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

CHARLES W. DOLAN,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner
For Social Security,

Defendant.

OPINION AND ORDER

20-cv-364-wmc

Pursuant to 42 U.S.C. § 405(g), plaintiff Charles W. Dolan seeks judicial review of the Social Security Commissioner's final determination, which upheld the opinion of Administrative Law Judge ("ALJ") Michael Schaefer that Dolan was not disabled. On appeal to this court, plaintiff maintains that the ALJ erred in three core respects: (1) by failing to ensure that the vocational expert's testimony was reliable; (2) by announcing inconsistent standards in evaluating Dolan's subjective symptoms and limitations; and (3) in discounting the opinion of Dolan's treatment provider Physician Assistant Brian Quick. For the reasons that follow, the court will reverse the denial of benefits and remand for further proceedings consistent with this opinion.

BACKGROUND[1]

A. Overview

Plaintiff Charles W. Dolan has at least a high school education, is able to communicate in English and has past relevant work experience as a sales attendant and

[1] The following facts are drawn from the administrative record, which can be found at dkt. #15.

landscape specialist, both of which are heavy exertional work. Dolan has not engaged in substantial gainful activity since April 20, 2017, the same date as the alleged onset of disability. Dolan applied for social security disability benefits on April 20, 2017, and his date last insured is June 30, 2022.

With a birth date of May 16, 1956, Dolan was 60 years-old at his alleged disability onset, which is defined as an individual "closely approaching advanced age." 20 C.F.R. § 404.1563. In his application, Dolan specifically claimed disability based on back injury and diabetes. (AR 74.)

B. ALJ Decision

ALJ Schaefer held a hearing on February 28, 2019, at which Dolan appeared both personally and by counsel. On May 8, 2019, the ALJ issued an opinion finding that Dolan had not been under a disability within the meaning of the Social Security Act from his onset date of April 20, 2017, through the date of the opinion. The ALJ first determined that Dolan had the following severe impairments: "lumbar spine degenerative disc disease with Grade 1 spondylolisthesis at L4-5 and mild to moderate multi-level spondylosis without disc herniation or canal stenosis." (AR 15.) At the same time, the ALJ concluded that a number of plaintiff's other physical and mental impairments were not severe, findings Dolan does not challenge on appeal. (AR 15-18.)

The ALJ next found that Dolan had the residual functional capacity ("RFC") to perform medium exertional work with additional, exertional restrictions, including that he "can frequently climb ramps or stairs, stoop, kneel, crouch, and crawl"; "can occasionally climb ladders, ropes, or scaffolds"; and "must avoid more than occasional exposure to

extremes of cold, pulmonary irritants (including fumes, odors, dusts, and gases) or poorly ventilated areas." (AR 18-19.) The ALJ then described the standard for evaluating plaintiff's symptoms and the "intensity, persistence, and limiting effects" of those symptoms, citing appropriately to SSR 16-13p. (AR 19.) After setting forth that standard, the ALJ recounted plaintiff's complaints of back pain, noting that he only uses over-the-counter pain relievers, but acknowledging that he limits himself in such a way out of concern with past addiction issues, that he reported only being able to sit and stand for approximately twenty minutes before needing to alter his position, that he needs to lay down at least three times a day, and that he can walk a mile and a half at a time. (AR 19.)

The ALJ then reviewed the medical record, including an April 2017 x-ray that showed "mild spondylolisthesis at L4-L5, mild disc space narrowing at L4-L5, degenerative changes at L4-L5, and no evidence of acute fracture or other osseous abnormalities"; a June 2017 MRI that showed "L4-L5 grade 1 spondylolisthesis, which appeared degenerative; mild to moderate lumbar spondylosis without significant focal disc herniation or canal stenosis"; and medical records in which Dolan "consistently reported mild to moderate pain," including to his chiropractor. (AR 20.) Based on this record, the ALJ concluded that plaintiff could perform medium exertional work, with the additional exertional limitations described above to address physical limitations caused by his non-severe diabetes and chronic obstructive pulmonary disease conditions.

The ALJ then explained why he was not fully crediting Dolan's account. In that portion of the decision, the ALJ stated that "[t]he record fails to fully substantiate the claimant's allegations of disabling pain," which, as described below, plaintiff contends

misstates the appropriate standard. (AR 20.) After making this statement, the ALJ then relies on the mild to moderate findings in the x-ray MRI, "good objective find[ing]s during physical valuations," and the "dearth of treatment history to substantiate the severity of the pain he alleges" to discredit Dolan. (AR 20-21.)

The ALJ then reviewed the opinion testimony, finding the opinions of the two state agency medical consultants that Dolan could perform medium exertional work persuasive, but finding the opinions of Dolan's treatment provider Brian Quick, PA-C, unpersuasive. Quick created two forms, one dated May 9, 2016, in which he opined that Dolan "was unable to perform any of his job functions," and a second dated September 28, 2017, in which he opined that Dolan

> could only stand for 15 minutes and sit for 60 minutes before needing to get up or move; the claimant could sit for at least six hours in an 8 hours work day and stand/walk or 2 hours of an 8 hour work day; that the claimant could frequently lift 20 pounds and rarely lift 50 pounds; that the claimant could rarely stoop, crouch, climb ladders, and occasionally climb stairs; and that the claimant was likely to miss about four days of work each month.

(AR 21-22 (citing 2F/13-14, 9F).) The ALJ discounted these opinions because they were (1) "inconsistent with X-rays of the claimant's lumbar spine" and (2) "not consistent with the claimant's reported activities of daily living." (AR 22.) The ALJ also relied on Quick's April 19, 2017, note that he did "not think Charlie qualified for permanent disability on my findings today." (AR 22 (citing 2F/7).) In noting this, however, the ALJ also stated that this was "not a full functional assessment but it only conclusory and is not treated as a medical opinion"; however the ALJ concluded that it is "relevant in assessing the quality and pervasiveness of the opinions from Quick referenced above." (AR 22.)

With the assistance of the vocational expert ("VE"), the ALJ then concluded that Dolan could not perform his past relevant work, since these jobs were heavy exertional work. Nonetheless, the ALJ concluded that there were jobs that plaintiff could perform that exist in significant numbers in the national economy, citing as examples: assembler (DOT 806.684-010) with 437,299 jobs nationally; counter supply worker (DOT 319.687-010) with 124,759 jobs nationally; and dining room attendant (DOT 311.677-018) with 61,402 jobs nationally. (AR 24.)

The court then addressed plaintiff's counsel's objection to the estimated job numbers, and specifically his objection to "the reliance by the vocational expert on a software package called 'Job Browser Pro' developed by a private business, SkillTran, LLC." (AR 24.) The ALJ explained that the VE testified that "Job Browsers Pro includes an option to obtain an estimate of national job numbers for a specific DOT code or job," that the VE testified that the "specific methodology or algorithm used for making that estimate . . . is proprietary," and that the expert was "unable to describe that methodology in detail." (AR 25.)

Nonetheless, the ALJ overruled the objection because plaintiff's objection to the VE's inability to describe the specific methodology is not a "new issue," and specifically "[t]he fact that the expert was not able to detail with specificity the statistical methodology used by the computer software to estimate the number of jobs available nationally is not fatal." (*Id.*) Instead, the ALJ concluded that the record does establish that Job Browser Pro relies "on employment and job incidence data from reliable, and administratively noticed, sources including the Department of Labor," but the software also does "what

VE's have done for year relying on the government data and the 'crosswalk' and whatever degree of judgment the particular expert elects to use in adjusting or modifying the estimates based on training, experience, and/or familiarly with the labor market." (*Id.*) The ALJ, however, stops short of providing any explanation of how Job Browser Pro allocates the DOL data to specific DOT codes. Instead, the ALJ points out that the Job Browser Pro "attempts to go farther and calculate an estimate of the number of the jobs in the economy by DOT code" and, therefore "attempts to provide a more precise, narrow, and presumably, *smaller* estimate than methodologies which do not attempt to narrow the estimation beyond more broad occupational categories." (AR 26 (emphasis in original).)

Material to plaintiff's challenge, during the hearing, the VE Mary Andrews indicated that she used "[a]s a base . . . Job Browser Pro, which is a software application developed by the company SkillTRAN," and that SkillTRAN "obtains publicly available labor statistics and census data to the occupational group code, and then further estimate down to the specific DOT code, so the employment estimates I provided to you today are to those specific to occupational DOT codes." (AR 61.) When asked by plaintiff's counsel how SkillTRAN determines the job numbers for specific DOT numbers, the VE provided that they "use a weighting factor, weighted information that comes from census data," and that "they don't necessarily[,] like some sources, provide an equal weighting of the various DOT codes," instead they rely on "census data, and knowledge and feedback from rehab counselors and various professional[s] throughout the United States." (AR 69.) The VE also explained that SkillTRAN has a "website that's publicly available" and described "how they arrive at reducing those numbers from the occupational group code[] to the specific

DOT code." (AR 69-70.) When further challenged, the VE stated, "I am not a statistician, so I'm not able to describe the methodology any further than what I just did." (AR 70.)

OPINION

The standard by which a federal court reviews a final decision by the Commissioner of Social Security is well-settled. Specifically, findings of fact are "conclusive," so long as they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Provided the Commissioner's findings under § 405(g) are supported by such "substantial evidence," this 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). Similarly, where conflicting evidence allows reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the Commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993).

At the same time, the court must conduct a "critical review of the evidence," *id.*, and insure the ALJ has provided "a logical bridge" between findings of fact and conclusions of law. *Stephens v. Berryhill*, 888 F.3d 323, 327 (7th Cir. 2018). Thus, plaintiff's three core challenges on appeal must be considered under this deferential standard, which the court will address in turn.

I. Reliability of VE's Job Numbers

The focus of plaintiff's appeal is on his challenge to the ALJ's reliance on the VE's job numbers for the three jobs she identified plaintiff could perform. As detailed above, at the hearing plaintiff's counsel challenged the VE's reliance on the Job Browser Pro software system. In *Chavez v. Berryhill*, 895 F.3d 962 (7th Cir. 2018), the Seventh Circuit held that the ALJ's reliance on a VE's job estimates is based on substantial evidence only if the job estimates are the "product of a reliable method." *Id.* at 968. While this is not an "overly exacting standard" and there is no requirement of a specific method for approaching this approximation," still "any method that the agency uses to estimate job numbers must be supported with evidence sufficient to provide some modicum of confidence in its reliability." *Id.* at 968-69.

More recently, in *Brace v. Saul*, 970 F.3d 818 (7th Cir. 2020), the court revisited the reliability requirement, finding that a VE's "[t]estimony that incants unelaborated words and phrases such as 'weighting' and allocation' and 'my information that I have' cannot possible satisfy the substantial-evidence standard." *Id.* at 822. While the Seventh Circuit has not considered the reliability of the Job Browser Pro software or the methodology behind it, a number of district courts, including this court, has considered challenges. These, cases, however, demonstrate that it is not the software itself that has been deemed reliable or unreliable; instead, reliability turns on the VE's ability to explain adequately the methodology behind it, in conjunction with other data sources on which the VE relied in determining job number estimates. *See Maples v. Saul*, No. 1:20-CV-157-PPS, 2021 WL 1291766, at *5–6 (N.D. Ind. Apr. 7, 2021) (citing district court opinions

within the 7th Circuit where "VEs were able to meaningfully describe the process they employed" and other cases where remand was warranted because the "VEs were unable to explain their process").

Recently, Judge Peterson considered such a challenge in *Westendorf v. Saul*, No. 19-cv-1019-jdp, 2020 WL 4381991 (W.D. Wis. July 31, 2020), remanding the case, finding that the VE's estimates were not supported by substantial evidence. In so finding, the court relied on (1) the VE's inability "to explain how Job Browser Pro actually derives DOT-code-specific job estimates from" the Bureau of Labor Statistics data, and (2) the insufficiency of a six-page document purportedly outlining the methodology provided by the VE to the ALJ after the hearing. *Id.* at *1, *3. In particular, the document was out of date, having been published in 2008 and was also "opaque" in that it failed to actually describe how the software works. *Id.* at *3. The court concluded that while "Job Browser Pro might be a useful tool, [] the VE needs to be able to explain how Job Browser Pro makes its job number estimates, how she used the software to generate her own estimates, and why she believes those estimates are reliable." *Westendorf*, 2020 WL 4381991, at *4.

Here, our VE appears to have provided a better explanation than that offered in *Westendorf*, but it does not cross the threshold of overcoming the "jargon" concern raised in *Brace*. Specifically, the VE explained that SkillTRAN "obtains publicly available labor statistics and census data to the occupational group code, and then further estimate down to the specific DOT code," but the VE stopped short of being able to explain how SkillTRAN drills down to the specific estimates, other than noting that SkillTRAN relies on "census data, and knowledge and feedback from rehab counselors and various

professional[s] throughout the United States." (AR 61, 69.) Instead, the VE apparently directed the ALJ to a website that explains the methodology, but there is nothing in the ALJ's decision that signals that he reviewed the website or otherwise gained additional information about the methodology to insure its reliability. *See, e.g.*, *Figarelli v. Berryhill*, No. 17-CV-1017, 2018 WL 6523027, at *8 (E.D. Wis. Dec. 12, 2018) (remanding because after the claimant objected to the VE's testimony, triggering an obligation on the part of the ALJ to ensure that the Job Browser Pro information was reliable).

Other courts have concluded that the VE's reliance on the Job Browser Pro software was reliable because it was used *in conjunction with* other sources and the VE's own experience. *See, e.g.*, *Dahl v. Saul*, No. 18-C-676, 2019 WL 4239829, at *4 (E.D. Wis. Sept. 6, 2019); *Clinton S. v. Berryhill*, No. 1:17-CV-1492, 2018 WL 6247261, at *15 (C.D. Ill. Nov. 29, 2018); *Irwin v. Berryhill*, No. 1:17-CV-00408-SLC, 2018 WL 5873877, at *14 (N.D. Ind. Nov. 8, 2018). Here, however, the VE provided no discussion of other sources, including her own experience, that she relied on as a check on the Job Browser Pro's estimation of job numbers by DOT code. If she had provided this testimony, then perhaps this would have formed a basis for finding the VE's estimation sufficiently reliable.

The ALJ points out in his decision that the issue of winnowing down Department of Labor statistics to job estimate numbers by DOT codes is not a new issue. Fair enough, but the fact that it is a common issue does not relieve the ALJ from ensuring that the VE's efforts to provide these job estimates were reliable. Moreover, the ALJ's belief that the fact that the job estimates were "more precise, narrow, and presumably *smaller* estimation[s]" than the overall Department of Labor statistics also does not solve the issue. The VE has

to provide job estimates based on DOT codes. Also, the Seventh Circuit rejected this very argument in *Brace*: "Evidence is not 'substantial if vital testimony has been conjured out of whole cloth." *Brace*, 970 F.3d at 823 (quoting *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002)). The fact that the numbers provided for the DOT codes at issue here may be large also does not excuse the lack of explanation. *See id.* ("An unreliable job-number estimates cannot be considered reliable merely because it is large.") (citing *Chavez*, 895 F.3d at 970).

As such, the court agrees with plaintiff that remand is warranted to further explore the reliability of the VE's method (or, specifically, the methodology behind the Job Browser Pro numbers) in providing job estimates by DOT code.

II. Standard of Proof

Finding a basis for remand, the court will touch briefly on the two other challenges raised in plaintiff's brief. Plaintiff also challenges the ALJ's use of certain language in his decision, arguing that it is contrary to the standard of proof required to demonstrate disability. Specifically, in his opinion, as highlighted above, the ALJ stated that"[t]he record fails to fully substantiate the claimant's allegations of disabling pain." (AR 20.) Instead, plaintiff argues -- and the Commissioner concedes -- that the proper standard is that the extent to which plaintiff's statements regarding subjective symptoms and limitations "can reasonably be accepted as consistent with the medical and other evidence." (Pl.'s Opening Br. (dkt. #21) 18 (citing AR 19, SSR 16-3p).) To be clear, earlier in the decision, the ALJ also recounted the correct standard. (AR 19.) Nonetheless, because of the ALJ's use of inconsistent language, plaintiff contends that remand is required. *See*

Weyland v. Saul, No 19-cv-1531, 2020 WL 5876062, at *3 (E.D. Wis. Oct. 2, 2020) (explaining that the court could not be sure which standard the ALJ used where he found "at different times that [the claimant's] symptoms were 'not fully supported in light of' and 'inconsistent with'" the evidence).

Perhaps this inconsistent language would warrant remand in and of itself, but because the court has determined that remand is warranted because of the challenge to the reliability of the VE's job numbers, the court will leave it to the ALJ to clarify and apply the appropriate standard to evaluating Dolan's subjective statements.

III. Treatment of Treating Provider's Opinion

Finally, plaintiff contends that the ALJ improperly concluded that PA Quick's statement in April 2017 that Dolan would not qualify for disability benefits was inconsistent with his opinions on exertional limitations express in May 2016 and September 2017. The court finds little merit in this challenge given that the ALJ discredited Quick's opinions about Dolan's limitations for reasons independent of his conclusion that Quick contradicted himself. Namely, the ALJ concluded that Quick's opinions were (1) "inconsistent with X-rays of the claimant's lumbar spine" and (2) "not consistent with the claimant's reported activities of daily living." (AR 22.) It is unlikely that this challenge would warrant remand, but, as noted above, the ALJ can review Quick's opinions anew upon remand.

ORDER

IT IS ORDERED that the decision of defendant Kilolo Kijakazi, Acting Commissioner of Social Security, denying plaintiff Charles W. Dolan's application for disability insurance 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 in plaintiff's favor.

Entered this 3rd day of January, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge