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

DAWN GUTTING,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner of Social Security,[1]

Defendant.

OPINION AND ORDER

20-cv-753-wmc

Under 42 U.S.C. § 405(g), plaintiff Dawn Gutting seeks judicial review of a final determination that she was not disabled within the meaning of the Social Security Act. An administrative law judge ("ALJ") reached that conclusion on November 6, 2019, after holding an evidentiary hearing. Gutting contends that remand is warranted for several reasons, but this court is only persuaded by the fact that the ALJ did not explain why he limited Gutting to occasional interactions with others, rather than to brief and superficial interactions, given the evidence supporting the latter. As explained more fully below, the court will, therefore, remand for further consideration

BACKGROUND

A. ALJ Decision

On August 21, 2019, Administrative Law Judge ("ALJ") Michael Schaefer held a hearing in which plaintiff Dawn Gutting appeared and testified in person. (AR 13.)

[1] Consistent with defense counsel's recent practice of adopting a new caption to reflect Kilolo Kijakazi's appointment as the Acting Commissioner of the Social Security Administration on July 9, 2021, the court has also adjusted the captions in pending cases.

Consistent with her testimony, the ALJ found that Gutting has at least a high school education, is able to communicate in English, previously worked as an assembler, machine operator, and store laborer, and was 54 years old at the time of the ALJ decision. (AR 28). In his written opinion, the ALJ also found Gutting not disabled for the purposes of the Social Security Act. (*Id*.)

Specifically, the ALJ found that Gutting had the following severe impairments: "major depressive disorder, anxiety, and learning disorder." (AR 15.) The ALJ further found that Gutting had the non-severe impairments of Factor V Leiden Thrombophilia, varicose veins, sleep apnea, wrist fracture, and deep vein thrombosis. (AR 16-17.) Still, the ALJ found that none of these conditions nor any combination thereof met or exceeded the severity listed in 20 CFR Part 404, Subpart P, Appendix 1. (AR 17.)

More specifically, in terms of mental impairments, the ALJ found that none of Gutting's impairments met the "paragraph B" criteria at 12.05, as Gutting had only moderate limitations in the following: remembering and applying information, interacting with others, concentrating, persisting, and maintaining pace and adapting and managing oneself. (AR 18-19.) Gutting also did not meet the "paragraph C" criteria at 12.04 and 12.06 or the criteria for severe intellectual disorder at 12.05. (AR 20-21.)

Ultimately, the ALJ crafted a Residual Functional Capacity ("RFC") allowing for a full range of work subject to the following non-exertional limits:

> She is capable of understanding, remembering, and carrying out only simple instructions and routine tasks that can be learned by verbal instruction or demonstration and do not exceed GED Language level 2 or Reasoning level 2. She is limited to a work environment with only occasional changes in work duties and only occasional exposure to workplace hazards

> (including moving machinery and unprotected heights). In addition, the claimant is limited to a work environment with no fast-paced production quota or rate (any production requirements should be more goal-oriented, such as based on a daily, weekly, or monthly quota, rather than assembly line or other similar work). She is also capable of only occasional interactions with the public, coworkers, or supervisors.

(AR 22.) With these limitations, the vocational expert then testified that Gutting would be able to perform a significant number of jobs within the national economy. (AR 29.) For this reason, the ALJ found Gutting "not disabled." (*Id*.)

OPINION

A federal court's standard of review with respect to a final decision by the Commissioner of Social Security is well-settled. 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). Thus, 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). Indeed, 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 ensure 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).

I. Mental Impairments

A. Occasional Interaction RFC

While the ALJ limited Gutting to only occasional interaction with others, he relied on a doctor's opinion suggesting that Gutting should only have brief and superficial interactions. (AR 27.) For that reason, plaintiff argues that the ALJ failed to build a logical bridge between the medical opinion and his RFC. The court agrees that some explanation for this departure was required, at least on this record.

In fairness, the ALJ relied on several medical reports when crafting his opinion. State agency consultant Esther Lefevre, Ph.D. found that a limit to occasional interaction would sufficiently accommodate the plaintiff. (AR 27.) In the opinion, however, the ALJ states, "I do not find this assessment to be persuasive overall, as . . . the claimant has greater cognitive limitations, as well as some social interaction limitations." (AR 27.) Instead, the ALJ gave more credence to Dr. Biscardi's opinion, finding it to be generally persuasive. Notably, however, Dr. Biscardi's opinion suggested that Gutting *should* be limited to brief and superficial interactions. (*Id.*) Even less understandable, the ALJ found that "Dr. Biscardi's assessment is generally consistent with limiting the claimant to unskilled work that involves only occasional interactions with others." (*Id.*) Yet, only sentences before, the ALJ states that Dr. Biscardi suggested Gutting could "interact briefly/superficially with coworkers/supervisors." (*Id.*) Most importantly, at no point, does the ALJ explain why a

limitation of occasional interaction was adopted after he expressly found Dr. Biscardi's opinion limiting plaintiff to brief and superficial interaction was persuasive.

Moreover, while the difference between occasional and superficial interaction may seem slight, other district courts within the Seventh Circuit have found the distinction matters. Specifically, "'[o]ccasional contact' goes to the quantity of time spent with the individuals, whereas 'superficial contact goes to the quality of the interactions." *Wartak v. Colvin*, 2:14-CV-401-PRC, 2016 WL 880945 at *7 (N.D. Ind., March 8, 2016); *see also Mack v. Berryhill*, 16 CV 11578, 2018 WL 3533270 at *3 (N.D. Ill., July 23, 2018); *Eveland v. Berryhill*, 2:16-CV-203-PRC, 2017 WL 3600387 (N.D. Ind. August 22, 2017). As here, the court in *Wartak* found that the ALJ did not explain why he imposed an RFC of occasional, rather than superficial, contact. *Id*. More generally, as here, the court faulted the ALJ for failing to explain why they departed from the recommendation of a physician whose report was otherwise credited, and thus, failed to build a logical bridge.

As a secondary argument, the government suggests that this error is harmless here, as the jobs identified by the vocational expert do not require more than superficial interactions. (Def.'s Opp'n. (dkt. #21) 2.) For support, defendant cites the Dictionary of Occupational Titles ("DOT"), which describes the jobs that the vocational expert ("VE") found Gutting could do have a communication score of 8; in other words, an interaction level marked by "attending to the work assignment instructions or orders of a supervisor." (Def.'s Opp'n. (dkt. #21) 21-22) (citing DOT 318.687-010). Defendant then argues that this shows that the jobs identified for Gutting only required "superficial workplace interactions." (Def.'s Opp'n. (dkt. #21) 22.)

However, there are three problems with this argument. First, while the VE may have identified jobs with a people code of 8, they were never given a hypothetical that included the restriction for brief and superficial interaction. As such, the VE never had a chance to consider and give guidance regarding the importance of this characteristic to the conclusion that sufficient jobs would be available to the plaintiff to be employable. Thus, again, other district courts have found the original error in not explaining the reasons for assigning greater communication skills than appears justified by the medical experts "is further compounded because the hypotheticals to the vocational expert did not include any limitations on the quality or extent of the contact." *Wartak v. Colvin*, No. 2:14-CV-401-PRC, 2016 WL 880945, at *7 (N.D. Ind. Mar. 8, 2016).

Second, the Seventh Circuit has held that district courts should not rely on DOT job descriptions to find harmless error because "is obsolete." *Spicher v. Berryhill*, 898 F.3d 754, 759 (7th Cir. 2018). Specifically, because the DOT has not been updated since 1991, "it is certain that 'many of the jobs have changed and some have disappeared.'" *Id*. (*quoting Herrmann v. Colvin*, 772 F.3d 1110, 1113 (7th Cir. 2014).) Accordingly, the Seventh Circuit "reject[ed] the agency's argument that these errors were harmless because—according to the Dictionary of Occupational Titles ("DOT")—the three jobs identified by the ALJ would not require" more than superficial contact. *Spicher*, 898 F.3d 754 at 759.

Third, even if the court were allowed to rely on DOT job descriptions, this court is not able to interpret whether a people code of 8 is *equivalent* to superficial interactions only. Indeed, nothing in the description of jobs with a people code of 8 states that such jobs require superficial contact or less. Simply put, the court is being asked to interpret a 30-

year-old definition in order to decide equivalency, rather than remanding for fact finding as is this court's typical practice. *See Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000) (when reviewing a social security decision, the court may not re-weigh evidence or substitute its judgment for that of the ALJ). For all these reasons, the court finds that the ALJ failed to build a logical bridge between the adopted RFC and medical opinions, and this error was not harmless.

B. Ability to Maintain Pace

Plaintiff also argues that the ALJ's hypothetical referring to a limitation to routine and repetitive tasks did not adequately allow the VE to account for her limitations in concentration and persistence. (Pl.'s Br. (dkt. #19) 10.) Certainly, the Seventh Circuit has credited arguments that "limiting a hypothetical to simple, repetitive work does not necessarily address deficiencies of concentration, persistence and pace" in *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 620 (7th Cir. 2010), and its progeny. Still, if this were the only argument plaintiff had raised for remand, it is uncertain whether this would be enough. *See O'Connor-Spinner*, 627 F.3d 614 at 621 ("there may be instances where a lapse on the part of the ALJ in framing the hypothetical will not result in a remand.") Because remand is warranted anyway, however, the ALJ should revisit this issue on remand as well, being sure to "refer expressly to limitations on concentration, persistence and pace in the hypothetical." *Id*.

II. Physical Limitations

Finally, plaintiff argues that the ALJ failed to account for her subjective reports of leg pain and her need for a sit-stand option while working due to deep vein thrombosis, Factor V Leiden mutation, and varicose veins. (Pl.'s Br. (dkt. #19) 9.) However, the ALJ *did* account for these reports; he simply did not credit them. (AR 16.) In particular, the ALJ notes in his opinion that evidence does not support plaintiff's subjective reports of physical limitations, as Gutting had frequently denied leg pain or numbness in her medical records and there appeared little sustained treatment that she needed outside of medication management. (Id.) The ALJ also found persuasive two physician opinions that these conditions were non-severe. (Id.) This explanation is sufficient to build a logical bridge between the medical records and the ALJ's findings, and the court will not re-weigh evidence at this point. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

Plaintiff also suggests that the ALJ solicited testimony from the VE regarding physical impairments but then improperly disregarded it without explanation. (Pl.'s Br. (dkt. #19) 9.) However, while soliciting testimony regarding sit stand options from the VE, the ALJ also explained that he ultimately found plaintiff's testimony about her leg pain to be unsupported (AR 16), and ALJs are not required to accept every complaint when they are unsupported, as was the case here. *Arnold v. Barnhart*, 473 F.3d 816, 823 (7th Cir. 2007).

ORDER

IT IS ORDERED that:

1) The decision of defendant Kilolo Kijakazi, Acting Commissioner of the Social Security Administration, finding that plaintiff Dawn Gutting is not eligible for social security disability benefits, is REMANDED for further factfinding and explanation in accordance with the directions contained in the opinion above.

2) The clerk of court is directed to enter judgment for plaintiff.

Dated this 13th day of September, 2002.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge