

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

CATHY ZANK,

Plaintiff,

v.

ORDER

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

15-cv-393-jdp

Defendant.

Plaintiff Cathy Zank seeks judicial review of a final decision of defendant Carolyn W. Colvin, the Acting Commissioner of Social Security, finding her not disabled within the meaning of the Social Security Act. Zank contends that the ALJ erred in two ways. First, she contends that the ALJ wrongly discounted the severity and limiting effects of her headaches. Second, she contends that although the ALJ found that she had moderate limitations in maintaining concentration, persistence, or pace (CPP), he did not fairly incorporate those limitations into her residual functional capacity (RFC) or into the hypothetical questions to the vocational expert (VE).

The court agrees on both points. The headaches present a straightforward question of whether the ALJ's determination is supported by substantial evidence. The court concludes that it is not because the ALJ apparently ignored medical records that showed that Zank's headaches were not always well controlled. The CPP issue is more complicated. There was scant evidence pertaining to Zank's limitations in CPP, but the ALJ nevertheless found that she had moderate limitations in CPP. Without identifying any specific CPP limitations, the ALJ stated (in both the RFC and the hypothetical to the VE) that Zank's moderate limitations in CPP allowed her to sustain work that is simple, routine, and repetitive and to

understand, remember, and carry out simple instructions. The court concludes that the ALJ was obligated to identify Zank's specific limitations in CPP, so that they could be accounted for in the RFC and in the hypotheticals presented to the VE.

A. Factual and procedural background

Zank suffers from multiple impairments, including myofascial pain, carpal tunnel syndrome, obesity, depression, back pain, and headaches. She applied for both disability insurance benefits and supplemental security income on June 4, 2010, alleging an onset of disability date of January 2, 2007. Zank has a work history that includes factory jobs, housekeeping, and working as a fast food cashier. Her applications were denied and she had a hearing on December 2, 2011. The ALJ found her not disabled, but the Appeals Council vacated that decision and remanded for further proceedings.

Zank had a second hearing on October 17, 2013. The second ALJ also found Zank not disabled in a written decision dated January 15, 2014. The Appeals Council denied review on April, 23, 2015, making the ALJ's decision the final determination by the Commissioner.

Zank timely appealed to this court. After briefing, the court held a telephonic hearing on Zank's motion for summary judgment on March 29, 2016.¹ The court took the matter under advisement to review the medical records pertaining to Zank's headaches and to review the law pertaining to limitations in CPP.

¹ Zank's motion to accept a late-filed reply brief, Dkt. 13, is GRANTED.

B. Zank's headaches

Zank suffers from at least four types of headaches: migraines, tension headaches, sinus headaches, and post-concussive headaches. Zank does not contend that either her sinus headaches or her tension headaches constitute a disability.

The ALJ appropriately considered Zank's post-concussive headaches, which resulted from a fall in March, 2103. At the October, 2013 hearing, the medical expert, Dr. Larrabee, testified that the post-concussive headaches were then the primary source of Zank's headaches and that he did not regard the post-concussion disorder as a long-term problem. R. 136-37.² The ALJ credited this testimony in finding that Zank's post-concussive headaches had not lasted 12 months and that there was no way to predict whether they would last 12 months. R. 23. The ALJ therefore concluded that the post-concussive headaches did not constitute a disability. The ALJ's findings concerning the post-concussive headaches, and his conclusion that they did not constitute a disability, were supported by substantial evidence.

The ALJ found that Zank's migraines were not a severe impairment because the record did not support her testimony that she had frequent migraines, and the records indicated that what migraines she had were treated successfully with Toradol. R. 18. The ALJ found that Zank's migraines did not limit her work capacity at all, and he included in the RFC the statement that "[t]he claimant's headaches do not limit her ability to perform work activity during the day or at night." R. 21.

Zank contends that the ALJ's evaluation her migraines is not supported by substantial evidence, and the court agrees. The medical evidence on Zank's migraines is mixed. The ALJ relied on four specific records from 2012 and 2013 to support his conclusion. The first, from

² Record citations are to the administrative record, Dkt. 7.

September 2012, stated that Toradol had worked “very well for [Zank] in the past.” R. 1081. The second, from May 2013, documented a two-week headache following a March 2013 fall that Zank’s treating doctor diagnosed as post-concussive syndrome; he prescribed Percocet. R. 1144. The third, from July 2013, actually involved a sinus headache—not a migraine—for which Zank’s doctor prescribed Nasonex and Zyrtec. R. 1141. Finally, in August 2013, a different doctor saw Zank, and he noted that she had a similar episode about a year before and had “responded very well to Toradol.” R. 1094. From these records, the ALJ concluded that “the record does not demonstrate a pattern of frequent migraine headaches.” R. 18.

But other records undermine the ALJ’s conclusion. Zank points to records demonstrating a longstanding pattern of headaches that lasted multiple days and were not responsive to medication. One record, from May 2007, stated that Zank “had multiple medications for migraine and nothing worked.” R. 753. Two years later, she visited the emergency room twice in one week for more migraines. R. 711. Treatment notes stated that Zank had come in to the emergency room four days earlier with a migraine, was given Demerol and Phenergan, but had returned because her “headaches [were] back again.” *Id.* Another record from 2009 described a headache that had lasted for several days. R. 701. A doctor’s note from March 2012 stated that Zank had been suffering a headache for two weeks and that “Maxalt and vicodin helps, but only takes [the] edge off.” R. 1165. A doctor noted a few months later that Zank “has tried acetaminophen, ibuprofen, [and] Vicodin for the pain without relief.” R. 1162. More notes from around the same time documented headaches that lasted for days, R. 1081, and other attempts at resolving the headaches with medication, to varying degrees of success, R. 1155.

Zank's headaches seem to wax and wane, but they must be considered if they affect Zank's ability to do basic work activities. The ALJ focused on records that indicated that medication was effective, but he ignored records that Zank's headaches were not responsive to treatment. The ALJ may not cherry-pick only the favorable evidence. *Scott v. Astrue*, 647 F.3d 734, 740 (7th Cir. 2011). The ALJ must view the record as a whole and explain how he reconciles evidence that is inconsistent with his conclusion. Because the ALJ failed to do so here, the court will remand this case for further consideration of Zank's migraines.

C. Zank's CPP limitations

The parties agree on two basic legal principles. First, both the RFC and the hypotheticals posed to the VE must incorporate all the claimant's limitations that are supported by the medical record, including deficiencies in maintaining concentration, persistence, or pace. *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 619 (7th Cir. 2010). Second, limiting a claimant to unskilled work, or to simple, routine, and repetitive tasks, does not necessarily account for an individual claimant's limitations in maintaining CPP. *Yurt v. Colvin*, 758 F.3d 850, 857 (7th Cir. 2014).

The issue here is whether the ALJ adequately accounted for Zank's moderate deficiencies in CPP by including this statement in the RFC:

Her moderate psychological limitation in maintaining concentration, persistence, or pace, allows her to satisfactorily and consistently sustain work that is simple, routine, and repetitive and to understand, remember, and carry out simple instructions.

R. 21.³ The Commissioner contends, in essence, that the ALJ incorporated the pertinent medical opinion directly into the RFC, thus satisfying the ALJ's obligation to account for Zank's limitations in CPP. Dkt. 11, at 8-9. The court disagrees for three reasons.

First, although the RFC is somewhat peculiarly phrased, at most it limits Zank to simple, routine, and repetitive work, requiring only simple instructions. The RFC is thus just a version of the one rejected in *Yurt*. A limitation to simple, routine, and repetitive work would be an appropriate accommodation of a moderate limitation in CPP only if it would avoid the cause of the CPP deficiency. *Yurt*, at 858 (“[W]e allowed the hypothetical in *Johansen* to stand despite its omissions because its description of ‘repetitive, low-stress work’ specifically excluded positions likely to trigger the panic disorder that formed the basis of the claimant’s limitations in concentration, persistence, and pace.”) The ALJ did not explain how the RFC limitation proposed for Zank would avoid the cause of Zank’s CPP deficiencies, and nothing in the record suggests that it would.

Second, the limitation in the RFC does not provide sufficient guidance to the VE. The peculiar phrasing of the statement in the RFC suggests that Zank has some moderate, yet undefined, deficiency in CPP, but that whatever that deficiency was, Zank was nevertheless able to sustain simple, routine, and repetitive work requiring only simple instructions. Thus, the ALJ short-circuited the analysis, and avoided the effort of determining her actual limitations. *O’Connor-Spinner* and its progeny require the ALJ to identify the claimant’s

³ The ALJ included essentially this same limitation in the hypothetical posed to the VE, by asking the VE to consider someone with “moderate psychological limitations [in] concentration, persistence, and pace,” who “is satisfactorily and consistently able to perform simple, routine and repetitive work. . . . [and is] able to understand, carry out, and remember simple instructions.” R. 142. Zank does not raise a separate objection to the hypothetical; it rises or falls with the RFC.

specific limitations. Merely pointing toward the broad category of “concentration, persistence, or pace” is not enough to determine what jobs the claimant might be able to perform. “[T]he ALJ should refer expressly to limitations on concentration, persistence and pace in the hypothetical in order to focus the VE’s attention on these limitations and assure reviewing courts that the VE’s testimony constitutes substantial evidence of the jobs a claimant can do.” *O’Connor-Spinner*, 627 F.3d at 620-21.

This leads to the third problem with the RFC in this case: the ALJ did not actually identify Zank’s limitations in CPP. To be fair to the ALJ, the record evidence is sparse. The ALJ found that Zank had moderate deficiencies in CPP based on the testimony of Larry Larrabee, PhD, which the ALJ gave “greater” weight. R. 29. Larrabee’s opinion concerning Zank’s deficiencies in CPP was based on the medical opinion of Craig Childs, PhD. R. 780-97. Childs’s opinion, in turn, was based on a medical evaluation of Zank’s mental functioning by Dennis Elmergreen, PsyD, R. 768-71.

Elmergreen’s report is apparently the foundation for all the evidence regarding Zank’s limitations in CPP. Elmergreen based his assessment on a series of questions that he posed to Zank. He observed that she got a couple of factual and arithmetic questions wrong, and that when asked to count backward from 100 by 3s, she “seemed to labor as she concentrated.” He summarized his assessment as follows:

Thoughts were organized. She is alert and interactive. Her intellectual functioning was estimated to be in the average range, lower in math. She appeared to have some struggles with concentration, otherwise she exhibited a continuous stream of consciousness. No obvious cognitive deficits. Memory appeared intact. She had average degree of social skills. No evidence of psychosis in her presentation.

R. 770.

Childs's opinion was presented on a Mental Residual Functional Capacity form. Childs gave Elmergreen's assessment great weight, and based on it, Childs checked boxes indicating that Zank had moderate limitations in:

The ability to maintain attention and concentration for extended periods;

The ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances;

The ability to sustain an ordinary routine without special supervision; and

The ability to complete 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.

R. 780. The ALJ gave only "some weight" to the opinions of Childs and Elmergreen, although he did not criticize or closely examine their conclusions about Zank's limitations in CPP. The ALJ gave more weight to Larrabee's testimony, but Larrabee's testimony also included the opinion that Zank had moderate limitations in CPP.

To recap, all the evidence of Zank's limitations in CPP derived ultimately from Elmergreen's assessment, which is not very informative. On this record, it would be hard to determine precisely what Zank's deficiencies in CPP are, and it would be even harder to determine how those ill-defined deficiencies would affect Zank's capacity for work. Indeed, on this record, the ALJ might have concluded that Zank had only minimal deficiencies in CPP that did not substantially impair her capacity for work. But he did not. Once the ALJ found that Zank had moderate limitations in CPP, he needed to identify those limitations and incorporate them in both the RFC and the hypotheticals to the VE.

The ALJ made only a few observations about Zank's difficulties with CPP. R. 20. Mostly the ALJ minimized her difficulties: he said she could follow instructions, pay attention for up to two hours, and finish what she starts. For limitations, he said that "she can handle stress, but it may trigger a headache," and that "[h]er ability to pay attention or concentrate is occasionally diminished due to physical problems." *Id.* But the ALJ completely failed to incorporate anything about stress-caused headaches or her limited ability to pay attention into the RFC. And Childs's Mental Residual Functional Capacity form indicated specific CPP categories in which Zank was deficient, but the RFC did not call out any of those specific categories either.

The Commissioner contends that the ALJ did enough because he directly stated in the RFC and the hypotheticals that Zank had moderate limitations in CPP. The Commissioner is correct that the ALJ need not use the magic words "concentration, persistence, or pace," so long as the VE was somehow aware of the claimant's limitations. *Yurt*, 758 F.3d at 857-58. But this case presents the opposite problem: the RFC includes the magic words, but it does not inform the VE of the claimant's actual limitations. The magic words alone, without meaningful explanation, are not enough. On remand, the ALJ must describe the particular nature of Zank's deficiencies in maintaining CPP, so that the VE is able to understand how those deficiencies would affect the work that Zank might be expected to do.

Accordingly, IT IS ORDERED that the decision of Carolyn W. Colvin, Acting Commissioner of Social Security, denying plaintiff Cathy Zank's application for disability benefits 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 April 15, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge