

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

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DENNIS HETZEL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.  
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OPINION AND ORDER

13-cv-772-bbc

Plaintiff Dennis Hetzel is seeking judicial review of a decision denying his application for disability insurance benefits and supplemental security income under the Social Security Act. 42 U.S.C. § 405(g). Plaintiff contends that the administrative law judge erred by (1) assessing plaintiff's credibility improperly; (2) failing to give proper weight to the medical opinion of Dr. Steven Kirkhorn; and (3) failing to give adequate consideration to the combined effects of plaintiff's ailments and to incorporate these effects into plaintiff's residual functional capacity assessment. I conclude that a remand is necessary because the administrative law judge did not provide sufficient reasoning for his determination of plaintiff's credibility.

BACKGROUND

Plaintiff Dennis Hetzel suffers from diabetes, chronic kidney disease and morbid

obesity. In 2007, he had three toes amputated from his right foot. He experiences bouts of edema and neuropathy in his hands and feet. He suffered a fracture of his left ankle in 2008 and has chronic lower back pain.

Plaintiff's proposed disability onset date is April 13, 2010. The Social Security Commission has denied him disability insurance benefits and supplemental security income.

In response to questioning from the administrative law judge at the administrative hearing, plaintiff testified that he could stand for about two out of eight hours in a work day, but that he could not sustain a five-day-a-week job that would require him to stand for two hours a day and lift a gallon of milk. AR 63-64. Further, plaintiff said he was unsteady on his feet and walked with a limp as a result of the amputation of his toes, AR 66, and that he experienced swelling in his legs that required him to elevate them for five to six hours a day. AR 67-68.

The administrative law judge who presided over plaintiff's hearing determined that plaintiff did not suffer from a "severe" condition as outlined in 20 CFR Part 404 and could complete sedentary work with certain movement and lifting restrictions. After taking into account plaintiff's skills, the administrative law judge found that approximately 13,000 jobs existed in the Wisconsin economy that plaintiff could perform and that he was not disabled.

## OPINION

### A. Credibility Determination

Plaintiff takes issue with the administrative law judge's decision to give little weight

to plaintiff's testimony about his medical problems because he found that they were not supported by the record evidence. The Court of Appeals for the Seventh Circuit has stated that an administrative law judge's credibility determination will not be overturned unless it is "patently wrong." Eichstadt v. Astrue, 534 F.3d 663, 668 (7th Cir. 2007). At the same time, the court has said that the administrative law judge must support credibility findings with citations to evidence in the record, Villano v. Astrue, 556 F.3d 558, 562 (7th Cir. 2009), building an "accurate and logical bridge" between the evidence and his decision. Castile v. Astrue, 617 F.3d 923, 929 (7th Cir. 2010). In addition, "when . . . the [credibility] determination rests on objective factors or fundamental implausibilities rather than subjective considerations, . . . courts have greater freedom to review the ALJ's decision." Indoranto v. Barnhart, 374 F.3d 470, 474 (7th Cir. 2004) (internal quotations and alterations omitted). In this case, the administrative law judge failed to properly consider objective factors related to the length of time plaintiff could engage in physical activities such as standing.

#### 1. Pain medication

The administrative law judge gave little credit to plaintiff's statement that he could not stand for long periods as a result of his back pain because plaintiff was not taking any medicine for that pain. As plaintiff points out, Social Security Ruling 96-7p provides that

the adjudicator must not draw any inferences about an individual's symptoms and the functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain [infrequent

treatment].

See also Shauger v. Astrue, 675 F.3d 690, 696-97 (7th Cir. 2012) (“Although a history of sporadic treatment or failure to follow a treatment plan can undermine . . . credibility, an [administrative law judge] must first explore the claimant’s reasons for the lack of medical care before drawing a negative inference.”). Indeed, plaintiff stated at the hearing that he did not take pain medication for his back because it made him feel ill and caused a spike in his blood sugar, which was a problem for his diabetes. The administrative law judge did not discuss plaintiff’s explanation when he made his credibility determination.

Defendant says the administrative law judge was correct to disregard plaintiff’s comments about his reactions to pain medication because plaintiff did not cite any part of his medical record that supported the statement. Further, defendant argues that plaintiff said the medicine he was prescribed was Vicodin and that plaintiff might have been able to choose less severe alternatives. However, this court’s “review is confined to the rationales offered by the ALJ,” Shauger, 675 F.3d at 695, and the administrative law judge said nothing in his opinion about plaintiff’s reason for not taking pain medication. This omission makes it impossible to assess the justification for the administrative law decision to discount plaintiff’s statements.

## 2. Physical therapy notes

The administrative law judge discounted plaintiff’s credibility because his “[p]hysical therapy notes reflect the claimant tolerating showers, shaving, and dressing with less low

back pain and being able to stand for longer periods of time (Ex. 12F/138) [AR 683]. This activity does not support the claim of a debilitating impairment that precludes him from working.” AR 29.

The administrative law judge’s reasoning is flawed in two respects. First, the physical therapy notes indicate that plaintiff was improving, but they do not state by how much. For example, the notes say plaintiff is able to stand for “longer” but not how much longer. Without details on the extent of plaintiff’s progress, the administrative law judge did not have a basis on which to determine that plaintiff’s condition had improved to the point that his statements about his ability to stand and lift were no longer credible. Second, taking a shower, dressing and shaving do not show that plaintiff can stand for more than two hours a day; those tasks may take only a few minutes each.

### 3. Activities of daily living

Finally, the administrative law judge found that plaintiff’s complaints about his conditions were contradicted by his reported activities of daily living. Specifically, the administrative law judge pointed to plaintiff’s reports that “he cares for his dog and his only limitations in his personal hygiene are that it takes longer to dress and he is unsteady when showering (Ex. 10E).” AR 30. Further, the administrative law judge noted that plaintiff “is able to cook simple meals, do light cleaning, wash dishes, drive[,] shop[,] . . . care for his personal finances[,] . . . watch television, socialize with friends on the telephone, and go out on his own.” Id.

None of these activities show that plaintiff is able to stand or perform other physical activities for longer than two hours a day or that he can do so on a consistent basis. Several of them require minimal physical exertion, including socializing on the telephone, watching television and taking care of finances. Moreover, plaintiff qualified his ability to shop by saying he used the cart at the grocery store to support himself while walking and he stated that he could not finish washing his dishes without resting. The administrative law judge did not discuss these aspects of plaintiff's daily activities. Overall, none show that plaintiff's characterization of his limitations is inaccurate or that plaintiff can handle the demands of a full time job. Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) ("The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons . . . and is not held to a minimum standard of performance, as she would be by an employer.").

I conclude that the administrative law judge did not support his determination of plaintiff's credibility with sufficient evidence. Accordingly, I am remanding this case for further proceedings consistent with this opinion.

## B. Remaining Issues

### 1. Weight of Dr. Kirkhorn's opinion

Dr. Steven Kirkhorn provided a disability assessment for plaintiff on March 2, 2012, concluding that plaintiff needed to elevate his legs for up to 25% of the day and required a

cane or other assistive device for walking. AR 971. The administrative law judge gave this opinion “little weight” because plaintiff saw Kirkhorn only once and Kirkhorn’s notes from that visit, AT 10-49-51, did not mention any need for a cane or for leg elevation. AR 30.

Plaintiff contends that the administrative law judge should have to provide a more detailed explanation for discrediting Kirkhorn’s opinion because Kirkhorn is a treating source, 20 C.F.R. § 404.1527(c)(2), whose assessment should have “controlling weight.” However, plaintiff made only one visit to this doctor and that was for the purpose of a disability assessment. The Social Security Administration “will not consider an acceptable medical source to be your treating source if your relationship with the source is not based on your medical need for treatment or evaluation, but solely on your need to obtain a report in support of your claim for disability. In such a case, we will consider the acceptable medical source to be a nontreating source.” 20 C.F.R. § 404.1502. Nevertheless, the administrative law judge must consider the factors laid out in 20 C.F.R. § 404.1527(c), including the supportability and consistency of the doctor’s findings, the doctor’s specialization (if any) and any other relevant factors raised by the claimant. Id.

Some of the administrative law judge’s reasons for discounting Kirkhorn’s opinion are entitled to deference, namely that Kirkhorn saw plaintiff only once and that Kirkhorn’s belief that plaintiff required a cane was contrary to plaintiff’s self-reports that he did not use a cane. However, I disagree with the administrative law judge’s opinion that Kirkhorn’s notes and the disability form are inconsistent. A review of both documents reveals that they report the same problems with respect to plaintiff’s back pain, diabetes, kidney disease and

other conditions and are consistent in assessing the severity of the problems. It is true that Kirkhorn's notes make no reference to a "cane," but they do refer to plaintiff's limited ability to walk and trouble ambulating. Similarly, Kirkhorn did not include a need for leg elevation in his notes, but he did mention the swelling in plaintiff's left leg. Finally, the administrative law judge says that Kirkhorn's opinion was inconsistent with the record as a whole, but he does not cite any other portions of the record to support his statement. Because I am remanding this case for other reasons, the administrative law judge should reevaluate the weight to be given to Kirkhorn's opinion in light of this discussion.

## 2. Consideration of edema and neuropathy

Plaintiff characterizes as flawed the administrative law judge's residual functional capacity determination and hypothetical question to the vocational expert because they fail to fully account for plaintiff's problems with edema and neuropathy. The administrative law judge stated that plaintiff did not point to any evidence that he needed to elevate his legs for edema, other than his own statements and the opinion of Kirkhorn, both of which the administrative law judge discredited. Those issues are addressed above and plaintiff has not pointed to any other evidence in the record after his April 2010 onset date that shows he required a limitation for leg elevation.

It is true that the administrative law judge did not discuss plaintiff's neuropathy other than to say that one examining physician stated it was "well controlled." AR 31. However, plaintiff does not explain how the limitations in lifting, standing and walking set forth in the



administrative law judge's hypothetical question do not account for any limitations he has related to neuropathy. The administrative law judge must refer to all plaintiff's limitations when setting forth the hypothetical question to the vocational expert, Stewart v. Astrue, 561 F.3d 679, 684 (7th Cir. 2009), but plaintiff has not shown that the limitations set forth in the hypothetical question are incomplete with respect to plaintiff's edema and neuropathy.

#### ORDER

IT IS ORDERED that the decision of defendant Carolyn W. Colvin, Acting Commissioner of Social Security, denying plaintiff Dennis Hetzel's application for disability insurance benefits and supplemental security income, is REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 22d day of September, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge