IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LISA LORRAINE MANTHE,

OPINION AND ORDER

Plaintiff,

15-cv-354-bbc

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

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Plaintiff Lisa Lorraine Manthe contends that she is disabled under the Social Security Act. Two different administrative law judges have reviewed her application for benefits, one in 2011 and one in 2013. Both denied her claim, finding her not disabled. She requested review of the first denial and was given a second hearing before an administrative law judge. Now she appeals from the second denial, asserting that the administrative law judge erred by (1) failing to give adequate consideration to her mental limitations; (2) putting a flawed hypothetical question to the vocational expert; and (3) failing to consider her fatigue resulting from her multiple sclerosis and obesity.

A review of the record shows that the administrative law judge gave careful attention to plaintiff's claim, but committed an error in framing his hypothetical question for the vocational expert. Accordingly, this matter must be remanded again.

RECORD FACTS

A. Administrative History

Plaintiff applied for disability insurance benefits in January 2010, alleging disability as of September 2009. After her application was denied initially and again on reconsideration, she requested a hearing before an administrative law judge, which was held in December 2011 and resulted in a finding that she was not disabled. Her request for review was granted by the Appeals Council and she had a new hearing before a different administrative law judge in October 2013. This judge found that plaintiff had the severe impairments of multiple sclerosis, lumbar degenerative disk disease, obesity and depression but that none of these, considered independently or in combination, met or medically equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. In addition, he found that plaintiff retained the residual functional capacity to perform a reduced range of light work. Relying on the testimony of a vocational expert, he found that plaintiff could perform a number of jobs in the national economy, which meant that she was not disabled. The Appeals Council denied review and plaintiff brought this lawsuit.

B. Plaintiff's Medical and Work History

Plaintiff was born in 1977. She had difficulty in school, particularly in reading, but graduated from high school. According to her testimony at the second administrative hearing, she is 5'4" tall and weighs 310 pounds. She has two herniated discs in her back that cause problems and are treated with pain medication. AR 51-52. She also has had multiple

sclerosis since at least 2006 and has one to two flareups a year, AR 52, although she reported at her second hearing in October 2013 that she had not had a flareup since the summer of 2012. AR 64. Fortunately for her, she has not had serious complications from the illness. She has been treated since at least 2006 by a specialist, Dr. Loren Rolak, who found in 2010 that she had a normal gait, no motor weakness and normal reflexes and sensation. AR 717-18.

Before September 2009, plaintiff performed assembly line work, which included assembling windows at WeatherShield, AR 47-48, operating a churn at a dairy products plant, AR 49-50, and making muffler filters at Nelson Industries. AR 50. She has also worked as a baker's helper. AR 49. For two months before the hearing, she had been working for the Sport & Spine Clinic near her house, doing cleaning, laundry and trash removal for an hour a day, six days a week. AR 46. She has problems going up and down stairs and will sit in her car for 30-45 minutes after she finishes work at the clinic before tackling the stairs to her apartment. AR 60. She can bend down and pick objects up off the floor and stand for an hour. AR 60-61. She testified that when she worked more than an hour a day at the clinic, she felt her multiple sclerosis kick in and found it hard to walk. AR 63.

Plaintiff is divorced and raising a daughter who was 11 in 2013. AR 44-45. She does not do much reading, if any, but she does housework, washes dishes, drives a car, pays her own bills, plays video games with her daughter, spends time with friends and family and shops for groceries. AR 55-60. Until 2011, she went along with family members when they

were hunting bear, although she herself did not hunt.

Plaintiff testified at the second administrative hearing that about once a week she had difficulty staying awake all day. AR 68. She said she usually took a 20-minute nap one to three times a week, after having a night of poor sleep. AR 69-70.

In addition to her multiple sclerosis and back pain, plaintiff is obese and has suffered from depression. She began seeing a counselor for the depression in early 2006, saying she was having difficulty controlling her anger toward her former husband. AR 558. In 2006, the counselor she was seeing diagnosed adjustment disorder with mixed depression and anxiety and assigned her a global assessment of functioning (GAF) of 65. Id. In December 2006, her physician found her to be mildly depressed and started her on Wellbutrin XL, AR 550, which she found "very helpful." AR 548. On February 15, 2007, she appeared to be mildly depressed, but showing a feeling of hopefulness, although she had had to stop taking the Wellbutrin because of the cost. AR 549. In March 2007, she told her doctor that the Wellbutrin seemed to be helpful and that she was not feeling depressed. (It appears from the record that the doctor found a less expensive or free source of medication.) The doctor noted that her mood was euthymic (in "a state of mental tranquillity and well-being, neither depressed nor manic," Dorland's Illustrated Medical Dictionary, 32d ed., at 655). AR 548.

Plaintiff has some other problems, but they do not need to be discussed because she is not alleging that they played a role in the adverse decision at issue.

In early May 2007, an agency psychologist determined from plaintiff's medical records that she had a dysthymic disorder (a disorder "characterized by symptoms of mild

depression," id. at 582), and might have an organic mood disorder secondary to her multiple sclerosis. AR 562. However, the psychologist did not check any boxes for functional limitation on the form he completed for the agency, AR 569, and although he added "see EWS," AR 571, no electronic work sheet is included in the agency record. A second state Department of Disability Services psychologist, Jack Spear, reviewed plaintiff's medical record on June 2008 and found that she had moderate limitations in understanding, memory and concentration, persistence and pace. AR 671. He broke down her "moderate limitations" into specific moderate limitations in these areas as affecting (1) her ability to understand and remember detailed instructions; (2) her ability to carry out detailed instructions; (3) her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods; and (4) her ability to respond appropriately to changes in the workplace. AR 675-76.

C. Administrative Hearing

At plaintiff's hearing, the administrative law judge heard from plaintiff and then called a vocational expert and asked her several hypothetical questions about a person who had plaintiff's limitations. With respect to the psychological limitations identified by Dr. Spear, the administrative law judge asked the expert to hypothesize a person whose work would be limited to simple, routine, repetitive tasks performed in a work environment free from fast-paced production, involving only simple work-related decisions and few if any

workplace changes. AR 72. He did not ask about a person "who was moderately limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods," although this was one of the moderate limitations Dr. Spear had identified. In addition, the administrative law judge did not explain in his written decision how the limitations he did list ("work environment free of fast-paced production, involving only simple work-related decisions, free of any workplace changes") addressed the moderate limitations of plaintiff's concentration, persistence and pace that Spear had identified.

OPINION

In her opening brief, plaintiff set out the three ways in which she believed that the second administrative law judge who heard her case in 2013 had erred: (1) he did not give adequate consideration to her mental limitations; (2) he posed a flawed hypothetical question to the vocational expert; and (3) he did not consider the fatigue that plaintiff felt as a result of her multiple sclerosis and obesity. After listing these three alleged errors, however, her counsel never discussed the first one, relating to plaintiff's alleged mental limitations. Therefore, I will treat it as abandoned. Duncan v. State of Wisconsin Dept. of Health and Family Services, 166 F.3d 930, 934 (7th Cir. 1999) (party must develop any arguments it wishes court to consider or they will be deemed waived or abandoned).

Plaintiff's second argument is founded on well developed law in this circuit, which

places strict requirements on administrative law judges to pose proper hypothetical questions to vocational experts when asking about the kind of gainful work a claimant might perform. As plaintiff notes, the administrative law judge failed to include in his hypothetical questions all of the limitations Dr. Spear had found. Dr. Spear had listed four areas in which plaintiff was moderately limited, one of which was "in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods," which is an aspect of "sustained concentration and persistence." AR 675. In his attempt to put all four moderate limitations into specific terms for the vocational expert, the administrative law judge accounted for Spear's assessments of plaintiff's moderate limitations in understanding and remembering detailed instructions by specifying that the tasks she could perform would be simple, routine and repetitive. He accounted for her moderate limitations in responding to workplace changes by specifying that such changes would have to be "few, if any." This was appropriate, as far as it went. However, he did not take the next step, which was to alert the vocational expert to plaintiff's psychologically based symptoms of depression and the possibility that she might have trouble performing at a consistent pace without more than the usual number of rest periods.

In failing to take this last step, the administrative law judge did not comply with the law in this circuit. It is true that some of these cases were decided after the administrative law judge issued his decision in this case on December 17, 2013. For example, the court discussed a hypothetical similar to the one posed to the vocational expert in this case in

Varga v. Colvin, 794 F.3d 809, 814 (7th Cir. 2015) ("we have repeatedly rejected the notion that a hypothetical like the one here "confining the claimant to simple, routine tasks and limited interactions with others adequately captures temperamental deficiencies and limitations in concentration, persistence, and pace"). In Yurt v. Colvin, 794 F.3d 850, 858 (7th Cir. 2014), when the hypothetical postulated a person who could perform unskilled tasks, relate superficially to small numbers of people and attend to tasks long enough to complete them, the court of appeals found that it "did nothing to insure that the [vocational expert] eliminated from her responses those positions that would prove too difficult for someone with Yurt's depression and psychotic disorder." However, many were decided well before the end of 2013. E.g., O'Connor-Spinner v, Astrue, 627 F.3d 614, 621 (7th Cir. 2010) ("limiting a hypothetical to simple, repetitive work does not necessarily address deficiencies of concentration, persistence and pace"); Stewart v. Astrue, 561 F.3d 679, 684-85 (7th Cir. 2009) (limiting hypothetical question to simple, routine tasks did not account for limitations of concentration, persistence and pace); and Croft v. Astrue, 539 F.3d 668, 677-78 (7th Cir. 2008) (restricting hypothetical to unskilled work did not account for claimant's difficulties with memory, concentration or mood swings)).

I note that it would not be necessary to remand this case if the record showed that the vocational expert was familiar with plaintiff's medical records, but it does not. Varga, 794 F.3d at 819 ("we will not assume that the [vocational expert] is apprised of [limitations of concentration, persistence, or pace] unless he or she has independently reviewed the medical record").

Plaintiff's third argument is that the administrative law judge erred in failing to consider the fatigue she suffered as a result of her multiple sclerosis and obesity and in failing to explain what consideration he gave to her obesity when he determined her residual functional capacity. He did specify the need for a sit/stand option so that she could alternate her sitting and standing positions at will, AR 73-74, but said nothing further about fatigue. It is the case that the residual functional capacity he assessed for plaintiff was more generous than that of the state agency's reviewing physician, Dr. Mina Korshedi, who reviewed the 2007 and 2010 notes of plaintiff's treating physician, Dr. Rolak, and concluded from them that plaintiff could perform a full range of light work, including her past relevant work. She did not make any reference to a sit-stand option. AR 573-80; AR 688; AR 792-99.

Plaintiff contends that the administrative law judge should have made his own assessment of her fatigue, "in light of the underlying condition of MS and the directives to consider fatigue," Plt.'s Br., dkt. #9, at 22, but an administrative law judge is not in a position to make such an assessment. That is the job of a physician.

As for her obesity, plaintiff has not pointed to anything in the medical record that would support a claim that her obesity, in combination with another severe impairment, equals a "listed impairment." Social Security Ruling 02-1p (obesity itself cannot meet requirements for listing). She criticizes the administrative law judge for not considering how her obesity in combination with her other impairments would affect her ability to perform basic work activities, but she concedes that the failure to address obesity is harmless error when the claimant does not connect obesity to her inability to work. Stepp v. Colvin, 795

F.3d 711, 720 (7th Cir. 2015) ("[A]n ALJ's failure to explicitly consider an applicant's obesity is harmless if the applicant did not explain how her obesity hampers her ability to work.") (internal quotations omitted); Prochaska v. Barnhart, 454 F.3 731, 737 (7th Cir. 2006) (harmless error when administrative law judge failed to address claimant's obesity when no medical opinion in record identified her "obesity as significantly aggravating her back injury or contributing to her physical limitations"). Plaintiff does not identify any medical evidence in the record that the administrative law judge should have considered.

ORDER

IT IS ORDERED that plaintiff Lisa Lorraine Manthe's motion for summary judgment, dkt. #8, is GRANTED with respect to the issue whether the administrative law judge failed to frame an adequate hypothetical for the vocational expert. The decision denying plaintiff benefits is REVERSED and REMANDED under sentence four of 42 U.S.C. § 405(g). The clerk of court is directed to enter judgment in favor of plaintiff and close this case.

Entered this 3d day of March, 2016.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge