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

GREGORY CONTRERAS-KOLBERG,

Plaintiff,

v.

CAROLYN COLVIN,
Acting Commissioner of Social Security,

Defendant.

OPINION & ORDER

13-cv-108-jdp

Plaintiff Gregory Contreras-Kolberg seeks judicial review of a final decision of the Commissioner of Social Security finding him not disabled within the meaning of the Social Security Act. Plaintiff contends, principally, that remand is warranted because the Administrative Law Judge (ALJ): (1) wrongly assessed the credibility of plaintiff's testimony regarding his impairments; (2) wrongly discredited the opinion of plaintiff's treating physician; and (3) wrongly ignored evidence of plaintiff's past absenteeism. According to plaintiff, the ALJ's residual functional capacity is deficient because it did not properly consider this evidence. The court concludes that, although the Commissioner's conclusion might be correct, the ALJ did not adequately consider the evidence of record. Remand is warranted.

BACKGROUND

A. Procedural Background

Plaintiff, born September 18, 1987, has an eleventh-grade education and has never been employed. He received supplemental security income disability benefits as a child, which ended shortly after his 18th birthday on November 1, 2005, after a redetermination of his eligibility for benefits. R. 190, 418.[1] Wisconsin's Department of Vocational Rehabilitation approved plaintiff for services but closed his case in June 2008 because he did not respond to calls and

[1] The record citations are to the Administrative Record, Dkt. 7.

correspondence and failed to attend scheduled appointments. R. 194, 309-12.

Seeking reinstitution of benefits, plaintiff filed a request for a hearing, which occurred on August 22, 2008, before ALJ John H. Pleuss. On September 16, 2008, ALJ Pleuss found that plaintiff was not disabled within the meaning of the Social Security Act. R. 418-25. In further proceedings, plaintiff testified at a second hearing before ALJ Pleuss on December 15, 2009. ALJ Pleuss found that plaintiff was capable of light work with environmental limitations, was seriously limited in dealing with the public and work stresses, and must be able to miss one day of work each month. R. 192. Given these restrictions, ALJ Pleuss again found that plaintiff was not disabled on March 26, 2010. R. 188-97.

On June 9, 2010, plaintiff applied anew for supplemental security income alleging that he has been disabled since his date of birth as a result of asthma, allergies causing rhinitis and chronic sinusitis, and immunoglobulin deficiency. The application was denied initially, R. 123-126, and upon reconsideration, R. 130-133. Then, after a hearing, ALJ William S. Coleman denied plaintiff's application on the grounds that plaintiff had the residual functional capacity to perform certain light-duty jobs despite his impairments, such as telemarketer, loader of semiconductor dyes, semiconductor wafer breaker, and semiconductor bonder. R. 28-29. Plaintiff's request for review was denied by the Appeals Council, making ALJ Coleman's decision the final determination of the Commissioner. On February 14, 2013, plaintiff sought judicial review in this court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

Before the court is the judicial review of ALJ Coleman's January 13, 2012, decision. Although plaintiff alleges disability since his date of birth, he must establish that he was disabled as of his application date. The record includes information dated prior to the application date, and the ALJ properly considered, weighed, and relied on some of this evidence in considering whether plaintiff was disabled as of June 9, 2010. The court reviews the ALJ's

decision to determine whether it is supported by sufficient evidence to support the conclusion that plaintiff was not disabled as of the application date.

B. Relevant Medical Evidence

The medical evidence includes plaintiff's records from Mercy Clinic East and forms completed by state agency reviewing physicians. Many of the Mercy Clinic East records document the treatment provided by Dr. Ronald Ragotzy, who has treated plaintiff since 1992 when plaintiff was about five years old. R. 402. However, there are gaps in Dr. Ragotzy's treatment of plaintiff, most notably in the approximately two years prior to the hearing, during which plaintiff did not have insurance. R. 97-98. After the application date, Dr. Ragotzy treated plaintiff twice, in July 2010 and February 2011. Although Dr. Ragotzy had been plaintiff's physician since he was a child, plaintiff went to Mercy South, a low-income clinic, while he was uninsured. *Id.* Nevertheless, during the period without insurance, plaintiff's mother stayed in contact with Dr. Ragotzy about plaintiff's condition and to obtain medication. R. 98-99.

Dr. Ragotzy also prepared correspondence in support of plaintiff's efforts to secure disability benefits. In August 2008, Dr. Ragotzy sent a letter to a paralegal at Legal Action of Wisconsin, Inc., accompanied by a physical residual functional capacity questionnaire. R. 394-99. In the August 2008 letter, Dr. Ragotzy stated that plaintiff does not meet disability criteria for his asthma because strict environmental controls were "very effective at controlling his exacerbations." R. 399. Dr. Ragotzy apparently believed that plaintiff would meet disability criteria in the absence of strict environmental controls. Dr. Ragotzy's physical residual functional capacity questionnaire indicated that plaintiff "would be able to sit for more than six hours in an eight hour day, stand or walk for more than six hours in an eight hour day, and occasionally lift less than ten pounds." R. 27, 396-97. Dr. Ragotzy further stated that plaintiff would require frequent breaks and would miss more than three days of work each month, if

strict environmental restrictions were not followed. R. 27, 397-98, 400.

A little more than a year later, Dr. Ragotzy submitted a similar letter. R. 402. In this October 2009 letter, Dr. Ragotzy stated that plaintiff would miss at least four days of work each month, plus additional absences due to weather conditions. *Id.* An accompanying pulmonary impairment medical assessment form suggested that plaintiff's condition had worsened since Dr. Ragotzy's August 2008 assessment. R. 403-06. In particular, the assessment form stated that plaintiff had acute asthma attacks at least eight times per year, each one incapacitating plaintiff for five to seven days, and that plaintiff's symptoms were severe enough to interfere with attention and concentration several times a day. R. 403. On the August 2008 capacity questionnaire, plaintiff's symptoms were not severe enough to interfere with attention and concentration. R. 395. Although Dr. Ragotzy's numerical responses regarding plaintiff's ability to sit, stand, and walk were the same on both the August 2008 capacity questionnaire and the October 2009 assessment form, they are qualified in the latter, with notations regarding medication. R. 396, 404-05. Both submissions state that plaintiff would likely have good days and bad days. R. 398, 406.

Dr. Ragotzy submitted additional letters in November 2010, May 2011, and January 2012. Dr. Ragotzy stated in these letters that plaintiff has no substantial work potential. R. 184, 260, 479. The letters were almost identical, stating that "even though his episodes do not last for 12 months in a continuous row, his asthmatic symptoms without environmental controls are certainly life threatening and could result in death. Without the above mentioned medications and excessive environmental controls [plaintiff] would be at extreme risk for significant morbidity and mortality from his asthma." *Id.* The May 2011 and January 2012 letters added that plaintiff's employment would be limited by frequent breaks and absences. R. 479.

Between May and September 2011, plaintiff was seen by other physicians on four

occasions for treatment of his asthma. R. 245-61. Plaintiff reported to these physicians that his asthma was well controlled at all the appointments, except one at which he reported dry cough, runny nose, sinus pressure, and headaches. These physicians reported normal physical examinations of his chest and lungs, which were clear to auscultation without wheezes, rales, or rhonchi. In this time period, plaintiff did not go to a hospital or emergency room for treatment.

Also in evidence are documents prepared by state agency physicians. In October 2010, Dr. Pat Chan completed a physical residual functional capacity assessment. R. 453-60. Dr. Chan did not find exertional, postural, manipulative, visual, or communicative limitations. The only limitations Dr. Chan placed on plaintiff were environmental limitations—to avoid even moderate exposure to extreme cold, extreme heat, fumes, odors, dusts, gases, and poor ventilation. Dr. Chan cited a May 2010 record in which plaintiff denied having severe chest problems or wheezing. In April 2011, Dr. Syd Foster affirmed Dr. Chan's physical residual functional capacity assessment. R. 492. He wrote only that he had "reviewed the evidence and affirm the RFC assessment dated 10/4/10 as written." *Id.*

C. The Administrative Hearing and Decision

On January 9, 2012, ALJ Coleman held a 128-minute hearing during which he took testimony from plaintiff and vocational expert Dr. Karl Botterbusch. R. 102-18. The documentary evidence, including plaintiff's medical records summarized above, was admitted without objection.

The ALJ asked plaintiff about his symptoms, his daily activities, and the reasons why he was unable to work. Plaintiff testified that he lives with his mother and sister, and he does not leave the house often. R. 64. Plaintiff stated that his asthma and allergies to "a lot of things" would cause him to take unscheduled breaks and prevent him from working full-time. R. 67. During asthma attacks (which may be triggered by allergies, physical exertion, cold, or heat),

plaintiff has difficulty breathing, but use of the nebulizer or an inhaler helps. R. 68-74, 83. Dust, smoke, and chemicals may also set off an asthma attack. R. 80. Plaintiff has sinus problems that are treated with antibiotics and a nose spray. R. 88-90. Plaintiff further stated that he has limitations with standing, but not sitting, and that he could walk five to ten minutes without an asthma attack. R. 77-78. In the year before the hearing, plaintiff spent most of his time inside at home to control his allergies. R. 84.

While in high school, plaintiff had a high number of absences because of his asthma and allergies—54 excused absences in his junior year and 80 excused absences in his junior year—and he received mostly failing grades. R. 94, 293. Although plaintiff has applied for jobs at stores (e.g., Wal-Mart) and believes that he could work as a cashier if "feeling okay," plaintiff testified that he thinks he would be absent a lot. R. 67.

The ALJ asked Dr. Botterbusch a series of hypothetical questions involving a person with plaintiff's limitations, all of which assumed a person of plaintiff's age and education. R. 103-08. The initial hypothetical posed by the ALJ was an individual working all exertional levels with the following limitations: moderate temperatures, avoiding exposure to extreme cold, heat, and humidity; no respiratory irritants such as fumes, odors, dusts, noxious gases, toxins, and chemicals; and no poor ventilation. Dr. Botterbusch opined that such a limited worker could be a sales attendant or cashier checker, and that there were significant numbers of such positions in Wisconsin. As to the cashier checker position, Dr. Botterbusch noted his disagreement with the specific vocational preparation (SVP) rating in the dictionary of occupational titles, which is three.[2] Dr. Botterbusch testified that he considers cashier checker to be unskilled work, with an SVP of two. However, adding the limitation of no exposure to the general public would

[2] Work with a SVP rating of three is considered semi-skilled, requiring up to three months of training to learn the job.

eliminate both sales attendant and cashier checker as options. R. 114-15.

The ALJ then added a further limitation that the individual could work only at the sedentary exertional level. R. 105-06. Dr. Botterbusch answered that such a limited worker could be a telemarketer, loader of semiconductor dyes, semiconductor wafer breaker, and semiconductor bonder, and that there were significant numbers of such positions in Wisconsin. All of the jobs have an SVP rating of two, except for telemarketer. Dr. Botterbusch voiced his disagreement with the higher rating and believes that telemarketer has an SVP of two. As with the previous disagreement with the SVP rating, Dr. Botterbusch based his opinion on personal observations, teaching, and occupational analysis. The additional limitation of exposure only to one person (i.e., a supervisor, and no co-workers) would eliminate all four jobs, because they require sitting next to another person. R. 117.

Finally, the ALJ added a further limitation that the individual could: do only occasional stooping, kneeling, crouching, climbing, or reaching above the shoulders; rarely lift 10 pounds; and occasionally lift less than 10 pounds. R. 106-07. This time, Dr. Botterbusch stated that only the telemarketer job would be suitable and, according to his previous testimony, there are 7,900 such jobs in Wisconsin.

The ALJ issued a decision on January 13, 2012, concluding that plaintiff was not disabled. In short, the ALJ discounted the post-2008 reports of plaintiff's treating physician, who had submitted letters after the application date that the ALJ deemed "drastically more restrictive" than previous reports. The ALJ concluded that plaintiff's asthma is well controlled, but that he is subject to more stringent environmental restrictions than assessed by the state agency physicians, whose reports were given partial weight. Although plaintiff did not have past relevant work, there were jobs available to him that only require sedentary work. For these reasons, the ALJ determined that plaintiff was not under a disability within the meaning of the

Social Security Act.

OPINION

When a federal court reviews a final decision by the Commissioner of Social Security, the Commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the Commissioner's findings under § 405(g), the court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that of the ALJ. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

Even so, a district court may not simply "rubber-stamp" the Commissioner's decision without a critical review of the evidence. *See Ehrhart v. Sec'y of Health and Human Servs.*, 969 F.2d 534, 538 (7th Cir. 1992). Rather, "the court must conduct a critical review of the evidence before affirming the [C]ommissioner's decision, and the decision cannot stand if it lacks evidentiary support or is so poorly articulated as to prevent meaningful review." *Hemminger v. Astrue*, 590 F. Supp. 2d 1073, 1079 (W.D. Wis. 2008) (internal citations omitted). To provide the necessary support for a decision to deny benefits, the ALJ must "build an accurate and logical bridge from the evidence to [his] conclusion." *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

After reviewing the record in this case, the court concludes that the ALJ erred in assessing plaintiff's credibility, in analyzing the opinions of the treating physician, and in ignoring certain record evidence. On remand, the ALJ must consider this evidence, making sure to fully explain his reasons for discounting any of it.

A. Plaintiff's testimony and credibility

Plaintiff argues that ALJ Coleman wrongly assessed the credibility of plaintiff's testimony regarding his impairments. As duly noted by plaintiff, the ALJ uses boilerplate language in its decision:

> After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.

R. 25. This language is almost identical to language criticized by the Seventh Circuit in *Bjornson v. Astrue*, 671 F.3d 640, 644-46 (7th Cir. 2007). The phrase "not credible to the extent they are inconsistent with the above residual functional capacity assessment," R. 25, "yields no clue to what weight the trier of fact gave the testimony . . . and fails to inform us in a meaningful, reviewable way of the specific evidence the ALJ considered in determining that claimant's complaints were not credible." *Bjornson*, 671 F.3d at 645 (disapproving the phrase "not entirely credible") (citations omitted). Further, the boilerplate language implies that plaintiff's residual functional capacity was determined before plaintiff's credibility. *Id.* at 645-46.

Social Security Ruling (SSR) 96-7p provides factors that the ALJ must consider in addition to the objective medical evidence, including: daily activities; pain or symptoms; aggravating factors; medication and other treatment; and limitations and restrictions. *Villano v. Astrue*, 556 F.3d 558, 562 (7th Cir. 2009). Plaintiff contends that ALJ Coleman's analysis of these factors is deficient in that he failed to sufficiently discuss any but the fifth factor, medication and other treatment. The court agrees that certain factors were not addressed thoroughly (specifically, plaintiff's daily activities, pain, and limitations), but the ALJ considered and discussed more than just medication and other treatment.

Plaintiff contends that the ALJ wrongly relied on the negative pulmonary function test as an indication that plaintiff does not have asthma. Dkt. 10, at 9. This argument is wrong. The ALJ did not find that plaintiff does not have asthma. *See* R. 25-26. The ALJ properly considered the negative pulmonary function test as evidence of the severity of plaintiff's condition and in evaluating the credibility of plaintiff's condition.

Plaintiff asserts that the ALJ did not properly credit plaintiff's mother's calls to Dr. Ragotzy as providing medical treatment in 2011. Dkt. 10, at 10. But the ALJ explicitly acknowledged these calls in plaintiff's medical record. R. 26 ("[T]he record reflects minimal medical care related to his impairments as a result of reported lack of insurance and resources . . . [H]is mother reported some increased symptoms [to Dr. Ragotzy] by phone related to weather changes and exposure to allergens."). However, the ALJ does not mention that Dr. Ragotzy sometimes prescribed medication to plaintiff over the phone. After an appointment with Dr. Ragotzy in February 2011, plaintiff was seen four times for treatment by other physicians between May and September 2011. The ALJ should consider whether plaintiff's minimal treatment was due to his lack of insurance.

The ALJ concluded that "the factors listed in SSR 96-7p support a finding that the claimant's complaints are credible only to the extent that they are consistent with the residual functional capacity set forth above." R. 26. Boilerplate language aside, this court determines that the ALJ's analysis is lacking. The ALJ properly points to evidence suggesting that, in 2011, plaintiff's asthma was not as severe as plaintiff claimed. On remand, the ALJ should specifically identify what limitations alleged by plaintiff are contradicted by the medical evidence.

B. Plaintiff's treating physician

Plaintiff argues that ALJ Coleman wrongly discredited the opinion of Dr. Ragotzy, which should have been given controlling weight. The "treating physician rule" provides that a treating

physician's opinion "that is consistent with the record is generally entitled to 'controlling weight' . . . [and an] ALJ who chooses to reject a treating physician's opinion must provide a sound explanation" for doing so. *Jelinek v. Astrue*, 662 F.3d 805, 811 (7th Cir. 2011) (citations omitted). The parties do not dispute that Dr. Ragotzy is plaintiff's treating physician. However, the ALJ decided to give more weight to Dr. Ragotzy's opinion prior to the application date and less weight to Dr. Ragotzy's opinion subsequent to the application date. R. 27. The analysis of why little weight had been given to Dr. Ragotzy's later opinions is limited to three sentences explaining that, after the application date, Dr. Ragotzy met with plaintiff only twice and Dr. Ragotzy's letters include limitations that "are drastically more restrictive than set forth in the doctor's previous correspondence even though there is no medical evidence to suggest any significant exacerbation or worsening of the claimant's medical conditions." *Id.* The ALJ deemed Dr. Ragotzy's later limitations not supported by recent medical evidence indicating that plaintiff's condition is well controlled. *Id.*

The pre-application opinion discussed by the ALJ is Dr. Ragotzy's August 2008 letter stating that plaintiff does not meet disability criteria for his asthma because of strict environmental controls. R. 394-99. But the ALJ does not discuss Dr. Ragotzy's October 2009 letter. R. 402. The pulmonary impairment assessment accompanying the October 2009 letter suggested that plaintiff's condition had worsened. R. 403-06. The post-application letters, namely those submitted in November 2010 and May 2011, directly expressed Dr. Ragotzy's opinion that plaintiff has no substantial work potential. R. 184, 479. Dr. Ragotzy submitted another similar letter in January 2012, which was not addressed by the ALJ. R. 260.

In discounting Dr. Ragotzy's 2010-2012 letters, the ALJ properly took into consideration the fact that Dr. Ragotzy only saw plaintiff twice after the application date. In addition, Dr. Ragotzy's 2010-2012 letters essentially provide a legal conclusion, which is less helpful and

persuasive than his medical assessment. However, on remand, the ALJ should consider the October 2009 letter and the pulmonary impairment assessment, making sure to explain his reasons for discounting this evidence. With medical evidence contradicting the post-2008 letters, the record could support giving the later opinions less weight.

The ALJ does not sufficiently explain why Dr. Ragotzy's later opinions are given less weight. On remand, the ALJ should explicitly consider the: (1) length, nature, and extent of the treatment relationship; (2) frequency of examination; (3) physician's specialty; (4) types of tests performed; and (5) consistency and supportability of the physician's opinion. *Scott v. Astrue*, 647 F.3d 734, 740 (7th Cir. 2011); 20 C.F.R. § 404.1527(d)(2). These factors should be addressed with respect to Dr. Ragotzy's pre- and post-application opinions, taking into consideration other medical evidence in the record.

C. Plaintiff's past absenteeism

Finally, plaintiff argues that ALJ Coleman wrongly ignored evidence of plaintiff's past absenteeism. Plaintiff entered into evidence his high school attendance records, and he testified that that his high number of absences and poor grades were due to his asthma and allergies. R. 94, 293. The record also contains Dr. Ragotzy's opinions on the number and extent of days off work and workday breaks that plaintiff would need to accommodate his condition.

The vocational expert also testified regarding absenteeism and breaks during the workday. Dr. Botterbusch stated that employers expect approximately two absences per month and two 15-minute breaks per day, in addition to a 30-minute lunch. R. 108. When asked what percentage of a typical workday employers will tolerate employees being off-task (aside from regularly scheduled breaks), Dr. Botterbusch answered 10%. R. 108-109.

In his decision, the ALJ summarily concluded that "[t]here is no reason to believe that the claimant would be frequently absent from work or require frequent unscheduled breaks if he

followed the strict environmental and physical restrictions set forth in the residual functional capacity." R. 26. Although the ALJ cannot find plaintiff eligible for benefits prior to the application date, the ALJ should consider evidence of plaintiff's high school absences, along with plaintiff's testimony about the practical effects of his condition and other record evidence regarding potential workplace absenteeism. On remand, the ALJ may decide that plaintiff's absences in high school were caused by factors that would not be present in the workplace. But the ALJ should consider this evidence, explaining why he finds it immaterial, if he does so. The fact that a previous agency decision considered plaintiff's past absenteeism and found him not disabled does not affect the ALJ's obligation to deliberate on this point. *Parker v. Astrue*, 597 F.3d 920, 922 (7th Cir. 2010) (An agency's lawyers may not defend the agency's decision on grounds that were not used by the agency.).

ORDER

IT IS ORDERED that the decision of defendant Carolyn W. Colvin, Commissioner of Social Security, denying plaintiff Gregory Contreras-Kolberg's application for disability benefits is REVERSED and REMANDED under 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 9th day of September, 2014.

BY THE COURT:
/s/
JAMES D. PETERSON
District Judge