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

CATHERINE BOLSSEN,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

15-cv-824-wmc

TERESA SMITH-WHITE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

15-cv-612-wmc

Pursuant to 42 U.S.C. § 405(g), plaintiffs Catherine Bolssen and Teresa Smith-White seek judicial review of final decisions of defendant Nancy A. Berryhill, the Acting Commissioner of Social Security, which denied both their respective applications for Social Security Disability Insurance Benefits and Supplemental Security Income. The court held a combined hearing because both appeals center on whether an ALJ failed to explain the basis for adopting a 10% off-task limitation in formulating claimant's residual functional capacity in hypothetical questions to the vocational expert. Because the court finds that the ALJ failed to provide an adequate explanation for the 10% off-task limitation and that error was not harmless, the court will reverse the Commissioner's determinations and remand both cases for further proceedings consistent with this opinion.

BACKGROUND

A. Overview of Bolssen

Catherine Bolssen was born on June 6, 1974. She was thirty-seven years old at the time she filed her SSI application and thirty-nine years old at the time of the hearing before an ALJ. Bolssen has an eleventh-grade high school education, is able to communicate in English, and has past work experience as a self-service gas attendant. Bolssen last worked in 2008, and she only worked sporadically before her alleged disability onset date. In fact, during her entire adult life, Bolssen earned over $5,000 a year only once, in 2005.

Bolssen testified at the hearing that she stopped working altogether because of a move. After that, Bolssen reported applying for other jobs -- assembly, other gas station work -- but was unsuccessful, raising a question as to whether she quit because of her disability. Bolssen claims disability based on syncope while driving, perhaps related to her diabetes, severe depression (requiring inpatient treatment in 2007, before the alleged onset date), heart palpitations and back pain, which sometimes radiates down her legs.

Because this appeal solely concerns the ALS's findings as to Bolssen's moderate limitations in concentration persistence and pace, the court limits its overview of her pertinent medical records, which mainly concern her mental health. The medical records reflect treatment for depression, dating back to 2007, including a hospital stay in 2007 following a suicide attempt. (AR 293-94, 301.) Bolssen primarily received treatment for depression from Christine R. Seguin, FNP, starting in 2009 and continuing into 2013. (AR 368-69, 378-79, 397, 403, 828, 832, 914, 955.) Seguin prescribed various anti-depressants over that period of time, including Effexor and Zoloft. Some of Bolssen's

depression appears to be situational -- during this period of time, she lost both her mother and brother and had a custody dispute over her young son.

In a decision dated May 29, 2014, ALJ Thomas W. Springer concluded that Bolssen was not disabled since January 27, 2012, the date the application was filed. Even so, the ALJ found several severe impairments, including affective disorder. Material to the present challenge, the ALJ found at step 3 that Bolssen had moderate limitations with respect to CPP.

> The claimant stated in her function report that she can pay attention for 20 minutes, does not finish what she starts, has problems following instructions, and has difficulty handling stress and change (Exhibit 3E). Her medical records document no unusual anxiety or depression, and she denied difficulty concentrating (Exhibits 2F/35; 3F/2; 4F/3; 13). On reconsideration, the State agency psychological consultant concluded that she had only mild difficulty in this domain, but at the hearing the claimant did appear anxious and nervous. Thus, the undersigned finds the opinion of the initial reviewing psychologist [finding moderate limitation] to be more persuasive and consistent with the record as a whole (Exhibits 2A; 4A).

(AR 23.)

The ALJ's ultimate residual functional capacity ("RFC") formulation limited Bolssen to light work with certain physical restrictions. The ALJ also limited Bolssen to "routine 2-4 step tasks i*n a job that allows for being off task up to 10% of the workday* in addition to regular breaks." (AR 24 (emphasis added).) The ALJ provided *no* explanation for this latter limitation, although he included some discussion more generally about Bolssen's mental health, noting that she initially declined psychotropic medications, but her "mental health screening was negative" after starting medication. (AR 26.) The ALJ also noted that there were no opinions from treating or examining

physicians indicating that Bolssen was disabled or had limitations greater than those determined by his formulation. Finally, the ALJ placed great weight on the state agency medical consultants, who concluded that "her depression does not appear to impact her work ability since she refused to take medication until recent stressors related to her family relationship." (AR 27.)

B. Overview of Smith-White

Teresa Smith-White was born on August 16, 1959, and was fifty-two years old on the alleged disability onset date. By the time of the hearing, she had turned fifty-five years old, which is considered "advanced" age under the applicable regulations. *See* 20 C.F.R. § 404.1563(e). Smith-White has a high-school education, is able to communicate in English, and has past work experience as a maid. Smith-White's last gainful employment appears to have been as a CNA in November 2011, though the ALJ noted that she also reported working in May 2012, which is consistent with her earnings records. (AR 23.) She claims that she no longer could work because of leg pain and swelling. Smith-White claimed disability based on back pain. During the hearing, she also complained of seizures (possibly anxiety-induced).

Consistent with the issues presented in her appeal, the court also limits its overview of her medical records to those pertinent to her mental health. From April 2011 through May 2013, Smith-White primarily saw Ernestine Wagne, PA, for depression and anxiety, along with other physical ailments.[1] Over that period of time,

[1] There are a number of medical records primarily concerning stomach issues (Smith-White ended up having her gallbladder removed) and back pain, in which the treating physician notes "cooperative, appropriate mood & affect. Normal judgment" under the "psychiatric" label. (*See,*

Smith-White consistently complained of depression and anxiety, though occasionally reported short-term improvement in mood, and was prescribed various medications, including Cymbalta, Effexor and Zoloft. (AR 461-62, 460, 454, 429, 605, 619, 632, 636; *see also* AR 607 (2/7/13 medical note by Bellack, Jason M., noting severe anxiety and depression); AR 819 (7/14/14 medical note by Evan K. Sandok, M.D., noting that she had "very significant and active depression").) During this same period of time, Smith-White was also seen in the emergency room on at least two occasions for "anxiety and shaking." (AR 632, 704.) She also experienced seizures, episodes of syncope and possible mini-strokes from 2012 through 2014.[2]

Central to her challenge, Smith-White began seeing a psychiatrist, Dr. Thomas Charles, in June 2013. One year later in June 2014, Dr. Charles completed a "mental opinion work-related limitations statement and listing." Dr. Charles rated Smith-White's mental abilities along the following spectrum: Category I (does not preclude performance), Category II (preclude performance for 5% of an 8-hour day), Category III (for 10%), and Category IV (15% or more). Charles checked several of the boxes as Category II and III, and one of the boxes ("travel in unfamiliar places") as Category IV. Some of the categories applied to limitations for "sustained concentration and memory." (AR 788-89.)

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e.g., AR 395.) Curiously, the ALJ relies on these records in discussing Smith-White's mental health limitations, rather than the treatment notes for mental health concerns.

[2] After the ALJ hearing, but before the Appeals Council's decision in May of 2015, Smith-White had a stroke, requiring hospitalization and inpatient therapy. Because these health records are part of the administrative record, the court assumes that this most recent health event was before the Agency, but Smith-White does not raise any discrete challenge based on the Appeals Council's consideration (or lack thereof) of her stroke.

Separate from these ratings, Charles was asked to determine "what percent of an 8-hour work day, 5 days a week, in a competitive work environment would your patient be precluded from performing a job, or [be] 'off-task,' that is, either unable to perform work and/or away from your patient's work environment due to those limitations?" (AR 789.) Charles did not check a box, instead writing, "patient doesn't know if she can work anymore." (*Id.*) While Charles declined to check a box on the off-task question, he did indicate that Smith-White would miss five days or more of work a month due to "her physical and/or mental impairments and/or need for ongoing and periodic medical treatment and care of them." (*Id.*) Charles also indicated that Smith-White had "marked" limitations in CPP and that she has had four or more episodes of decompensation within a 12-month period. (AR 791.)

A state consultative examination by Mina Khorshidi, M.D., dated 12/10/2013, notes anxiety issues, including two emergency room visits for "moderate symptoms," but concludes that activities of daily living show "very minimal limitations due to anxiety." (AR 104.)

In her decision, ALJ Debra Meachum concluded that Smith-White was not disabled. (AR 31.) The ALJ found two severe impairments: degenerative disc disease of the lumbar spine and anxiety. (AR 23.) At step 3, the ALJ concluded that Smith-White does not have an impairment or combination of impairments that met or equaled a listing. (AR 22.) With respect to CPP, the ALJ found moderate difficulties, explaining:

> The claimant reported losing focus when stressed, but in her function report said she had no problems paying attention or following directions (Exhibits 5E, pages 7 and 8). She additionally reported activities, including reading, using the computer, and watching movies, which require at least some

> ability to maintain concentration. Accordingly, the claimant has at most moderate limitations in this area.

(AR 25.)

The ALJ's RFC limited Smith-White to light work, with other physical limitations, and that she was "further limited to unskilled wok including simple routine tasks and, because of problems with concentration, persistence, and pace, she *may be off task up to 10% of the workday*." (AR 25 (emphasis added).) The opinion also contains a lengthy discussion of the mental health records and how the ALJ considered that evidence vis-à-vis claimant's activities of daily living and other record evidence. (AR 28-29.) In particular, the ALJ notes that anxiety was not reported in her initial application for disability, and it was only mentioned in April 2011, at which time Smith-White started on an anti-depressant. Subsequent reports from June through November 2012 then revealed normal mental status exams. (AR 28.) Smith-White suffered anxiety again in December 2012, and continued to complain of anxiety through February 2013, although she reported on April 17 2013, being off her medication and feeling better. (AR 28.) Just 12 days later, on April 29, Smith-White reported increased anxiety, however, and in August 2013, she was seen at the ER complaining of anxiety and told to restart her medication. (AR 28.)

The ALJ further noted that in September 2013, Smith-White began treatment with Adams County Human Services, more specifically, Thomas Charles, Ph.D. Still, the ALJ notes that Smith-White did not begin taking an anti-psychotic medication until June 2014, some three years after her claimed onset date. (AR 28.) The ALJ also

acknowledged that her treating physicians assessed her with a GAF score of 50,[3] but discounted the score specifically based on "the claimant's functioning over the entire period at issue" and other GAF scores more generally. (AR 28.) The ALJ similarly questioned the severity of Smith-White's anxiety based on the fact that she did not seek "specialized mental health treatment until the fall of 2013 and did not begin taking Seroquel until the summer of 2014," concluding that "[w]ere the claimant in fact suffering from severely limiting mental impairments[,] one would expect more intensive counseling and consistent medication." (AR 28.) The ALJ also considered the opinion of state agency medical consultant, Beth Jennings, Ph.D., finding that Smith-White's anxiety was not severe, but gave that opinion little weight, because other evidence supported a finding that it was a severe impairment. (AR 29.)

Central to Smith-White's challenge, the ALJ gave little weight to Charles' opinion, dated June 30, 2014, that Smith-White "could not work, would miss more than five days of work a month, has extreme limitations in social functioning and marked limitations with maintaining concentration," because it is "incon[sistent] with the rest of the opinion." (AR 29.) Smith-White also takes issue with the ALJ's treatment of Charles' report -- namely, the percent of time Smith-White would be off task -- which the court discusses in the opinion below. Specifically, with respect to CPP, the ALJ found Charles' assessment of marked limitations in CPP inconsistent with his finding that Smith-White "can carry out very short and simple instructions 100% of the time and can remember

[3] According to Wikipedia, "41 – 50 Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job, cannot work)." "Global Assessment of Functioning," Wikipedia, https://en.wikipedia.org/wiki/Global_Assessment_of_Functioning.

and understand short instructions 95% of the time." (AR 29.) "Overall, the undersigned gives the opinion some weight, but only to the extent it is consistent with other substantial evidence, which supports a limitation to the range of unskilled work assessed above, which also allows the claimant to be off task up to 10% of the workday." (AR 29.)

Ultimately, the ALJ found that the claimant is still able to perform her past relevant work as a maid. Alternatively, she found that Smith-White could perform production worker, inspector/sorter and food preparer jobs, of which there are significant numbers in the national economy. (AR 29-31.)

OPINION

These are not the first cases where this court has been asked to consider whether the ALJ adequately explained an off-task percentage limitation to accommodate a CPP limitation and whether that limitation was supported by substantial evidence. In *Rapp v. Colvin*, No. 12-cv-353-wmc, 2015 WL 1268327 (W.D. Wis. Mar. 19, 2015), the court determined that the ALJ failed "to *explain* why the 10% limitation he arrived at properly characterizes each of the claimant's moderate limitations in CPP," and also failed to explain the basis for the 10% limitation. *Id.* at *5-6. While the state agency psychologist provided CPP limitations, the court noted in particular that those were qualitative in nature, and "the ALJ does not even attempt to explain how Dr. Rattan's limitations lead to the quantitative limitation adopted by the ALJ in formulating Rapp's RFC." *Id.* at *6.

The court confronted the same issue in *Olivarez v. Colvin*, No. 12-cv-884-wmc, 2015 WL 1506084 (W.D. Wis. Apr. 1, 2015), and reached the same result, remanding the case for further proceedings. In *Olivarez*, the ALJ similarly failed to explain why he

arrived at the 5% off-task limitation. *Id.* at *4. Specifically, the court took issue with the ALJ's failure to explain how qualitative limitations provided by the state agency psychologists translated into a quantitative off-task percentage. *Id.* at *4-5.

As pointed out by counsel for plaintiffs, the Seventh Circuit Court of Appeals also recently considered a case raising a similar challenge to an ALJ's 10% off-task limitation, finding error, vacating the denial of disability benefits and remanding for further proceedings. In *Lanigan v. Berryhill*, 865 F.3d 558 (7th Cir. 2017), that court specifically rejected the Commissioner's argument that "the ALJ's 10% calculation was supported by the state-agency psychologists, who opined that Lanigan demonstrated adequate ability to sustain concentration and had only moderate—not marked—difficulty in various functional areas." *Id.* at 563. The court found this argument unpersuasive because the ALJ "made no effort to 'build an accurate and logical bridge,' *see Beardsley v. Colvin*, 758 F.3d 834, 837 (7th Cir. 2014), between the 'no more than 10%' finding and the psychologists' general assessment that Lanigan exhibits moderate difficulty in areas like the 'ability to maintain attention and concentration for extended periods' and the 'ability to perform activities within a schedule.'" *Id.*

During the hearing, counsel for the Commissioner conceded that the ALJ failed to provide an explanation as to how he arrived at the 10% off-task limitation with respect to Bolssen, but argued that Dr. Charles' opinion provided a sufficient basis to support the ALJ's 10% off-task finding for Smith-White. As to both petitioners, the Commissioner

also argued that any error was harmless, since neither record supported a finding of an off-task percentage greater than the 10% allotted.[4]

First, with respect to Dr. Charles' opinion and whether it provides a basis to support the ALJ's finding of a 10% off-task limitation for Smith-White, Dr. Charles did *not* offer an opinion as to the total percent off-task that Smith-White would be in an eight-hour workday. Instead, Dr. Charles simply responded that *Smith-White* "doesn't know if she can work anymore." Dr. Charles did check-off that Smith-White would be 5%, 10% and even 15% or more off-task because of various mental limitations, including ones concerning concentration and memory. While the ALJ selected a couple of those categories to support her 10% off-task limitation, she gave no reason why those particular categories could be viewed in isolation, rather than aggregated with the others.[5]

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[4] During the hearing, counsel for plaintiffs again argued, as he had in his brief, that it was the Commissioner's burden to demonstrate the 10% off-task limitation because it was communicated to the vocational expert in the form of a hypothetical question at step 5. However, the 10% off-task limitation was *developed* by the ALJ at step 3, in formulating the RFC. Accordingly, any error occurred at that step, where the burden still rests with the claimant. Because the court finds that the ALJ failed to build an accurate bridge between the off-task limitation and the record as a whole (and that error was not harmless), however, the court need not wade any further into the parties' burden dispute.

[5] While not intuitively obvious that either isolated percentages or aggregation is appropriate -- as opposed to a more nuanced approach or the more obvious step of *asking* Charles to clarify his opinion -- it appears that the VE in Smith-White agreed with plaintiff's counsel that the off-task percentages should be aggregated:

> [Atty Duncan Q] The individual about 5 percent of the day is going to have difficulty maintaining attention and concentration. About 5 percent of the day, the individual may need special supervision. The individual may also have to be or be distracted about 5 percent of the day. This is cumulative, not an individual, basis. That would take it to over the 10 percent, would it not?
> A. I think that's the best way to look at it, yeah. I mean, in each of those parameters of not doing work, one, they're asking questions at least, but the other two – they're not working. That's over 10 percent.

Moreover, relying on Charles' opinion to support the 10% off-task limitation ignores his findings that: (1) Smith-White would miss five days or more of work a month due to "her physical and/or mental impairments and/or need for ongoing and periodic medical treatment and care of them"; (2) Smith-White had "marked" limitations in CPP; and (3) she has had four or more episodes of decompensation within a 12-month period.

Second, the Commissioner argues that any error in formulating the 10% off-task limitation is harmless since plaintiffs have not demonstrated that they would require more. In so arguing, counsel for the Commissioner reasons that the ALJs did not err because a moderate limitation does not render an individual unable to work, though it is a significant impairment that cannot be ignored. Therefore, in the Commissioner's view, the 10% limitation is appropriate because, as it appears undisputed, this is the maximum percent off-task one can be and still be employable. This argument is circular at best, and cynical at worst. If anything, it supports plaintiffs' counsel's characterization of this limitation as intentionally "superfluous." (Bolssen Opening Br. ('824 dkt. #9) 11.)

Finally, the Commissioner attempts to minimize the deficiencies in the ALJ's formulation of plaintiffs' CPP limitations, stressing that the cases for which courts have vacated and remanded because of an error in formulating the off-task percentage have involved more severe CPP limitations. In both cases here, however, the ALJ found the claimants had moderate limitations in CPP, and the Commissioner cannot backtrack from those findings. In light of the significant documentation of mental health

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(AR 70.) This would, of course, also be consistent with Dr. Charles' apparent agreement with the claimant's questioning whether she could work at all. Regardless, the ALJ fails to address the reasons for this approach altogether.

limitations for each plaintiff and the qualitative description of those limitations, there is no basis for this court to find independently that the 10% off-task limitation is plausible.

ORDER

Accordingly, IT IS ORDERED that the decisions of defendant Nancy Berryhill, Acting Commissioner of Social Security, denying plaintiffs Catherine Bolssen and Teresa Smith-White's respective applications for disability and/or supplemental income benefits are REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. Accordingly, the clerk of court is directed to enter judgments for plaintiffs and close these cases.

Entered this 21st day of September, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge