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

SUEANN CAREY,

Plaintiff,

v.

NANCY BERRYHILL,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

17-cv-581-wmc

Claimant Sueann Carey seeks judicial review of a final decision of defendant Nancy A. Berryhill, the Acting Commissioner of Social Security, under 42 U.S.C. § 405(g), denying her application for disability and disability insurance benefits. Because the ALJ built a logical bridge, supported his opinion with substantial evidence, and did not unreasonably limit counsel's ability to elicit testimony about claimant's limitations in her activities of daily living, the Commissioner's decision will be affirmed.

BACKGROUND

A. Procedural History

Carey's neck was injured in a car accident on February 12, 2012, which led to continuing neck pain. (AR 47.) Carey filed a Title II application for disability and disability insurance benefits on May 30, 2013, with an alleged onset date of October 16, 2012. Her application was initially denied on August 7, 2013, and denied again on reconsideration on March 8, 2014. (AR 25.)

B. Hearing Testimony

Carey appeared at a video hearing before Administrative Law Judge M. Dwight Evans

("the ALJ") on December 22, 2015. (AR 40.) Carey testified to injuring her neck in a car accident in 2012. She further testified that her pain has continued since then at a minimum of 2/10 on a pain scale. (AR 47-48.) Carey went on to explain that activity increases her pain, adding that the pain is generally located in her shoulder and neck, but with activity "sometimes it'll go down [her] arm." (AR 48.) The pain itself will also increase to a 6/10, eventually forcing her to stop the activity. (*Id.*) Carey also described how her pain "goes across [her] shoulder, sometimes down [her] arm and a little bit down [her] back." (AR 49.)

In addition, Carey reported that the pain in her arm impacts her ability to use it, even including her ability to raise it above the shoulder and to reach in front of her. (AR 49-50.) Because of her neck injury, Carey has also been limited to sitting for approximately fifteen minutes at a time, at which point her neck and arm would start hurting so badly that she had to stand up and walk around. (AR 50-51.) Likewise, Carey could stand still for only twenty-five minutes before the pain forced her to move. (AR 51.) She also reported only being able to walk for about half an hour at a time. (*Id.*) Finally, Carey explained her ability to clean the house was impacted by injuries from her car accident. Specifically, she identified "[s]weeping, mopping, [and] washing windows" as affected functions. (AR 52.) She explained that "[t]he pain gets worse as "she engages in house cleaning activities," and she needed to take breaks because of the pain in her neck. (AR 52-53.)

Following this testimony, claimant's counsel attempted to continue exploring her household-chore limitations, but was interrupted by the ALJ:

> Q What about doing laundry? Are you able to do laundry?
> A Yes.
> Q Do you have to modify what you do or the way you do it because of the neck pain?
> ALJ: Sir, excuse me. Let's stick with objective questions. I've given you great latitude already with a lot of leading questions.

Let's stay objective please.
Q All right. How do you, let's say, the pain from your neck affect your ability to do laundry?
ALJ: I don't think there was any testimony to that affect, sir. So, let's stop testifying and leading. Let's ask some objective questions.
Q Can you do laundry?
ALJ: She's already asked and answered -- you've asked and she's answered it. Move to the next question.
Q Can you do dishes?
A Yes.
Q Is that affected by your neck pain?
ALJ: Sir, she can perform the task. Let's move on please.
Q Can you vacuum?
A Yes.
Q Is it limited in any way?
ALJ: What was the question?
ATTY: I said, are you limited in how you vacuum.
A A few minutes at a time.
ALJ: That's your last leading suggestive question.

(AR 53-54.) Carey went on to testify that she could no longer perform her previous jobs doing hotel laundry or delivering medications, and she described her battle with depression. (AR 55-56.)

C. ALJ Decision

On May 25, 2016, the ALJ issued a written decision concluding that claimant was not disabled. (AR 34.) Still, the ALJ found that Carey's degenerative disc disease of the cervical spine qualified as a severe impairment, but that it did not meet or medically equal a listed impairment. (AR 27-28.) He further found that while Carey had some upper extremity limitations, they did not preclude her from reaching, feeling, fingering or handling. (AR 28.) In assessing her residual functional capacity in particular, the ALJ found Carey was able "to perform a reduced range of light work," including: sitting, standing or walking for six hours during a workday; lifting or carrying ten pounds frequently and twenty pounds occasionally;

and "occasionally reach[ing] above the shoulder with the left upper extremity, but reach[ing] waist to chest with the left upper extremity frequently." (*Id.*) The ALJ further summarized claimant's hearing testimony, noting that "[a]ctivities such as housework increase[] pain," claimant "has to take breaks when she cleans the house, sweeps, washes windows, and mops," and she can do laundry, dishes and vacuuming for "a few minutes at a time." (AR 29.)

The ALJ next found claimant's description of the intensity, persistence and limiting effects of her symptoms "not entirely consistent" with the record. (*Id.*) For example, the ALJ noted that Dr. Joseph Hebl opined after examining claimant that she should avoid a variety of household chores, including "pushing or pulling a vacuum, and doing laundry," while the ALJ noted claimant performed these activities "despite her alleged symptoms," explaining that:

> While the claimant reported limitations stemming from her neck injury, overall, the claimant continued to function. . . . She also had good activities of daily living. The claimant was able to clean the house, sweeps, wash windows, and mop, with breaks. She testified that she was able to do laundry and dishes. She stated that she could vacuum a few minutes at a time, and drive for twenty to twenty-five minutes.

(AR 30-31.) The ALJ later used claimant's testimony "that she was able to perform many activities of daily living" to discount Dr. Hebl's opinions. (AR 32.) Claimant's ability to "perform some activities of daily living" was also used to discount earlier opinions by her treatment providers. (AR 32-33.)

Based on the opinions of Drs. Hebl, Bente and, to a lesser extent, Carlson as to claimant's residual functional capacity, the ALJ determined that claimant could perform all of her past relevant work as a home attendant, housekeeper and outside deliverer. (AR 33.) Thus, he concluded, claimant was not disabled. (*Id.*)

OPINION

On appeal, this court reviews an ALJ's decision and reverses a "determination only where it is not supported by substantial evidence." *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Skinner v. Astrue*, 478 F.3d 836, 841 (7th Cir. 2007)). Likewise, the court does not "reweigh evidence, resolve conflicts, decide questions of credibility, or substitute [its] own judgment for that of the Commissioner." *Id.* (quoting *Lopez ex rel. Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003)). Ultimately, the court must ensure that the ALJ has created an "accurate and logical bridge" between the evidence and the conclusion that the claimant is not disabled. *Id.* (citing *Lopez*, 336 F.3d at 539).

Here, the claimant raises three arguments for reversal. Two of the arguments are related, contending that the case must be remanded because: (1) the ALJ purported to give the opinions of both Dr. Bente and Dr. Hebl "weight" but then failed to "explain why Dr. Bente's opinion is better"; and (2) the ALJ erred by failing to defer to Dr. Bente's opinion that claimant could only sit for four hours, concluding instead that she could sit for six. (Dkt. #9 at 36-38.) The government responds that "[t]he ALJ thoroughly explained why Dr. Bente's opinion was entitled to more weight" than Dr. Hebl's, noting the ALJ's reliance on Bente's consideration of the impact of claimant's neck and shoulder pain and on how "Bente's environmental limitations accommodated her neck and shoulder pain." (Dkt. #11 at 3.) The government also argues that the ALJ identified three of Hebl's opinions that were not supported: (1) the claimant could only rarely use her left hand to push or pull and only occasionally pull with her right hand; (2) she could only occasionally grasp, handle and move her left wrist; and (3) she could only occasionally reach overhead

with both arms. (*Id.* at 4-5.) Finally, the government adds, "the ALJ found that the record did not support a four-hour sitting restriction because while some examinations showed positive findings in the lower back, others reflected no such limitations." (*Id.* at 4.)

As to claimant's first concern, the ALJ explained that Bente's "opinion was accorded great weight because it was mostly consistent with the record," "took into account the evaluation and opinion of Dr. Hebl," and "adequately took into account the effects of the claimant's impairment and symptoms." (AR 31.) The opinion of Dr. Hebl, on the other hand, was only given "some weight" because "the records did not support some of his restrictive limitations" (AR 32), as identified by the government in its response. Because the ALJ's decision relies on substantial evidence, creating a logical bridge, this ground does not warrant remand.

As to claimant's second concern -- that the ALJ failed to support his finding that the claimant could sit for six hours in an eight-hour workday (AR 28) -- the medical opinions in the record are inconsistent. Dr. Hebl opined that she could sit "occasionally";[1] Dr. Bente opined that she could sit for four hours; Dr. Byrd opined that she could sit for six hours; *and* claimant's treating physician, Dr. Carlson opined that as of August 20, 2014, claimant was "expected to be able to sit for eight hours a day." (*See* AR 31-32.) The ALJ adequately explained the weight he gave to each of these opinions, noting where proposed restrictions were unsupported and where additional restrictions were necessary. (*Id.*) Accordingly, the court cannot say that either the ALJ's weighing of the evidence or his conclusion is unreasonable. The court also cannot say that this determination is not supported by substantial evidence. As

[1] The report filled out by Dr. Hebl indicates that "occasional" means 1-33% (AR 378); 33% of an eight-hour workday would be only 2.64 hours.

a result, this concern is similarly insufficient to warrant a remand.

Finally, claimant contends that the ALJ improperly limited her examination by counsel at her hearing. (Dkt. #9 at 38.) Claimant cites to a number of examples where the ALJ instructed counsel to "stay objective," to "stop testifying and leading," and to "move on." (*Id.* at 38-39.) This, she contends, prevented her counsel from describing the full extent of her limitations and ultimately led the ALJ to conclude that she "had good activities of daily living." (*Id.* at 39-40.) More specifically, claimant objects that the questions asked by counsel were not leading, but instead "were only used to inquire as to [the] nature and extent of [claimant's] limitation in conducting physical activity." (*Id.* at 40.) In response, the government contends that: "Plaintiff's counsel extensively questioned Plaintiff at the hearing"; the ALJ "reasonably limited" counsel's questioning; and she "clearly testified that she could do laundry, do dishes, and vacuum." Accordingly, even if the ALJ's leading rulings were mistaken, the government argues, the mistake was harmless. (Dkt. #11 at 6.)

"Although a claimant has the burden to prove disability, the ALJ has a duty to develop a full and fair record. Failure to fulfill this obligation is 'good cause' to remand for gathering of additional evidence." *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000) (internal citation omitted) (remanding in part because of the ALJ's failure to get updated x-rays to assess knee degeneration and because the ALJ failed to consider evidence of claimant's dizziness). An ALJ "may ask the witness any questions material to the issues and *will* allow the parties or their designated representatives to do so." 20 C.F.R. § 404.950(e) (2015) (emphasis added). Accordingly, "a claimant 'is entitled to present [her] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.'" *Thomas v. Astrue*, No. 09 C 7851, 2011

WL 5052049, *4 (N.D. Ill. Oct. 19, 2011) (quoting 5 U.S.C. § 556(d)) (remanding in part because ALJ prevented counsel from questioning the medical examiner and "counsel should have been given a full opportunity to present her case at the hearing").

Certainly, the failure of the ALJ "to conduct a full and fair hearing by refusing to allow the claimant to testify or cross-examine witnesses" constitutes an abuse of discretion. *See* Social Security Ruling, SSR 13-1p; Titles II and XVI: Agency Processes for Addressing Allegations of Unfairness, Prejudice, Partiality, Bias, Misconduct, or Discrimination by Administrative Law Judges (ALJs), 78 Fed. Reg. 6168, 6169-70 (Jan. 29, 2013). However, the ALJ obviously may exercise reasonable discretion in receiving evidence and conducting an efficient hearing, particularly in light of daunting caseloads. Moreover, remand based on a violation of due process rights is only appropriate with "a showing of prejudice." *Gonzalez v. Comm'r of Soc. Sec.*, Case No: 6:15-cv-334-Orl-DNF, 2016 WL 4927863, at *7 (M.D. Fla. Sept. 16, 2016) (quoting *Graham v. Apfel*, 129 F.3d 1420, 1423 (11th Cir. 1997)).[2]

As quoted in the "Background" section above, the ALJ repeatedly interrupted counsel's questioning because they were leading. Inexplicably, however, counsel did not even attempt to rephrase the questions to be more open ended in a less objectionable "who, what, where, when, how" format (e.g., "How, if at all, has your ability to do laundry been affected by your accident?"). Instead, counsel "check[ed his] notes" and moved on to the subject of hobbies. (AR 54.) Even so, some questions posed by claimant's counsel *could* have been treated as

[2] The district court in *Gonzalez* affirmed the denial of supplemental security income in part because the claimant could not show prejudice where the ALJ asked counsel to pose hypothetical questions and the attorney then abandoned that proposed line of questioning altogether. 2016 WL 4927863, at *7-*8. Likewise, the court also declined to find prejudice in *Cribbs v. Comm'r of Soc. Sec.*, Case No: 3:15-cv-3-J-DNF, 2016 WL 1068480 (M.D. Fla. Mar. 18, 2016), where counsel was briefly allowed to ask about a claimant's limitations working with men and then asked no further questions on that topic, stating "that's all that I had to ask about the PTSD."

preliminary -- to be answered "yes" or "no," followed by an open ended question seeking elaboration -- and the ALJ's failure to treat them that way is problematic at best and arguably prevented claimant from testifying about limitations in her ability to perform activities of daily living at worst. More problematic still, the ALJ then repeatedly relied on claimant's truncated testimony "that she was able to perform many activities of daily living" in discounting medical opinions that her abilities were more restricted, ultimately finding that she "remained able to function in her activities of daily living" and "had good activities of daily living." (AR 31-33.)

Claimant's counsel asserts that by unfairly preventing her from describing the limitations in her daily life, the ALJ essentially directed a finding that her activities of daily living were good and, therefore, that she was not disabled. However, that assertion is not ultimately supported by the record here. Instead, counsel's failure to adjust his questioning to accommodate the ALJ's rulings, despite repeated encouragement by the ALJ to rephrase questions in a non-leading manner, is what limited claimant's testimony. Admittedly, the ALJ need not have been such a stickler when it comes to the rules of evidence. *See* 20 C.F.R. § 404.950(c) (2015) ("The administrative law judge may receive evidence at the hearing even though the evidence would not be admissible in court under the rules of evidence used by the court."). However, requiring that counsel ask non-leading questions when it came to material disputes of fact is certainly *not* a denial of due process; if anything, it is quite the opposite. On that score, neither the claimant nor her counsel points to anything in the record that would support her contention that she was denied a full and fair hearing. In fact, at multiple points, the ALJ interrupted counsel's questioning to *expand* the line of inquiry and to seek additional information. (AR 45-46, 49, 56-63.) On this record at least, therefore, limiting a claimant's direct examination to non-leading questions is not enough by itself to warrant remand. *Compare*

Koker v. Comm'r, Soc. Sec. Admin., No. 6:14-cv-02043-KI, 2015 WL 8514320, at *4 (D. Ore. Dec. 11, 2015) (concluding ALJ's "failure to allow full development of the record was error" where ALJ prevented claimant's attorney from questioning claimant's employer about claimant's limitations since that testimony was "crucial" to the decision whether claimant's work was substantial gainful activity).

Finally, the record is equivocal on claimant's ability to engage in activities of daily living. In April 2012, claimant's physical therapist noted her reports of headaches after stretching and pain from driving, but that "[n]o other activities cause her pain." (AR 356.) In November of that year, her physician noted that "[d]oing housework is a problem." (AR 329.) In August 2013, claimant told the Social Security Administration that "she is able to do everything, but some days are harder than others due to pain level" and that "[s]he cooks, cleans, does laundry, shops and manages her accounts and bills," such that she "tr[ies] to do a little something everyday." (AR 244.) That month, she also reported to her doctor that "[s]he does her own housework." (AR 400.) Even on her October 2013 adult function report, she noted that she could vacuum some, clean the bathroom and dust weekly or biweekly, but that she had to "take breaks." (AR 268.) In fairness, a few months later in January 2014, her physician noted claimant's report that "[m]oderate activities such as housekeeping activities hurt a lot. She finds that vacuuming is particularly a problem." (AR 636.) In the absence of more definitive evidence that the ALJ erred in finding that claimant's activities of daily living were good, the ALJ's apparent view that the ability to do daily chores is a binary question, while somewhat concerning, is not enough to warrant remand on this record.

ORDER

Accordingly, IT IS ORDERED that the decision of defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying claimant Sueann Carey's application for disability and disability insurance benefits is AFFIRMED. The clerk of court is further directed to enter judgment for defendant and close this case.

Entered this 31st day of August, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge