine, including a bulging disc, anterior spurs and narrowing of the inner spinal column. Id. He testified that his spine caused him "pain every day," particularly when he looked up and down, and that he did not have a full range of motion in his neck. AR 85. Plaintiff explained that he took some pain medication for his neck but that he did not take narcotic medications because of his history of drug abuse. AR 83, 85. Plaintiff also testified that using his arms caused neck pain and that his pain radiated from his neck into his arms and fingers, causing numbness. AR 86. He said that he had to lie down several times a day for an hour or two because of the pain in his neck. AR 88.

When asked whether he had difficulty picking things up and grasping items, plaintiff testified that it sometimes took two or three tries to pick something up and sometimes he dropped items. Id. He also testified that he could pick up a gallon of milk, but he could not carry it continuously throughout an eight-hour workday. AR 88-89.

Plaintiff testified that he was limited by his headaches, which occurred six to eight times

a month. AR 91. He stated that the headaches could be excruciating, could last most of a day and caused his neck to hurt. Id. He said that his headache medication was not very helpful in controlling symptoms.

With respect to his memory and cognitive problems, plaintiff testified that since his bike accident, he had had trouble with his memory. AR 97. He had difficulty watching TV because by the time a commercial break ended, he would forget what program he was watching, AR 97-98, and that while working at Goodwill he sometimes had problems remembering where to put things. AR 99. He also said that he had missed four or five days in the three months he worked there because of his impairments. AR 95. He said that he applied to continue working at Goodwill after completing his 12-week program but was "not accepted." AR 96.

After plaintiff's testimony, the administrative law judge called a vocational expert as a witness. He asked the expert whether a person could perform any work in the economy if the person could lift 20 pounds occasionally and 10 pounds frequently; walk 15 blocks at a time with no rest; stand for one hour and sit for one hour, alternating positions throughout the workday; sit for a total of six hours and stand or walk for a total of four hours in an eight-hour workday; occasionally twist, climb, stoop and crouch; and was available only for simple, routine and repetitive work, meaning that the person could understand, carry out and remember simple instructions, respond appropriately to supervisors, coworkers and the public and adjust to routine changes in the work setting. AR 108-09.

The vocational expert testified that such a person could work as an unskilled assembly person with a sit or stand option (1,000 or 2,000 positions at the sedentary level and 1,000 or 2,000 at the light level), unskilled office assistant (10,000 positions at the light level with a sit

or stand option), and security guard (5,000 at the light level and 3,000 at the sedentary level). AR 109-110. The vocational expert testified that there would be no work available if the person was absent for two or more random days each month. AR 111.

Plaintiff's counsel then asked several hypothetical questions of the vocational expert and also asked the vocational expert whether it was true that a person who could stand for only four hours in an eight-hour workday would generally be limited to sedentary jobs. The vocational expert responded that although a person who could stand only four hours in a day is generally limited to sedentary jobs, the person could perform some light jobs that have the option of sitting or standing. AR 116.

E. Administrative Law Judge's Decision

The administrative law judge denied plaintiff's claim on March 23, 2011. AR 34. He concluded that plaintiff's degenerative disc and joint disease, history of polysubstance abuse, depression and anxiety disorder constituted severe impairments under 20 U.S.C. § 404.1520(c), AR 40, but that these impairments did not meet or equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1, although they did limit plaintiff's ability to work. In particular, the administrative law judge found that plaintiff was mildly restricted in activities of daily living and social functioning and had moderate difficulties with concentration, persistence or pace. AR 40-41.

The administrative law judge then discussed plaintiff's residual functional capacity, id., and concluded that plaintiff could perform "light work," as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), with the following restrictions:

> The claimant can walk 15 blocks without rest, stand for one hour, and sit for one hour with alternate positions throughout an 8-hour workday. The claimant can stand and walk a total of 4 hours in an 8-hour workday and sit for 6 hours in an 8-hour workday. He is limited to occasional twisting, climbing ladders and stairs, stooping, and crouching. He must avoid hazardous heights and dangerous machinery. The claimant is available only for simple, routine and repetitive work. He is able to understand, carry out, and remember simple instructions. He is also able to respond appropriately to supervisors, coworkers, and the public. Finally, the claimant is able to adjust to routine changes in the work setting.

AR 47.

In reaching his conclusions about plaintiff's physical capabilities, the administrative law judge stated that he was according "great weight" to the opinions of the state agency medical consultants, Dr. Chan and Dr. Cohen, that plaintiff is capable of the "full range of light work." AR 46. The administrative law judge explained that those consultants had agreed that although plaintiff has advanced degenerative changes to his cervical spine, he has "normal gait and station, normal neurological findings, and only a mildly limited range of motion." Id.

With respect to the opinions of Dr. Derr, plaintiff's treating physician, the administrative law judge noted that "the restrictions indicated by [Dr. Derr] are generally consistent with those determined in this decision." Id. The administrative law judge incorporated Dr. Derr's opinion that claimant had limitations relating to positional and postural demands as well as heights and some hazards, and that plaintiff needed walking breaks and could sit and stand for only an hour at a time by allowing for a "sit/stand option." Id. The administrative law judge went on to say that, "[a]s for the restrictions that are inconsistent with this opinion, . . . Dr. Derr treated the claimant only four times and only during the time the claimant was recovering from a bike accident." Id. The administrative law judge did not accept Dr. Derr's opinions that plaintiff could not lift 10 pounds frequently and that plaintiff would be absent once a month. AR 47.

With respect to plaintiff's limitations resulting from his mental illness, the administrative law judge said that he was placing "significant weight" on the opinion of state consultative examiner Dr. Ludvigson that plaintiff can "understand, remember, and carry out simple instructions; respond appropriately to supervisors and coworkers; maintain concentration, attention, and work pace; and withstand routine work stressors and adapt to changes." Id. He also agreed with the opinions of the state medical consultants Dr. Spear and Dr. King, noting that their opinions were supported by "claimant's lack of treatment and the overall evidence in the record [which] strongly suggests that claimant's symptoms of mental illness are resolved by medication," with the exception of their opinion that plaintiff had "moderate limitations in interacting with the public." AR 47. The administrative law judge observed that although these doctors noted that plaintiff "has a tendency to withdraw," they also noted that "plaintiff is able to relate in an extremely pleasant and appropriate manner." AR 47. The administrative law judge concluded that this suggested that claimant is "capable of responding appropriately to supervisors, coworkers, and the public." Id.

The administrative law judge discredited plaintiff's statements regarding the severity of his impairments and symptoms, stating that they were "not credible to the extent they [were] inconsistent with his residual functional capacity assessment." AR 43. The administrative law judge went on to explain why he believed plaintiff's testimony about his pain, memory and other impairments were not supported by the medical record and evidence of plaintiff's activities. AR 43-45.

OPINION

"The standard of review that governs decisions in disability-benefit cases is deferential."

Eichstadt v. Astrue, 534 F.3d 663, 665 (7th Cir. 2008). In reviewing a final decision by the commissioner, the court must evaluate "only whether the final decision of the [Commissioner] is both supported by substantial evidence and based on the proper legal criteria." Id. (citation and quotation marks omitted). See also 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971). The decision cannot stand if it "lacks evidentiary support or is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

A. Sentence Six Remand

Plaintiff's first argument is that a remand is warranted under sentence six of 42 U.S.C. § 405(g) because plaintiff's counselor, Dale Kolstad, completed mental health source statements that were not submitted to the administrative law judge. AR 1152-57. In his assessment, Kolstad found that plaintiff would be unable to "complete a normal workday and workweek without interruptions from psychologically based symptoms," thus precluding work. Id.

A remand is warranted under sentence six if there is additional evidence that is new, material and not previously submitted for good cause, Jens v. Barnhart, 347 F.3d 209, 214 (7th Cir. 2003), but none is required in this case because plaintiff has not shown good cause for failing to obtain Kolstad's report and present his opinions earlier. Kolstad indicates on his report that he has known plaintiff since 2004, but plaintiff does not appear to have sent Kolstad a medical source statement to complete until September 2011, six months after plaintiff's hearing

before the administrative law judge. AR 1152. Plaintiff's only explanation for failing to obtain the statement earlier is that he "could not be expected to consider every potential contingency and every potential error" that the administrative law judge would make. Plt.'s Reply Br., dkt. #20, at 10. This is not a showing of "good cause." I will not remand the case under sentence six.

B. Opinion of Treating Physician

Plaintiff next challenges the administrative law judge's failure to give controlling weight to treating physician Dr. Derr's opinion that plaintiff could lift 10 pounds only occasionally and would need to take a break to walk around about every 60 minutes for about two minutes. Instead, when the administrative law judge presented his hypothetical to the vocational expert, he told the expert to consider an individual who, among other limitations, could lift 20 pounds occasionally and 10 pounds frequently and who could stand for one hour and sit for one hour, with alternating positions throughout the eight-hour workday. AR 108-09. In other words, the administrative law judge did not limit plaintiff to lifting 10 pounds only occasionally and to requiring a two-minute unscheduled walking break every hour.

The administrative law judge provided numerous reasons in his decision for rejecting these aspects of Dr. Derr's opinion, including the following: (1) Dr. Derr did not have a "significant longitudinal review of plaintiff's condition," having treated plaintiff only four times and only during the time plaintiff was recovering from the April 2010 accident; (2) Dr. Derr's opinion was inconsistent with "plaintiff's admission of being able to lift 20 pounds" and there was "no evidence of [plaintiff] being unable to lift 10 pounds frequently"; (3) there was a "lack

of consistent reports of any limitation in sitting, standing and walking"; and (4) a "sit/stand option" adequately covered Dr. Derr's opinion that plaintiff would need a break between sitting and standing positions. AR 46-47. Additionally, the administrative law judge noted in his decision that during plaintiff's examinations, plaintiff had reported doing landscaping work, riding his bike, working on the house, walking and carrying groceries back from the store and other activities not fully consistent with the limitations assessed by Dr. Derr. AR 44.

There may be valid objections to one or more of these reasons provided by the administrative law judge. However, plaintiff has not identified any specific objection. In the sections of his briefs addressing Dr. Derr's opinion, plaintiff does not point to any specific problems with the administrative law judge's criticism of Dr. Derr's opinion. Instead, plaintiff supplies several pages of boilerplate language from cases discussing the weight that should be given to the opinions of treating physicians. Plt.'s Br., dkt. #10, at 44-48; Plt.'s Reply, dkt. #20, at 15-18. Additionally, plaintiff argues generally that the administrative law judge failed to apply the appropriate factors for considering a treating physician's opinion that are set forth in 20 C.F.R. § 404.1527. This is not helpful. Plaintiff does not explain which factors the administrative law judge failed to address or why his rationale was flawed. By failing to develop any coherent argument on this issue, plaintiff has waived it. Puffer v. Allstate Insurance Co., 675 F.3d 709, 711 (7th Cir. 2012) (undeveloped arguments are waived).

C. Memory and Impaired Cognition

Plaintiff advances two arguments challenging the administrative law judge's decision regarding his mental residual functional capacity: (1) the administrative law judge failed to

incorporate plaintiff's mental health limitations into his residual functional capacity assessment, which meant that his hypothetical questions to the vocational expert were flawed; and (2) the administrative law judge relied primarily on evidence concerning plaintiff's mental health before the April 2010 accident and ignored the more recent medical evidence. I agree with plaintiff on both counts.

In reviewing the administrative law judge's discussion of plaintiff's mental health impairments, it is impossible to tell what evidence the administrative law judge considered, rejected or found to be persuasive and what specific conclusions he reached regarding plaintiff's mental capacity. In discussing plaintiff's impairments, the administrative law judge found that

> With regard to concentration, persistence or pace, the claimant has *moderate* difficulties. The claimant indicated that he has recently noticed problems with memory, concentration, understanding, following instructions, and completing tasks. He reported that he is not very good with stress or changes in routine. However, he did not indicate any difficulty in this area regarding his work at Goodwill. The claimant also reported that he does not need reminders, though treatment notes suggest that he does.

AR 41 (emphasis added). From this discussion, it seems that although the administrative law judge discounted some of plaintiff's testimony about his mental impairments, he found that plaintiff's problems with memory, concentration, understanding, following instructions and completing tasks contributed to "moderate" limitations in concentration, persistence or pace. There is evidence in the record to support this conclusion, including plaintiff's own hearing testimony that he suffered memory problems and had trouble watching TV, AR 98; evidence from before the accident in March 2009 showing that plaintiff had reduced cognitive function and poor recall, AR 474; and numerous notes in the medical record after the April 2010 accident stating that plaintiff was having problems with his memory and cognition, AR 725 (Dr. Derr's

5/27/10 note that plaintiff had suffered "probable mild traumatic brain injury" with problems of "borderline memory recall" and "impaired speed of processing"), AR 723 (notes from neuropsychological diagnostic interview stating that plaintiff had post-concussion syndrome with "slowness of cognitive processing" and "limitations in the rate of learning"), AR 718 (Dr. Derr's 7/9/10 note that plaintiff had memory problems); AR 715-16 (7/30/10 neuropsychology note that plaintiff had "very slowed thought process," "slowed cognition," "slowed learning" and "slowed recall process"); AR 713-14 (Dr. Derr's 8/6/10 note that plaintiff had "traumatic brain injury with memory deficit"); AR 691 (9/27/10 notes from speech therapist that plaintiff's attention and processing speed had improved but he was still struggling with memory); and numerous comments from plaintiff's medical providers after the April 2010 accident that plaintiff was having difficulty remembering appointments.

Although the administrative law judge found that plaintiff had "moderate" difficulties with concentration, persistence and pace in one section of his decision, he discounted plaintiff's testimony about memory and cognitive difficulties when discussing plaintiff's residual functional capacity, stating that

> [T]he claimant testified at the hearing that he is limited by his memory, which worsened after an April 2010 car accident. He also asserted that the car accident left him with 'impaired cognition,' but May 2010 treatment notes indicate the claimant requires no neurological care and the claimant later discontinued physical and speech therapy only a short time after the accident due to improved symptoms (Ex. 21F/49). The claimant had follow-up appointments, which he cancelled, or he failed to show (Ex. 21F). . . . Treatment notes indicated that the claimant had some fatigue after the accident, but that after only minimal treatment he had better attention, insight, and awareness with only some reported unsteadiness and memory problems.

AR 44.

The administrative law judge also stated that he was giving "significant weight" to the

opinion of the consultative examiner Dr. Ludvigson, who concluded that plaintiff could "understand, remember, and carry out simple instructions; respond appropriately to supervisors and coworkers; maintain concentration, attention, and work pace; and withstand routine work stressors and adapt to changes." AR 47. Additionally, Ludvigson found the plaintiff has a "global assessment of functioning score of 55-60, . . . indicat[ing] only mild to moderate limitations." Id. Finally, the administrative law judge stated that he had "considered the opinion of the State agency medical consultants that the claimant is capable of a broad range of unskilled and semi-skilled jobs with mild limitations in task achievement . . . ." Id. Thus, although the administrative law judge had found that plaintiff had "moderate difficulties" with "concentration, persistence or pace," he did not include any specific mental or cognitive limitations in plaintiff's residual functional capacity or in the questions he posed to the vocational expert. Instead, the administrative law judge asked the vocational expert to consider a person with plaintiff's physical limitations who was available "for simple, routine and repetitive work, . . . is able to . . . understand, carry out and remember simple instructions. He is able to respond appropriately to supervisors, coworkers and the public . . . [and] is also able to adjust to routine changes in the work setting." AR 42.

From the administrative law judge's discussion of plaintiff's residual functional capacity and the questions he posed to the vocational expert, it is difficult to determine why he concluded that plaintiff had "moderate difficulties" with respect to concentration, persistence or pace, what he believed those difficulties to be and whether he incorporated those difficulties into the questions he posed to the vocational expert. Although the Commissioner suggests that the administrative law judge's residual functional capacity determination clarifies plaintiff's

impairments by limiting plaintiff to "simple, routine and repetitive" work with "simple instructions," the residual functional capacity assessment should be determined by a claimant's impairments, not vice versa. O'Connor-Spinner v. Astrue, 627 F.3d 614, 619 (7th Cir. 2010) ("Our cases generally have required the ALJ to orient the [vocational expert] to the totality of a claimant's limitations."); 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).

Additionally, the Commissioner does not explain how the administrative law judge's residual functional capacity assessment accounts for all of plaintiff's memory or cognitive difficulties. As the court of appeals has explained, simply limiting a claimant to "routine" or "simple" tasks may be insufficient to account for limitations of concentration, persistence or pace and in particular, those caused by memory or cognitive impairments. Kasarsky v. Barnhart, 335 F.3d 539, 544 (7th Cir. 2003). For example, in O'Connor-Spinner, 627 F.3d 614, the state examiner and the administrative law judge concluded that the plaintiff had moderate limitations in concentration, persistence and pace because of her depression, but the administrative law judge asked the vocational expert to consider only a "hypothetical worker [who] was restricted to routine, repetitive tasks with simple instructions." Id. at 617. The court of appeals rejected the Commissioner's argument that the limitation to routine and repetitive tasks "implicitly incorporated" the limitations for concentration, persistence and pace in part because "[t]he ability to stick with a given task over a sustained period is not the same as the ability to learn

how to do tasks of a given complexity." Id. at 620. As a result, the court remanded the case for additional proceedings. See also Craft, 539 F.3d at 677 (limiting claimant to "simple, unskilled work" may not account for claimant's mental impairments).

Because the administrative law judge failed to clearly incorporate all of plaintiff's relevant impairments into his residual functional capacity analysis and hypothetical to the vocational expert, this case must be remanded. Jelinek v. Astrue, 662 F.3d 805, 813-14 (7th Cir. 2011) ("We have stated repeatedly that ALJs must provide vocational experts with a complete picture of a claimant's residual functional capacity, and vocational experts must consider deficiencies of concentration, persistence, and pace.") (internal quotations omitted); Alhin v. Commissioner of Social Security, 2008 WL 2743954, *4-5 (E.D. Mich. July 11, 2008) (hypothetical question, which referred to "simple, routine, and repetitive tasks," was not detailed enough to encompass administrative law judge's finding that claimant had limitation in sustaining focused attention and concentration).

Moreover, I agree with plaintiff that the administrative law judge's failure to adequately address the post-April 2010 medical evidence regarding plaintiff's brain injuries is an independent reason for remand. In assessing plaintiff's mental residual functional capacity, the administrative law judge relied primarily on Dr. Ludvigson's analysis, which was issued in August 2009, before plaintiff's bike accident. The Commissioner argues that although the administrative law judge relied on Ludvigson's report, he analyzed the more recent evidence as well. In particular, the administrative law judge concluded that although Ludvigson's report pre-dated the accident, "the relatively minimal treatment [after the bike accident] ending with the claimant discontinuing treatment due to improvement, strongly suggests that his condition has

not worsened since [Dr. Ludvigson's] opinion." AR 47. The administrative law judge stated that plaintiff needed no further neurological care after May 2010, and that he discontinued speech therapy "only a short time after the accident due to improved symptoms." AR 44. Additionally, plaintiff had been able to work part-time at Goodwill after his accident without apparent cognitive or memory problems and it appeared that Goodwill was considering hiring him full time, but he failed to show up to the final job interview. AR 45-56.

The problem with the administrative law judge's analysis is that he failed to squarely address the evidence in the record that supported plaintiff's testimony about his memory and cognitive impairments. In particular, he does not discuss plaintiff's treatment for memory problems throughout August and September 2010. It is true that plaintiff's speech therapist concluded that plaintiff's attention and concentration had improved, but the medical records show that plaintiff continued to suffer from memory problems in September and November 2010. AR 733. The administrative law judge should have addressed this evidence. As in Zolek v. Apfel, 123 F. Supp. 2d 1136, 1142 n.5 (N.D. Ill. 2000), the administrative law judge in this case concluded that claimant was capable of performing unskilled work, but "made no effort at all to reconcile or to explain away" the multiple cognitive deficits identified in a comprehensive evaluation that "plainly impacted adversely on a number of the factors.".

Additionally, although plaintiff did not pursue treatment for his memory after September 2010, the administrative law judge should not have held that against plaintiff without exploring his reasons for discontinuing treatment. Shauger v. Astrue, 675 F.3d 690, 696 (7th Cir. 2012) ("ALJ must first explore the claimant's reasons for the lack of medical care before drawing a negative inference."); Moss v. Astrue, 555 F.3d 556, 561 (7th Cir. 2009); SSR. 96–7p, 1996

WL 374186, at *7 (administrative law judge may need to "question the individual at the administrative proceeding in order to determine whether there are good reasons the individual does not seek medical treatment or does not pursue treatment in a consistent manner."). The record suggests that the primary reasons plaintiff underwent only "minimal treatment" were his repeated forgetting about his appointments and his lack of transportation. AR 694, 707. During the relevant time period, plaintiff lived either in homeless shelters, at hotels or with his mother in Mauston, while his medical appointments were in La Crosse. AR 660, 661, 695, 710-11. He had no means of transportation and limited financial resources with which to travel.

The administrative law judge also did not address plaintiff's own testimony about his memory problems, including his testimony about current problems and the problems he had remembering where to put things when he worked at Goodwill. With respect to plaintiff's employment at Goodwill, the administrative law judge remarked only that plaintiff did not have problems while working and also, that plaintiff chose not to attend the final interview. However, the administrative law judge never addressed plaintiff's testimony that he applied for a position at Goodwill but was not accepted. AR 96. The administrative law judge should not have drawn a negative inference against plaintiff on this issue without asking plaintiff to clarify the circumstances.

In sum, the administrative law judge failed to squarely address the evidence suggesting that plaintiff had cognitive and memory problems resulting from the accident. By failing to address the evidence directly and not asking plaintiff his reasons for missing appointments, discontinuing treatment and missing the final interview at Goodwill, the administrative law judge failed to build a logical bridge between the evidence and his conclusions. Indoranto v.

Barnhart, 374 F.3d 470, 474 (7th Cir. 2004) (administrative law judge "must confront the evidence that does not support his conclusion"). Accordingly, I will remand the case to the Commissioner for a new determination of plaintiff's mental residual functional capacity.

D. Headaches and Hand Numbness

Plaintiff contends that the administrative law judge erred by concluding that his headaches and the numbness in his hands were not "severe impairments" under 20 C.F.R. § 404.1520(c) and § 416.920(c). In particular, the administrative law judge noted that although plaintiff testified that his headaches and the numbness in his hands limited his ability to work, AR 43-44, plaintiff's testimony was "not fully consistent" with the records of plaintiff's treatment, AR 43, or his work history. AR 44.

1. Hand numbness

At the hearing, plaintiff testified that he had intermittent pain that radiated from his neck to his hands and fingers, causing numbness in his hands that sometimes made it difficult to grasp items and pick them up, particularly flat objects. AR 86-87. Plaintiff contends that the administrative law judge failed to consider this testimony as well as medical records showing that plaintiff was limited in fine and gross manipulation with his hands and fingers. However, plaintiff fails to acknowledge the administrative law judge's discussion of this issue. The administrative law judge noted that despite plaintiff's testimony about numbness in his hands and difficulty grasping, the medical records showed that plaintiff had full use of his hands before the bike accident, in October 2009, AR 501, and after the April 2010 accident. AR 43 (citing AR 662 (clinic notes from 5/1/10 stating that plaintiff reported hand numbness but had normal

grip and finger strength); AR 692 (clinic notes from 9/27/2010 stating that plaintiff had no current hand numbness)). See also AR 713 (Dr. Derr noting on 8/6/10 that plaintiff's "previous hand numbness is resolved"). The administrative law judge also noted that although plaintiff stated at the hearing that he would have trouble picking up a gallon of milk frequently, AR 89, this was inconsistent with his reports to his doctors that he was doing landscaping work, working on the house, walking and carrying groceries back from the store, drawing, woodworking and riding his bike. AR 44. I see no reason to disturb the administrative law judge's findings on this issue.

2. Headaches

With respect to headaches, the administrative law judge noted that plaintiff asserted he was limited by bad headaches that occurred six to eight times a month and could be a 10/10 in intensity level. AR 44. The administrative law judge acknowledged plaintiff's testimony that during his headaches he had to stay in a dark, quiet room and that medication did not seem to help. However, the administrative law judge found that plaintiff's allegations were "not fully consistent" with the record, which showed that plaintiff's headaches "began only in May 2010," that they did not prevent him from working part-time at Goodwill and that he made infrequent trips to the doctor for his symptoms. AR 44. He concluded that "[o]ne would expect a person with disabling headaches to seek treatment that is more frequent and take medication that is more significant." Id.

I agree with plaintiff that the administrative law judge's discussion of this issue is problematic. First, the administrative law judge does not explain why it matters that plaintiff's

headaches started only in May 2010. Plaintiff has not denied this, and in fact, relies primarily on evidence of treatment for his headaches from a specialist in August 2010. AR 707.

Second, the administrative law judge did not discuss the medical records regarding plaintiff's headaches. After the April 2010 accident, plaintiff reported headaches to his treating physicians on several occasions. E.g., AR 720, 722. On August 26, 2010, plaintiff met with a headache specialist who gave him a diagnosis of "postconcussion syndrome with migraine." AR 708. Plaintiff continued to report headaches during medical appointments throughout September 2010. AR 706 (9/3/10); AR 701 (9/9/10); AR 694 (9/22/10); AR 692 (9/27/10); AR 690 (9/27/10).

Third, although the administrative law judge discounted plaintiff's testimony about his headaches because plaintiff missed appointments and failed to seek more frequent treatment, the administrative law judge did not ask plaintiff his reasons for missing appointments. As discussed above, the administrative law judge should not have faulted plaintiff for failing to seek treatment without exploring plaintiff's reasons. Shauger, 675 F.3d at 696

Finally, the administrative law judge criticized plaintiff for not taking more "significant" medication, AR 44, but failed to acknowledge that plaintiff could not take narcotics because of his previous drug and alcohol dependency. In light of these problems, I will remand the case so that the administrative law judge can determine whether plaintiff's headaches are severe impairments.

E. Credibility Assessment

Plaintiff also takes issue with the administrative law judge's finding that his allegations

regarding his symptoms and limitations were not totally credible. Generally, an administrative law judge's credibility determinations are "afforded special deference because the [administrative law judge] is in the best position to see and hear the witness and determine credibility." Eichstadt, 534 F.3d at 667-68 (citation and quotation marks omitted). Nonetheless, an administrative law judge's credibility determination must be supported by substantial evidence, Moss, 555 F.3d at 561, and the administrative law judge must explain his credibility determination. Castile v. Astrue, 617 F.3d 923, 929 (7th Cir. 2010).

In this case, the administrative law judge concluded that plaintiff's "statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the . . . residual functional capacity assessment." AR 43. As plaintiff points out, the Court of Appeals for the Seventh Circuit has criticized similar language as "unhelpful" and "meaningless boilerplate" because it "backwardly implies that the ability to work is determined first and is then used to determine the claimant's credibility." Shauger, 675 F.3d at 696 (internal quotations omitted). The administrative law judge cannot rely on a template or conclusory statements; he must explain why he found particular allegations not to be credible. Bjornson v. Astrue, 671 F.3d 640, 644-46 (7th Cir. 2012); Parker v. Astrue, 597 F.3d 920, 922 (7th Cir. 2010).

Although the administrative law judge used meaningless boilerplate language in his credibility assessment, he went on to explain for more than three pages why he believed plaintiff's statements were not credible. He provided the following reasons for dismissing plaintiff's subjective complaints about pain, memory, cognitive impairments and other limitations:

- the medical evidence from before plaintiff's April 2010 accident did not support plaintiff's limitations, and the post-accident evidence suggested that plaintiff's condition did not change significantly, AR 43;

- plaintiff engaged in activities not consistent with his complaints of intense pain, including landscaping work, working on his house, walking and carrying groceries, drawing, woodworking and riding his bike, AR 44

- plaintiff made relatively infrequent trips to the doctor for the allegedly disabling symptoms; he missed several scheduled appointments; and most of the visits were for routine follow-ups or medication refills, id.;

- plaintiff did not use medication for his symptoms frequently, id.;

- plaintiff was able to work at Goodwill after the April 2010 accident without problems and missed only four days of work in three months, id.;

- plaintiff's alleged anxiety problems had been controlled with medication, AR 45;

- plaintiff could have worked full time at Goodwill but failed to show up to the final interview because he believed the job did not pay enough, AR 46;

- treatment notes from before the accident and from when plaintiff was in prison suggested that he exaggerated his complaints, id.

Some of these explanations are supported by substantial evidence and some are not. The administrative law judge stated repeatedly in his decision that plaintiff failed to attend his appointments or did not seek frequent medical attention, but the administrative law judge never questioned plaintiff about the reasons for his missed appointments or his failure to seek medical attention. Shauger, 675 F.3d at 696. As discussed above, the record suggests that the primary reasons plaintiff missed appointments and failed to seek treatment were plaintiff's memory problems and his lack of transportation. Neither reason undermines plaintiff's credibility. Further, plaintiff's forgetfulness suggests that plaintiff may have a difficult time with concentration, persistence and pace in the workplace. Punzio v. Astrue, 630 F.3d 704, 711 (7th Cir. 2011) ("Punzio's records from the county health department show that her inability to keep

appointments is both a symptom of her mental illness and an aggravating factor.").

The administrative law judge also did not ask plaintiff about his reasons for missing the alleged "final interview" at Goodwill or the alleged landscaping plaintiff performed after his accident. The administrative law judge drew these facts from various treatment notes but never asked plaintiff to explain the circumstances.

The administrative law judge's reliance on plaintiff's failure to take frequent medication is questionable, particularly because the administrative law judge acknowledged that plaintiff had a drug dependency problem and plaintiff explained at the hearing that he could not take narcotics. Thus, the administrative law judge should not have held that against plaintiff.

Finally, the administrative law judge did not explain adequately why missing four days of work at Goodwill undermined plaintiff's credibility. Plaintiff worked part-time at Goodwill for only three months and missed four scheduled work days. If plaintiff had been working full time, he may have missed more scheduled days. This is significant because the vocational expert testified that if plaintiff were to miss two or more scheduled work days a month, no jobs would be available for him in the national economy. AR 110.

In sum, the administrative law judge's credibility determination contains too many flaws and missing explanations to be sustainable. Accordingly, the administrative law judge's failure to explain his credibility determination adequately and to question plaintiff about the evidence on which he relied in making the determination is a second and independent reason for ordering a remand in this case.

F. Vocational Expert and Dictionary of Occupational Titles

Plaintiff's final argument is that the administrative law judge violated SSR 00-4p because he failed to clarify the inconsistencies between the vocational expert's testimony and the Dictionary of Occupational Titles. Under SSR 00-4p, the administrative law judge has an "'affirmative responsibility' to ask if the [vocational expert's] testimony conflicts with the DOT, and if there is an 'apparent conflict,' the ALJ must obtain a 'reasonable explanation.'" Terry v. Astrue, 580 F.3d 471, 478 (7th Cir. 2009) (citing SSR 00-4p). See also Overman v. Astrue, 546 F.3d 456, 462-63 (7th Cir. 2008).

Plaintiff contends that because the administrative law judge's hypothetical questions to the vocational expert involved limitations amounting to "sedentary" limitations, such as limiting the claimant to standing four hours out of eight hours in a workday, SSR 83-10, the vocational expert should have testified only about sedentary work. Instead, the vocational expert included jobs constituting "light" work under the Dictionary of Occupational Titles. On cross examination, plaintiff's counsel asked the vocational expert whether his testimony was a deviation from the Dictionary of Occupational Titles and the vocational expert responded that it was not because, in his opinion, some light duty jobs can be done "with a sit/stand option." The administrative law judge did not question the vocational expert further on the issue and in his decision, he noted that "[p]ursuant to SSR 00-4p, the vocational expert's testimony is consistent with the information in the Dictionary of Occupational Titles." AR 48.

Plaintiff is correct that the administrative law judge should have identified and explained the conflict between the Dictionary of Occupational Titles and the vocational expert's testimony about light jobs. Overman, 546 F.3d 456; Prochaska v. Barnhart, 454 F.3d 731, 735 (7th Cir. 2006). However, the error appears to be harmless because the administrative law judge found

that there were 3,000 sedentary security jobs in Wisconsin. AR 48. Plaintiff does not challenge this finding, and the court of appeals has noted that "it appears to be well-established that 1,000 jobs is a significant number [of jobs]." Liskowitz v. Astrue, 559 F.3d 736, 743 (7th Cir. 2009). In any event, plaintiff may raise this issue on remand. If he believes that the conflicts between the vocational expert's testimony and the Dictionary of Occupational Titles render the vocational expert's opinion unreliable, he may explain the basis for that belief to the administrative law judge.

ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff's application for Disability Insurance Benefits and Supplemental Insurance Income is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 21st day of November, 2012.

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