

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

LORI LYNN KIRCHNER,

Plaintiff,

OPINION AND ORDER

v.

15-cv-773-wmc

NANCY A. BERRYHILL, Acting Commissioner
of Social Security,

Defendant.

Plaintiff Lori Lynn Kirchner seeks judicial review of a denial of her application for supplemental security income by the Commissioner of Social Security under 42 U.S.C. § 405(g). Before the court is plaintiff's motion for summary judgment contending that the Administrative Law Judge ("ALJ") erred by failing to: (1) provide satisfactory justification for the weight assigned to her treating physician's opinion; (2) adequately consider her fibromyalgia in determining her residual functional capacity ("RFC"); and (3) give adequate reasons for discounting entirely the opinions of her chiropractor. (Dkt. #8.) Because the court agrees with plaintiff that remand is required for a more detailed analysis of her treating physician's opinions, the Commissioner's decision will be reversed and remanded.

BACKGROUND¹

A. Overview of Claimant

Kirchner was 41 years old on the date her application was filed, November 16, 2012. (AR 21, 31.) Her past relevant work is as a waitress and “telephone solicitor.” (AR 30.) Kirchner claims that she is unable to work due to multiple impairments, including degenerative hip disease, fibromyalgia, vertigo, anxiety and pain in her arms, neck and back. (Pl.’s Opening Br. (dkt. #9) at 2.)

B. Relevant Medical History

A few days after being involved in a car accident in November of 2011, Kirchner sought treatment for left shoulder and hip pain, having already had “known fibromyalgia, chronic low back pain, and hip pain.” (AR 341.) Some two months later, treatment notes from Dr. Ricky J. Waniger indicate continuing, worsening neck and shoulder pain, which caused her difficulty in raising her arms above shoulder height and turning her neck to the right side. (AR 345-46.) Waniger referred her to Chiropractor Linda Lorenz for treatment of neck and shoulder pain. (AR 346.)

After a follow-up visit on February 13, 2012, Dr. Waniger noted Kirchner’s ongoing effort to alleviate her pain with chiropractic, stretching and massage treatment, but that she reported continued back and shoulder pain. (AR 347-48.)² After another visit in

¹ The Administrative Record (“AR”) is available at dkt. #7.

² In May of 2012, Kirchner also sought treatment for bilateral ear discomfort, which she thought may have been related to her vertigo. (AR 354.) After an exam, however, Dr. Cheng Her doubted that any Eustachian tube dysfunction was related to vertigo and prescribed her an allergy treatment

October of 2012, Dr. Waniger also noted that Kirchner was suffering from chronic low back pain, fibromyalgia affecting her mostly in her shoulders, neck and lower back, as well as chronic vertigo, for which she was consistently prescribed medications to relieve her pain symptoms and difficulty sleeping. (AR 366-67.) Dr. Waniger further noted her continued effort to seek chiropractic and physical therapy treatment. (AR 367.)

Progress notes from Dr. Waniger after a visit on July 3, 2013, discuss similar symptoms, but note that Kirchner had begun to seek counseling for anxiety. (AR 400-01.) Those same treatment notes indicate that Kirchner was experiencing increased soreness after working four-hour shifts two days per week as a waitress. (AR 401.)

C. ALJ's Decision

ALJ William Spalo held a hearing by videoconference on April 30, 2014. (AR 21.) In an opinion dated August 8, 2014, the ALJ found Kirchner not disabled for purposes of receiving disability benefits. (AR 32.)

The ALJ determined that Kirchner's severe impairments were "fibromyalgia, vestibular system disorder causing vertigo, and degenerative joint disease of the left hip." (AR 23.) The ALJ explained that he reached his conclusion regarding the severity of Kirchner's fibromyalgia "[e]ven though the record did not contain actual evidence of 11 positive tender points on examination as required by SSR 12-2p," deciding to "rel[y] on the documentation describing 'trigger point and tightness/tautness' and the diagnosis of

for relief. (AR 355.) At a follow-up visit on June 20, 2012, with Dr. Waniger, Kirchner reported that the treatment of her Eustachian tube dysfunction had been largely ineffective. (AR 356.)

fibromyalgia in the record.” (AR 23.) According to the ALJ, Kirchner’s complaints of non-vestibular relapsed vertigo, left hip socket problems and anxiety did not rise to the level of severe impairments. (AR 24.)

After outlining the medical evidence regarding treatment for Kirchner’s neck, back, leg and hip pain, the ALJ further concluded in his written decision that Kirchner “has the residual functional capacity to perform sedentary work as defined in 20 CFR § 416.967(a) with no repetitive rotation, flexion, or extension of neck [but without] overhead reaching bilaterally.” (AR 26.) The ALJ went on to explain that he discredited Kirchner’s subjective reports of symptoms largely due to inconsistencies between her self-reported capabilities in a function report and at the hearing. (AR 28.) In particular, the ALJ explained that Kirchner’s admitted “involvement in most activities of daily living” discredited her claim that she needed assistance with most of those activities. (*Id.*) The ALJ further emphasized several treatment notes by Dr. Waniger, indicating “normal range of motion in her hip, straight leg raise, and normal strength in her lower extremities” on November 8, 2012, seemingly “normal and fluid” range of motion with regard to her spine in January of 2013, and “normal hip range of motion” on February 15, 2013. (*Id.*) The ALJ also found that “the medical records did not document any ongoing problems with standing or walking.” (*Id.*) Finally, the ALJ noted that Kirchner had undergone only “routine and conservative” treatment and “was able to participate in the hearing without any overt pain behavior.” (AR 29.)

With respect to the treating physician opinions, the ALJ explained that he gave “some weight” to Dr. Waniger’s opinions, as did the state agency consultants, and he found

the consultants' initial limitation of Kirchner to sedentary work deserved "greater weight" than their light work limitation at the reconsideration level. (AR 29.) The ALJ noted that Dr. Waniger opined that Kirchner could not lift her arms above chest level or make repetitive head or neck movements, but also opined in February of 2014 that Kirchner could: (1) lift ten pounds occasionally and five pounds frequently; (2) sit for 30 minutes at a time and four hours in an eight-hour workday; and (3) stand for fifteen minutes at a time and less than two hours total. (AR 29.)

As for Dr. Waniger's opinion that Kirchner would require eight separate ten-minute breaks each workday, as well as at least three absences from work per month, the ALJ explained that he found no objective medical evidence to support the need for these unscheduled breaks. (AR 29-30.) While acknowledging similar opinions of Chiropractor Lorenz -- that Kirchner had limited use of her hands and arms, would need two unscheduled, fifteen-minute breaks and would be absent at least three days per month -- the ALJ gave no weight to them, nor to Lorenz's later opinions regarding standing, walking and sitting restrictions for the same reason, finding all of those opinions were not supported by the objective medical evidence,. (AR 30.)

In light of these findings, as well as testimony from the vocational expert ("VE") at the hearing, the ALJ went on to conclude that Kirchner was capable of performing her past relevant work as a telephone solicitor, as well as the occupations of "machine tender," "sorter" and office helper." (AR 30-31.) Accordingly, the ALJ concluded that Kirchner was not disabled. (AR 32.)

OPINION

Plaintiff argues remand is warranted because the ALJ: (1) inadequately assessed the treating physician's opinion; (2) failed to account for limitations caused by Kirchner's fibromyalgia in formulating her RFC; and (3) lacked adequate reason for discounting Kirchner's chiropractor's opinion. The court turns first to the ALJ's analysis of the treating physician opinion, which here requires remand.

I. Treating Physician Opinion

A treating physician's opinion is entitled to controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence." *Larson v. Astrue*, 615 F.3d 744, 749 (7th Cir. 2010) (quoting 20 C.F.R. § 404.1527(d)(2)). If the ALJ finds that a treating physician's opinion does not deserve controlling weight, then "the regulations require the ALJ to consider the length, nature, and extent of the treatment relationship, frequency of examination, the physician's specialty, the types of tests performed, and the consistency and supportability of the physician's opinion." *Moss v. Astrue*, 555 F.3d 556, 561 (7th Cir. 2009) (citing 20 C.F.R. § 404.1527(d)(2)).

As an initial matter, the ALJ's discussion of the greater weight he afforded the state agency consulting physicians' opinions as opposed to Dr. Waniger's opinions as a treating physician appears to flip the appropriate analysis on its head, especially considering that a non-examining physician's less restrictive opinion as to a claimant's capabilities cannot alone supply the "substantial evidence" required to forego assigning controlling weight to

the treating physician's opinion. *See Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003). Even if crediting the finding that Dr. Waniger's February 2014 opinion did not deserve controlling weight, the ALJ's analysis falls well short of supplying "good reasons" for discounting entirely Dr. Waniger's conclusion that Kirchner could not sit for more than four hours in a workday or her need for unscheduled breaks and absences. *See Larson*, 615 F.3d at 751 ("An ALJ who does not give controlling weight to the opinion of the claimant's treating physician must offer 'good reasons' for declining to do so.") (citing 20 C.F.R. § 404.1527(d)(2)).

There are at least three reasons why the ALJ's assessment of the treating physician opinion in his written decision is inadequate. *First*, the ALJ offered no sufficient reason for not similarly crediting Dr. Waniger's opinion as to Kirchner's standing and sitting limitations. This is true even though the ALJ explained his reasons for weighing the two state agency physician's opinions differently.³ In particular, while "affording some credibility to the claimant that she cannot stand as [long] as required for light work[,] or up to 6 hours in an 8-hour workday" for purposes of distinguishing between the two agency physician's opinions, the ALJ never explains why the plaintiff's regular treating physician is not entitled to similar deference. (AR 29.)

Moreover, by limiting Kirchner to sedentary work, the ALJ found that she could stand for no more than two hours of the workday with normal breaks. *See SSR 96-96*, 1996 WL 374185, at *3. Both Drs. Waniger and Chan agreed on this much, but with

³ The ALJ found that the opinion of Dr. Pat Chan, a state agency physician, that Kirchner was capable of no more than sedentary work was deserving of *more* weight than the subsequent opinion of state agency physician Dr. Mina Khorshidi, that Kirchner was able to do light work.

respect to the total number of hours in the workday that Kirchner could sit, Dr. Waniger opined four, rather than Dr. Chan's opinion of six hours. (AR 97, 415.) Yet the ALJ's explanation for giving some weight to Dr. Waniger's opinion failed to address his reasons for supporting Dr. Chan as to the length of a sitting restriction. Similarly, the ALJ merely asserted that there was "no objective evidence to support the unscheduled breaks." (AR 29-30.) Finally, the ALJ also provided little reasoning for giving no weight to the opinions of Kirchner's chiropractor, Linda Lorenz, including her opinion in November of 2012 that Kirchner could sit for at most four hours of the workday, other than that Lorenz's opinions, collectively, were not supported by the objective medical evidence. (AR 30.)

In support of his finding that Kirchner was "not totally credible," the ALJ explained elsewhere in his written decision that Kirchner was somewhat inconsistent in explaining her limitations, that she was "involve[d] in most activities of daily living and that she "was able to participate in the hearing without any overt pain behavior." (AR 28-30.) That reasoning is insufficient to explain the ALJ's refusal to give more weight to combined, consistent opinions of plaintiff's longtime treating physician and chiropractor as to her sitting limitations.

Second, the inadequacy of the ALJ's explanation for discounting the treating physician's limitation opinion is compounded by the lack of any reference to the checklist factors used to determine whether a treating physician's opinion merits controlling weight. While an ALJ's failure to address these factors is not itself cause for remand, the factors requiring consideration of the length, nature and extent of the treatment relationship all appear to weigh strongly in Kirchner's favor and should have been addressed in the written

decision. *See Moss*, 555 F.3d at 561 (finding error in part because the ALJ’s “choice to accept one physician’s opinions but not the other’s was made . . . without consideration of the factors outlined in the regulations”).

Third, and finally, the ALJ’s dismissal of Dr. Waniger’s opinion as to the breaks and absences Kirchner would need was “based solely on [Kirchner’s] reports,” which is not only insufficient for many of the same reasons discussed above, but also highlights a larger problem with the ALJ’s decision. As plaintiff argues in support of her second basis for remand, despite finding Kirchner’s fibromyalgia (not to mention her degenerative joint disease of the left hip) to be *severe* impairments, the ALJ’s written decision contains little analysis of how these conditions may affect her RFC. This flaw is especially significant because nowhere in his written decision does the ALJ acknowledge meaningfully Kirchner’s testimony at the hearing that she has good days and bad days with pain (AR 58-59), which would further support Dr. Waniger’s opinion as to her need for breaks and absences.⁴

Also troubling is the ALJ’s seemingly heavy reliance on Kirchner’s “involvement in most activities of daily living” to discredit her reports of subjective symptoms. (AR 28.) “The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons . . . and is not held to a minimum standard of performance, as she

⁴ In fairness, the ALJ did make note that Kirchner reported having good and bad days in his written decision, but only to emphasize that Kirchner’s reports of subjective symptoms were not entirely consistent. (AR 28.) The ALJ’s omission of an adequate discussion regarding whether Kirchner had good and bad days is particularly significant given his finding that fibromyalgia was a severe impairment. *See SSR 12-2p*, 2012 WL 3104869, at *6 (“For a person with FM [fibromyalgia], we will consider a longitudinal record whenever possible because the symptoms of FM can wax and wane so that a person may have ‘bad days and good days.’”).

would be by an employer.” See *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012); see also *Gentle v. Barnhart*, 430 F.3d 865, 867 (7th Cir. 2005) (“[The claimant] *must* take care of her children, or else abandon them to foster care or perhaps her sister, and the choice may compel her to heroic efforts.”) (emphasis in original). Finally, contrary to defendant’s assertions, the ALJ’s recitations of Dr. Waniger’s treatment notes indicating “normal” range of motion (AR 28) is unable to rehabilitate the other, obvious shortcomings regarding his analysis of that treating physician’s opinions -- especially with respect to plaintiff’s complaints of fibromyalgia pain. See, e.g., *Gerstner v. Berryhill*, 879 F.3d 257, 264 (7th Cir. 2018) (“[t]he extent of fibromyalgia pain cannot be measured with objective tests aside from a trigger-point assessment.”); *Vanprooyen v. Berryhill*, 864 F.3d 567, 572 (7th Cir. 2017) (stating the same).

For all these reasons, the ALJ’s explanation for discounting the treating physician opinions here are inadequate and remand is required.

II. Fibromyalgia

As a separate basis for remand, plaintiff argues that the ALJ erred by “fail[ing] to provide an accurate credibility assessment . . . and to provide sufficient rationale in showing how Kirchner’s fibromyalgia was considered in determining the [RFC].” (Pl.’s Opening Br. (dkt. #9) at 22.) In support of her argument, plaintiff discusses at length the symptoms typically associated with fibromyalgia and generally faults the ALJ for not finding her testimony believable with regard to the extent of the limitations that condition causes her. As defendant argues persuasively in response, however, not all individuals with

fibromyalgia experience symptoms severe enough to preclude them from working, *see Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996), and plaintiff fails to cite testimony or other evidence from Kirchner's medical records emphasizing the effects of her fibromyalgia that the ALJ may have overlooked in formulating her RFC, other than the glaring one -- the need for unscheduled breaks and absences.

In light of the reasons explained above why remand is necessary for the ALJ to reweigh the treating physician opinion (Pl.'s Opening Br. (dkt. #9) at 32), the ALJ should expressly consider on remand the severity of Kirchner's fibromyalgia-related symptoms as an explanation for symptoms that may need to be accounted for in plaintiff's RFC limitations.

III. Chiropractor Opinion

Finally, plaintiff argues that the ALJ erred by assigning no weight to the opinion of her treating chiropractor without explanation. Given that the court has found that remand is required for the ALJ to reconsider his treatment of the treating physician's opinions, the ALJ should also analyze Chiropractor Lorenz's opinions consistent with the applicable regulations, especially since Kirchner's limitations regarding sitting, breaks and absences received insufficient analysis in the ALJ's decision with regard to both Drs. Chan's and Waniger's opinion on Kirchner's need for breaks and absences.

ORDER

IT IS ORDERED that the decision of defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying plaintiff'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 20th day of March, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge