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

AMY HUBNER,

Plaintiff,

v.

CAROLYN COLVIN, Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

14-cv-794-wmc

Pursuant to 42 U.S.C. § 405(g), plaintiff Amy Hubner seeks judicial review of a final decision of the defendant Carolyn W. Colvin, the Acting Commissioner of Social Security, denying her application for Social Security Disability Insurance benefits. On July 22, 2016, the court heard oral argument on plaintiff's contention that the administrative law judge ("ALJ") did not give appropriate weight to the opinions of two treating physicians. For the reasons set forth below, the case will be remanded for further proceedings.

BACKGROUND

Hubner claims a disability onset date of November 1, 2009, primarily because of diabetic neuropathy, asthma, and carpal tunnel syndrome. She was 48 years old when she applied for benefits. Huber has past work experience as a housekeeper, restaurant server, phlebotomist, and electronics assembler, but she has not worked since October 30, 2009.

Hubner was diagnosed with type II diabetes in November of 2007. (AR 300.) On

February 11, 2010, Hubner saw Dr. Adrienne Laverdure and complained of a six-month history of "burning in her feet." (AR 475-478.) Between 2010 and 2012, Hubner's diabetic neuropathy[1] and joint pain waxed and waned. (AR 470-71, 454-55, 449-50, 444-45, 440-42, 433-34, 429-432, 426.) Throughout this period, Laverdure regularly noted that Hubner had normal strength and range of motion, was not in acute distress, and did not complain of pain in her arms, wrists or hands. On June 25, 2010, she was referred to pain management for a full workup, although nothing was found. (AR 421-23.)

On April 26, 2012, Hubner saw Dr. James Mullen for complaints of bilateral numbness and tingling in the hands accompanied by episodic neck and shoulder pain. (AR 711.) She reported poor control over her diabetes and a four-month history of paresthesia in her hands. *Id.* During this exam, Dr. Mullen noted that Hubner had decreased sensation in the median nerve distribution in both hands and symptoms of left shoulder impingement.[2] (AR 711-12.) Mullen also ordered an EMG, which indicated mild to moderate median neuropathy, minimally slowed ulnar response, and a normal radial response. Ultimately, Mullen diagnosed Huber with cubital and carpal tunnel syndromes. (AR 719, 721.)

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[1] Diabetic neuropathy is a disorder that can cause nerve damage throughout the body. See Diabetic Neuropathy, NATIONAL INSTITUTE OF HEALTH, https://www.niddk.nih.gov/health-information/health-topics/Diabetes/diabetic-neuropathies-nerve-damage-diabetes/Pages/diabetic-neuropathies-nerve-damage.aspx (last visited July 27, 2016).

[2] The empty and full can test is commonly used in an orthopedic examination for shoulder impingement or integrity of the shoulder muscle and tendon. http://physicaltherapyweb.com/empty-can-test-shoulder-orthopedic-examination/ (last visited Aug. 9, 2016).

Over the next several months, Hubner's shoulder, neck, and hand symptoms improved with mobility exercises, physical therapy, and gabapentin. (AR 724-25, 727-28, 730-31, 736-37, and 742-43.) A residual functional capacity ("RFC") assessment performed by consulting physician, Dr. Pat Chan, M.D., on July 20, 2011, found Hubner capable of light work[3] with no postural, manipulative, or environmental limitations. This RFC was confirmed by another state agency physician, Dr. Mina Khorsidi, on March 5, 2012. (AR 568-77 and 678.) Dr. Khorsidi noted that Hubner smoked 1.5 packs of cigarettes a day and was not interested in quitting. (AR 678.) She also noted that Hubner needs money to refill a prescription of Neurontin for her feet. *Id.*

On November 20, 2012, however, a RFC assessment completed by Huber's treating physician, Dr. Laverdure found Hubner had carpal tunnel syndrome, poorly controlled type II diabetes, shoulder impingement syndrome, and chronic neck pain that limited her to sedentary work.[4] Based on these findings, Laverdure assessed a number of postural, environmental, and manipulative limitations, including no balancing, reaching, or fingering. Laverdure did not assess a "handling limitation." (AR 683-90.)

On May 17, 2013, Dr. Mullen also completed a RFC assessment, finding that Hubner could perform less than a full range of sedentary work,[5] including occasional balancing and limited reaching and handling. Mullen did not list any fingering limitation. (AR 811-18.)

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[3] Light work is defined as lifting up to 20 lbs. and sit/stand/walk for 6 hours a day. 20 C.F.R. § 404.1567(b).

[4] Limited sedentary work is defined as "walk/stand less than 2 hours a day, sit 6 hours a day and lift up to 10 lbs." 20 C.F.R. § 404.1567(a).

[5] SSR 96-9P ("Less than a full range of sedentary work reflects very serious limitations resulting from an individual's medical impairment(s) and is expected to be relatively rare.").

Following an administrative hearing on June 5, 2013, the ALJ issued a written decision dated July 12, 2013, finding Hubner severely impaired by diabetic neuropathy, obesity, history of breast cancer, carpal tunnel syndrome, thyroid nodules, and asthma. (AR 13-15.) The ALJ also "gave weight" to the postural, manipulative, and environmental limitations assessed by Dr. Laverdure and the manipulative and environmental limitations assessed by Dr. Mullen because they are "consistent with the evidence of record." (AR 17-18.) Even so, the ALJ discounted Hubner's statements regarding the limiting effects of her symptoms, because she made inconsistent statements about her abilities and was still able to perform a wide range of daily activities. *Id.* The ALJ also faulted Hubner for not following her recommended diabetes treatment. (AR 19.) The ALJ found Hubner had the residual functional capacity ("RFC") to perform a limited range of light work with no more than frequent bilateral handling or fingering. (AR 15.) The ALJ based this RFC assessment on the opinions of the state agency physicians, Drs. Chan and Khorsidi. He also found persuasive Dr. Khorsidi's note that Hubner "runs out of medicine and had trouble affording refills of her prescriptions, but she can afford to smoke 1.5 packs of cigarettes a day, [and] has no interest in quitting smoking." (AR 16-17.) At the same time, the ALJ gave Dr. Laverdure's sedentary work limitation little weight because it was inconsistent with Hubner's reported daily activities and the medical record, including Laverdure's own treatment notes showing unremarkable findings in 2012 and early 2013. The ALJ also criticized Dr. Laverdure for failing to consider Hubner's non-compliance with her treatment regimen for diabetes. (AR 17.) Similarly, the ALJ gave little weight to Dr. Mullen's postural limitations and

sedentary work restriction because of Hubner's daily activities, the evidence of record, and Dr. Mullen's 2012 notes showing that Hubner's symptoms were improving. (AR 17-18.)

OPINION

On review by this court, Hubner argues that the ALJ failed to provide good reasons for rejecting the opinions of her treating physicians, Drs. Laverdure and Mullens, and improperly relied on the opinions of state agency reviewing physicians who did not have the opportunity to review Dr. Mullen's examination or test results. The Commissioner contends that the ALJ's determination of Huber's RFC should be affirmed because it is consistent with her reported activities of daily living, the opinions of Drs. Chan and Khorsidi, and the clinical findings of Drs. Laverdure and Mullen. (Dft.'s Br. (dkt. #11) at 13-14.)

On judicial review, a court will uphold the Commissioner's decision if the ALJ applied the correct legal standards and supported his decision with substantial evidence. 42 U.S.C. § 405(g); *Jelinek v. Astrue*, 662 F.3d 805, 811 (7th Cir. 2011). Crucial to review in this case, an ALJ is required to assign a treating source physician's opinion controlling weight, provided the opinion is supported by "medically acceptable clinical and laboratory diagnostic techniques[,]" and is "not inconsistent" with substantial evidence in the record. *Schaff v, Astrue*, 602 F.3d 869, 875 (7th Cir. 2010); *Jelinek*, 662 F.3d 805, 811 (7th Cir. 2011); 20 C.F.R. § 404.1527(c)(2). When an ALJ does not give a treating source controlling weight, the ALJ must consider the type, length and nature of the relationship, frequency of examination, specialty, tests performed, and consistency

and supportability of the opinion. *Scott v. Astrue*, 647 F.3d 734, 739 (7th Cir. 2011); 20 C.F.R. § 404.1527(d)(2). An ALJ who rejects a treating source opinion must provide a sound explanation for doing so. *Jelinek*, 662 F.3d at 811.

Although the ALJ here gave good reasons for rejecting the exertional limitations assessed by Drs. Laverdure and Mullen, he did not address the difference between the treating physician limitations as to handling versus fingering or Dr. Laverdure's postural limitations. In addition, while the ALJ gave weight to the handling, postural, and environmental limitations assessed by Drs. Laverdure and Mullen, he rejected their opinions as to Hubner's exertional limitations on the grounds that they were inconsistent with the objective medical record, physical exams and tests preferred by doctors,[6] and Hubner's disability report. (AR 17-18.) The ALJ also purported to "convert" the discrepency in limitations to "manipulation," stating that he was giving Hubner "the benefit of the doubt as to her obesity, diabetic neuropathy, and respiratory impairments[.]" (AR 16.)

Unfortunately, this discussion does not adequately explain the reason for the manipulative and postural limitations. *See Terry v. Astrue*, 508 F.3d 471, 475 (7th Cir. 2009)) (holding that an ALJ must build a "logical bridge" between the evidence and her conclusion). Even more importantly, it lacks the support of a medical opinion. *See Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996) (holding that ALJs must not succumb to the

[6] The ALJ did address Dr. Laverdure's use of the monofilament test in order to diagnose diabetic neuropathy. This test is used to assess an individual patient's sensitivity to touch. *See* Andrew J.M. Boulton, et al., *Comprehensive Foot Examination and Risk Assessment*, DIABETES CARE, 2008, August 31 (8); 1679-1685. The ALJ also discussed the EMG testing by Dr. Mullen, who performed Tinel's test, EMG and physical exams. (AR 18.)

temptation to make their own independent medical findings). As Hubner points out, these deficiencies in the ALJ's treatment of the treating physicians' opinions are only exacerbated by the fact that the state examining physicians, on whose opinions the ALJ did rely, were not provided the results of Dr. Mullens' exam or EMG study. Thus, this case must be remanded to allow the ALJ to build a logical bridge between the evidence and his conclusions, as well as seek input from a state examiner regarding Dr. Mullen's examinations and the EMG results.

As discussed during oral argument, there also remains uncertainly as to *when* Hubner's limitations began, given that her upper extremity issues started in 2012, yet her alleged disability onset date is in 2009. In light of the decision to remand, the ALJ will have an opportunity to resolve this issue as well.

Of additional concern, is the ALJ criticism of Dr. Laverdure for failing to consider Hubner's "noncompliance with her diabetic treatment regimen," as well as his finding persuasive Dr. Khorsidi's comment that Hubner "runs out of medicine and had trouble affording refills of her prescriptions, but she can afford to smoke 1.5 packs of cigarettes a day, she has no interest in quitting smoking, and has poor exercise habits." (AR 16-17.) Certainly, a claimant's failure to follow a treatment plan can undermine her credibility, but an ALJ must explore the reasons for a lack of care before drawing a negative inference. *Shauger v. Asture,* 675 F.3d 690, 696 (7th Cir. 2012). For example, an ALJ may need to "question the individual at the administrative proceeding in order to determine whether there are good reasons the individual does not seek medical treatment or does not pursue treatment in a consistent manner." *Id.* (quoting SSR 96-7p, 1996

WL 374186, at *7). Good reasons may include an inability to afford treatment, ineffectiveness of further treatment, or intolerable side effects. Absent questioning or exploration of these issues, an ALJ cannot draw a negative inference from a claimant's failure to follow her treatment plan. *Beardsley v. Colvin*, 758 F.3d 834, 840 (2014).

On the record here, the ALJ appears to have made no such inquiry. Furthermore, the ALJ did not explain how Dr. Laverdure's lack of discussion of Hubner's non-compliance is relevant to exertional limitations. Finally, the ALJ appears to give no consideration of the addictive aspects of cigarette smoking. On remand, the ALJ may properly address these concerns. *Beardsley*, 758 F.3d at 840 (citing *Craft v. Astrue*, 539 F.3d 668, 679 (7th Cir. 2008); SSR 96-7p).

ORDER

IT IS ORDERED that the decision of defendant Carolyn W. Colvin, Commissioner of Social Security, denying plaintiff Amy L. Hubner'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 15th day of August, 2016.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge