IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARYANN AKKERMAN,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

12-cv-610-bbc

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Plaintiff Maryann Akkerman applied for disability benefits on July 22, 2009, alleging disability beginning on July 13, 2009. She had received benefits from 2001 through March 2005, after having been found disabled from a 1999 automobile accident but these benefits stopped when she began working as a certified nursing assistant. Her 2009 application for new disability benefits was denied. On appeal of the denial, administrative law judge Virginia Kuhn concluded that plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment and that she had the residual functional capacity to perform light work consisting of "unskilled tasks that are routine in that they are consistent from day to day with minimal if any workplace changes in terms of tasks or the work setting." Administrative Record (AR) 59. The Appeals Council upheld the administrative law judge's decision.

In this court, plaintiff challenges the denial of benefits. In her opening brief, she

argued that she qualified for benefits on two grounds: (1) her mental condition either met or equaled Listing 12.05C, the listing for mental retardation, and (2) the administrative law judge did not account properly for her moderate deficiencies in concentration, persistence and pace. She has abandoned the first ground, so it is necessary only to determine the soundness of the administrative law judge's handling of the second issue. Given the governing law in this circuit, I have no option but to reverse the administrative law judge's decision on the second ground and remand the case to the Commissioner for further proceedings. Plaintiff is correct in arguing that the administrative law judge erred in her determination of plaintiff's residual functional capacity and in using that determination as the basis for the hypothetical questions she put to the vocational expert.

RECORD FACTS

A. The Plaintiff

Plaintiff Maryann Akkerman was born on September 10, 1971. She graduated from high school. Sometime around 2000, she sustained a closed head injury in an automobile accident and later started receiving social security disability benefits. At some time thereafter, she obtained her certification as a nursing assistant and began working in that position. In April 2005, her disability benefits stopped because she was working as a certified nursing assistant at a level the Social Security Administration considered to be substantial gainful activity. She worked at a number of these certified nursing assistant jobs; at least one of the jobs lasted from February 4, 2008 until August 20, 2008, when she left

to obtain another job. AR 256. Her employer reported no problems with her employment in that job. Id. In 2009, when she was 37, she re-applied for disability benefits, alleging disability starting in July 2009.

B. Mental Evaluations

1. Drs. Bodway and Heyer

In 2001, plaintiff saw psychologists Dr. Claudia Bodway and Dr. Thomas Heyer for evaluations on referral from the Social Security Administration. AR 327-39. At that time, Bodway diagnosed a history of learning disability, mild mental retardation and low educational functioning, all of which were expected to continue. AR 332.

Heyer found mild mental retardation as well, as well as a cognitive disorder. AR 338. He noted that plaintiff's memory functioning was in the extremely low range. AR 339.

2. Dr. James Logan

Dr. Logan treated plaintiff when she was hospitalized for a severe asthma attack in October 2009 and he saw her on two followup visits at the Mile Bluff Medical Center in Mauston, Wisconsin. AR 542. He never treated her for mental problems and nothing in the record indicates that he is trained in mental health. On November 23, 2009, he completed a questionnaire on plaintiff's medical condition for Workforce Connections, noting that plaintiff was still having shortness of breath from bronchitis, fatigue and recurrent migraine headaches. Id. Of relevance to her social security claim, he wrote that

she had had a closed head injury previously and that he was concerned about her cognitive abilities and "also her psychiatric abilities." AR 543. He added, "I think she certainly has a psychiatric disease that would at least lend [sic] towards more depression but she is more complex because having a head injury I am not sure if her poorly [sic] concentration is perhaps due to ADD or due to any other mental-illness like depression or possibly even dementia." Id.

Logan noted plaintiff's blunt, flat inappropriate affect, decreased energy, difficulty thinking and concentrating, her loss of intellectual ability, sleep disturbance and poor memory. Id. He thought that plaintiff's ability to get along with the general public and coworkers would be fair and that she would be "poor" at dealing with normal stress or the stress of semiskilled or skilled work, responding to appropriate changes and routine work settings, understanding and remembering instructions, sustaining an ordinary routine without special supervision, working in coordination or proximity to others without being unduly distracted and constant difficulties with concentration. AR 544.

In a questionnaire dated December 11, 2009, Logan identified depression and ADD as psychological factors affecting plaintiff's physical condition. AR 700. In his opinion, plaintiff could not handle even a low stress job. Id.

3. Gary Ludvigson

Plaintiff had a mental status evaluation performed by a clinical psychologist, Gary Ludvigson, at the Mile High Clinic on March 10, 2010. AR 715-23. Ludvigson found it

difficult to determine when plaintiff had last worked. AR 715. Plaintiff told him she had been accustomed to drinking 21 to 30 beers at a sitting, AR 716; she had graduated from high school at 18; and she had worked at a nursing home in Adams, Wisconsin for a year, then took another nursing aid job that paid better, but lost it when she was jailed for a probation violation. AR 717. She also said that she had worked off and on at nursing homes in Florida for three years. Id.

Ludvigson found no indications of retardation. Id. He did not see evidence of malingering, but he noted that plaintiff seemed to put forth a minimal effort on all of the tasks he gave her. AR 718. She described her normal mood as "tired." Id. He thought she might have mild depression, but she denied having anxiety or any symptoms of an obsessive-compulsive disorder, social phobia or panic disorder. Id. Plaintiff told Ludvigson she slept 16 to 17 hours a day and she denied any hallucinations or delusions. Id. Plaintiff exhibited no indications of tangential, circumstantial or illogical thinking but Ludvigson found her "quite scattered at all times, most likely the result of an attention deficit disorder." AR 719.

In his statement of work capacity, Ludvigson said that plaintiff had difficulty understanding, remembering and carrying out simple instructions, but that he could not tell whether this was "feigned or accurate." AR 722. He noted that she "alleges she cannot maintain concentration or attention at the present time"; she "likely could respond appropriately to supervisors and coworkers"; her work pace was unknown because of her fatigue; and she "likely could withstand routine work stressors and adapt to changes." Id.

4. Michael Mandli, Ph.D.

State agency psychological consultant Michael Mandli completed a mental residual functional capacity questionnaire on October 22, 2009. He found that plaintiff was markedly limited in understanding and remembering detailed instructions and in carrying them out. AR 517-18. He found her only mildly limited in various aspects of functioning, with the exception of concentration, in which he found her moderately limited in her ability to maintain attention and concentration for an extended period. Id. He found no limitations in any other area, including pace. He thought plaintiff was capable of meeting no more than the basic mental demands of unskilled work. AR 520.

5. Jack Spear, Ph.D.

State agency psychologist Jack Spear completed a report on June 10, 2010, finding plaintiff markedly limited in her ability to carry out detailed instructions and moderately limited in her ability to understand and remember detailed instructions and maintain attention and concentration for extended periods, AR 746, and moderately limited in the ability to respond appropriately to changes in the work setting. AR 747. His assessment was that plaintiff's primary mental impairment was cognitive disorder, not otherwise specified; her secondary one was alcohol dependence in remission. AR 748.

C. Administrative Hearing

At her hearing before the administrative law judge, plaintiff testified that she had last

worked in health care in July 2009 and that she had been let go from the job after only about five months because she was always tired and she had depression. AR 99. She estimated that she had had to miss two days a week of work because her migraines were so bad. AR 100. She also testified that she had obtained her certified nursing assistant degree at "Miss State," but had needed an aide to help her learn. Id. She said she had worked at a number of nursing home facilities in Wisconsin and Florida, but that she had had difficulty learning the job and working with computers. AR 101-03. She also worked at hotels and at McDonalds, but had trouble handling money. AR 105. Plaintiff testified to her inability to comprehend what she hears, AR 109, and her tendency to sleep most of the day. AR 111.

The administrative law judge called a vocational expert, Stacia Star, and asked her a number of questions about a hypothetical person with plaintiff's limitations (light work, no exposure to pulmonary irritants, and limitation to "unskilled tasks that are routine," that is, "the types of tasks that would be consistent from day to day, with minimal, if any, changes in terms of tasks or the work setting"). Star's response was that plaintiff's past work would not fall within the limitations, AR 123, but that the hypothetical person could work as an auto car wash attendant, ticket taker, dishwasher or cook counter helper. AR 124. All of these were unskilled jobs at the light level existing in sizeable numbers in Wisconsin. Id. Star testified that the jobs she had listed were consistent with the Dictionary of Occupational Titles. AR 125. She testified as well that if the person could not be on task at least 85-90% of the time or had more than two absences a month, the person would be unable to keep competitive employment. Id. In response to questioning from plaintiff's

attorney, Star said that a person would be precluded from employment if she had moderate difficulties in maintaining concentration, persistence and pace and, specifically with "problems maintaining attention and concentration for extended periods such that they would lose focus." AR 126.

D. Administrative Law Judge's Decision

The administrative law judge found that plaintiff had moderate limitation in concentration, persistence and pace. She noted that plaintiff had alleged that she had difficulties with understanding, instructions and handling stress and workplace changes, as well as longstanding memory problems, but was unable to specify what they were or how they limited her. AR 57. She found that an evaluator (presumably Ludvigson) had seen memory deficits when he saw plaintiff, but had reported that plaintiff put forth little effort in completing the testing and demonstrated little motivation, id., and that plaintiff had shown the ability to perform daily activities and had worked as a certified nursing assistant. Id.

The administrative law judge concluded that plaintiff's limitations in concentration, persistence and pace would limit her to jobs that involved unskilled tasks that were routine, that is, jobs that were "consistent from day to day with minimal if any workplace changes in terms of tasks or the work setting." AR 59. She found "little evidence contained in the medical record" that supported plaintiff's alleged limitations of depression, attention deficit disorder or organic mental disorder related to a previous closed head injury. AR 60. She

noted that documentation of plaintiff's treatment from July 2009 showed that her condition was stable and she was taking medication for both depression and ADD that was proving to be effective in treating her symptoms. Id. She found plaintiff's credibility undermined by inconsistencies between her testimony at her hearing and the report of her functioning at her psychological consultative evaluation and that her statements at that evaluation were inconsistent with the function report she gave the agency on October 13, 2009. AR 61 (referring to Exh. 5E at AR 279-86). In addition, she noted that, despite plaintiff's complaints of impairments, she had been able to obtain a certified nursing assistant certificate and work as a certified nursing assistance in 2008; her previous employer had reported that she was able to perform her duties satisfactorily without any indication that she had limitations that kept her from doing her work; she left the job to obtain a better paying one, not because she had mental or physical limitations; and she had not submitted any information to support her allegation that she had frequent absences from work. Id.

The administrative law judge gave weight to Dr. Ludvigson's opinion that plaintiff did not appear to be so psychologically debilitated as to be unable to work and that she could respond appropriately to supervisors and coworkers and handle routine work stresses and changes. AR 63. She gave little weight to Dr. Logan's opinions, because of the short time Logan had treated plaintiff and the absence of any indication that Logan had any training or experience in the area of mental health. AR 63.

In addition, she gave "great weight" "to the opinion[s] of the state agency medical consultants who . . . concluded that the claimant's mental impairments caused . . . moderate

impairments in maintaining concentration, persistence and pace." AR 62. She found these conclusions consistent with plaintiff's level of mental functioning and supported by substantial evidence in the record. Id.

Finally, the administrative law judge found that plaintiff could perform the jobs of automatic car wash attendant, ticket taker, dishwasher and cook counter helper, which existed in large numbers in Wisconsin. These were jobs that were limited to simple, routine work that involved minimal if any workplace changes.

OPINION

With plaintiff's decision not the pursue the issue of the administrative law judge's decision that plaintiff did not meet the requirements for Listing 12.05, the listing for mental retardation, the only question still at issue in this appeal is whether the administrative law judge ruled correctly when she decided that plaintiff could perform jobs that exist in the national and state economies.

The administrative law judge did a thorough job of evaluating the evidence and explaining the process by which she arrived at her conclusions. However, she failed to heed the court of appeals' repeated admonition that it is not sufficient for administrative law judges to account for a claimant's impairments in concentration, persistence and pace by simply limiting the claimant to a simple, routine job. E.g., Stewart v. Astrue, 561 F.3d 679, 684-85 (7th Cir. 2009) ("The Commissioner continues to defend the [administrative law judge's] attempt to account for mental impairments by restricting the hypothetical to

"simple" tasks, and we and our sister circuits continue to reject the Commissioner's position.") (citing, *inter alia,* Craft v. Astrue, 539 F.3d 668, 677-78 (7th Cir. 2008) (limiting hypothetical to simple, unskilled work does not account for claimant's difficulty with memory, concentration or mood swings); Ramirez v. Barnhart, 372 F.3d 546, 554 (3d Cir. 2004) (hypothetical restriction to simple one or two-step tasks does not account for deficiencies in concentration)).

It was proper for the administrative law judge not to give any weight to the professional opinions from Drs. Bodway and Heyer, who saw plaintiff in connection with her first application for social security disability benefits, or those of Dr. Logan, who is not trained in mental health and who saw plaintiff only three times. The application at issue now is the one she filed in 2009; her ability to work must be determined on the basis of current evaluations, not on those undertaken eight or nine years earlier, which is when Bodway and Heyer saw her.

Dr. Logan's report did not provide credible information on which the administrative law judge could rely. As she explained, Dr. Logan had a minimal treating relationship with plaintiff and his assessment of plaintiff's physical limitations was not consistent with his treatment notes, with the overall medical evidence or plaintiff's daily activities. Moreover, as she noted, Logan is not a mental health professional and he did not conduct any psychological evaluation or testing. Finally, she found Logan's opinions inconsistent with the opinions of the mental health professionals who did evaluate plaintiff, such as Ludvigson.

Even without these reports, however, the record contains evidence that plaintiff had

problems with concentration. Drs. Spear and Mandli both found plaintiff moderately limited in her ability to maintain attention and concentration for an extended period. In fact, the administrative law judge herself found that plaintiff had moderate limitations in concentration, persistence and pace. (The finding on pace is questionable, but irrelevant.) Nevertheless, she did not include anything about limitations on concentration when she posed her hypothetical questions to the vocational expert. She merely asked the question that the court of appeals has criticized, equating concentration problems with the ability to perform a simple, routine job.

The problem was compounded when plaintiff's counsel asked the vocational expert what effect it would have on a person's ability to work if she had problems maintaining attention and concentration and would lose focus, AR 126, and the vocational expert answered that if such a person were off task more than 85 to 90% of the time, she would be precluded from performing the jobs the expert had listed. The administrative law judge never followed up on this answer or discussed it in her decision.

I conclude that this matter must be remanded so that the Commissioner can consider whether plaintiff's moderate limitations in concentration preclude her from working at any substantially gainful activity.

ORDER

IT IS ORDERED that plaintiff Maryann Akkerman's motion for summary judgment is GRANTED with respect to her claim that remand of this case is necessary because the

administrative law judge failed to elicit information from the vocational expert adequate to allow the administrative law judge to determine whether jobs exist in the national and local economies that plaintiff can perform. FURTHER, IT IS ORDERED that the decision of defendant Carolyn Colvin, Acting Commissioner of Social Security REVERSED and the case is REMANDED to defendant under sentence four of 42 U.S.C. § 405(g) for further

proceedings consistent with this opinion.

Entered this 15th day of May, 2013.

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