

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

BOBBIE J. MALLOY,

Plaintiff,

OPINION AND ORDER

v.

20-cv-584-wmc

ANDREW M. SAUL, Commissioner of
Social Security,

Defendant.

Pursuant to 42 U.S.C. § 405(g), plaintiff Bobbie J. Malloy seeks judicial review of the Social Security Commissioner's final determination upholding an opinion that she was not disabled. On appeal to this court, plaintiff maintains that Administrative Law Judge ("ALJ") Carla Suffi erred in three respects: (1) assessing the opinions of the state agency psychologists; (2) weighing the opinion of a mental status evaluator, Dr. Kurt Weber; and (3) failing to adequately address Malloy's fibromyalgia and subjective complaints of pain. The court held a telephonic hearing on plaintiff's appeal on May 19, 2021, at which the parties appeared by counsel. Although a close case given the plaintiff's young age, apparent work history and lack of support for disability from any of her treatment providers, the court will remand the ALJ's decision for a more complete explanation of her translations of accepted limitations endorsed by the state agency psychologists and evaluator.

BACKGROUND¹

A. Overview

Plaintiff Bobbie J. Malloy has at least a high school education, is able to communicate in English, and has past work experience as a newspaper delivery supervisor and loan officer. Malloy claims not to have engaged in substantial gainful activity since September November 27, 2017, the same date as her alleged onset disability date, although as the ALJ noted, Malloy *did* work on a full-time basis as a bartender through August 2018.²

Malloy applied for social security disability benefits on January 29, 2018 and filed a claim for supplemental security income on October 10, 2018. Both applications allege a disability onset date of November 27, 2017. With a birth date of September 23, 1979, Malloy was 38 years old upon applying for disability benefits, defining her as a “younger individual” on her alleged disability onset date. 20 C.F.R. §§ 404.1563, 416.963. Malloy claimed disability based on fibromyalgia, degenerative arthritis, depression and anxiety. (AR 87-88.)

B. ALJ Decision

ALJ Suffi held a video hearing on September 9, 2019, at which Malloy appeared personally and by a non-attorney representative. On September 25, the ALJ issued an opinion finding that Malloy had not been under a disability within the meaning of the Social Security Act from her alleged disability onset date through the date of the hearing. The ALJ first determined that Malloy had the following severe impairments: “fibromyalgia;

¹ The following facts are drawn from the administrative record, which can be found at dkt. #14.

² Nevertheless, the earnings records for her bartending work do not support a finding of “substantial gainful activity,” at least as to reported income. (AR 29.)

mild lumbar degenerative disc disease and bulging; left knee Baker's cyst with meniscus degeneration and c[h]ondral defect of the left knee; left distal radius fracture status-post surgery; depression and anxiety; and history of substance abuse." (AR 29.)

Next, the ALJ considered whether Malloy's impairments or combination of impairments met or medically equaled various Listings, concluding that they did not. (AR 30-32.) Malloy does not challenge the ALJ's conclusion that she did not meet any of the physical listings, including Listing 1.02 (major dysfunction of a joint) or Listing 1.04 (disorders of the spine).³ At this step, the ALJ further considered whether plaintiff's mental impairments met or medically equaled Listings 12.04 (depression) and 12.06 (anxiety). Under the "paragraph B" criteria, the ALJ concluded that Malloy had mild limitations with respect to understanding, remembering or applying information, and moderate limitations with respect to interacting with others, concentrating, persisting and maintaining pace, and adapting or managing oneself.

At step four, the ALJ determined that even with these limitations, Malloy had the residual functional capacity ("RFC") to perform light work with the following exertional limitations: "she can occasionally balance, stoop, kneel, crouch, crawl and climb ramps/stairs; she can never climb ladders, ropes or scaffolds; . . . and she can frequently use her bilateral upper extremities for gross handling and fine fingering." (AR 32.) As for Malloy's mental limitations, the ALJ concluded that Malloy can

understand, remember, carry out and adapt to demands of simple, routine work tasks and make simple work related decisions on a sustained basis; she can frequently interact with

³ The ALJ also touched briefly on her fibromyalgia diagnosis, and while Malloy does raise a challenge as to that treatment, she does not argue that it is equivalent to a Listing.

the general public; she can tolerate occasional changes to the work routine and setting; [and] she can never perform fast paced production line work tasks that are timed, only goal oriented work tasks.

(Id.)

In formulating her RFC, the ALJ specifically considered what Malloy said about her limitations as well, including that she: could lift only five pounds; could walk half a mile or 30 minutes before stopping to rest; could sit or stand for two hours before needing a break, but could only sit or stand for a total of two hours at a time in an eight-hour workday; experienced swelling in her knee, which nothing seems to alleviate; and uses a cane to address back pain. (AR 32.) As for the mental limitations, the ALJ acknowledged Malloy's testimony that she stopped treatment because she was feeling better, but planned to return again. (AR 33.)

The ALJ next turned to the medical record describing Malloy's left knee issues, while noting that she had included exertional and postural limitations in the RFC to address these issues. In particular, the ALJ noted that Malloy's physical exams "demonstrated near full range of motion and generally normal ambulation" of her knee. (AR 33.) In April 2018, Malloy fell on her knees while working and noted that she was not able to attend physical therapy because she was working overtime "most days," thus, "undermining her allegations that she was unable to work during this period." *(Id.)* In June 2018, Malloy confirmed that her knee pain did not bother her until about five hours into her bartending shift. Around this time, Malloy explored knee replacement surgery, but was told that she was not a good candidate. She also received another cortisone injection, and she began physical therapy in July.

Still, imaging of her left knee at around that time revealed only mild degenerative changes, and in September 2018, Malloy attended just one physical therapy session before stopping. While she reported no improvement from the last cortisone injection, she nonetheless requested another one. During that appointment, Malloy had almost full range of motion, mild swelling, and no tenderness. An October 2018 exam was similarly normal. In January 2019, Malloy had knee swelling, but the doctor explained that her chances of having inflammatory arthritis was low.

The ALJ reviewed other records concerning Malloy's claims of fibromyalgia pain. Specifically, in March 2018, Malloy reported improvement in her pain with medication. Although she still had tenderness in her right ribs, she had a normal gait, range of motion, and strength in her extremities. At that time, her fibromyalgia was deemed stable. In June 2018, Malloy had imaging of her back, which showed mild facet hypertrophy, but no evidence of disc bulging, protrusion, or stenosis in the lumbar spine. At the same time, she also reported improvement with her fibromyalgia pain. During that appointment, her gait and range of motion were both reported as normal.

In October 2018, however, Malloy reported that her fibromyalgia was so severe that it was "incapacitating." (AR 34.) Malloy also reported that she had tried multiple medication but they had failed, a report that ALJ characterized as "contradicting the record." (*Id.*) A doctor further noted that Malloy had a normal gait and a full range of motion. In May 2019, however, Malloy complained of severe pain in her extremities again, but the doctor noted that she was not in acute distress on examination and that she left the clinic, "walking with no obvious discomfort in ambulation, swinging her arms and

laughing with her significant other.” (*Id.*) The ALJ noted that this “undermines the claimant’s allegations that her pain was significant enough to interfere with her daily activity and contradicts her testimony that she needed to use a cane.” (*Id.*)⁴

With regard to claimant’s mental impairments, the ALJ noted that she has depression and anxiety, but “had little treatment overall.” (AR 34.) Specifically, the ALJ noted that in June 2018, she reported having had a “meltdown” with suicidal thoughts. (*Id.*) The physician noted that she had been referred to psychiatric care a few months before the incident but had not followed through with the referral, which the ALJ concluded was “not consistent with an individual who needs dire mental health treatment.” (*Id.*) The ALJ also summarized Malloy’s mental status evaluation with Kurt Weber, Ph.D., in November 2018, in which he found that she “had adequate concentration to hold a conversation, read a newspaper article and use a digital device.” (*Id.*) Dr. Weber also noted that while her affect was flat, she otherwise exhibited normal behavior and cooperation.

With regard to various test, Weber found that Malloy had “intact remote memory, could repeat three of three words immediately and after seven [minutes], and could recite five digits forward and three in reverse,” had “an adequate fund of information, could perform Serial 3s and follow simple instructions.” (*Id.*) Based on this evaluation, Weber concluded that Malloy had a “fair prognosis,” but should follow-up with psychotherapy professionals. The ALJ also noted that she had not done so to date. In other medical

⁴ The ALJ recounted records from July 2019 of a left forearm fracture, but plaintiff’s appeal does not touch on this medical issue or the limitations caused by it.

records, Malloy was not described as anxious or depressed and otherwise was deemed to have “normal insight, affect and orientation.” (*Id.*) Finally, the ALJ found that Malloy “reported she can perform many of her daily activities.” (AR 35.)⁵

Next, the ALJ considered the medical opinion testimony, finding the opinions of the state agency medical consultants to be persuasive. Malloy does not challenge this finding on appeal. Critical to plaintiff’s first challenge, the ALJ also reviewed the opinions of state agency psychological consultants Robert Barthell, Psy.D., and Souma Palreddy, Ph.D., finding these opinions persuasive. Barthell concluded that Malloy “would have difficulty adapting to high stress work environments and performing at a consistent pace.” (AR 35.) Upon reconsideration, Palreddy offered additional restrictions, finding that Malloy “could frequently interact with the public, should perform more routine tasks, and could perform 1 to 3 step tasks, but would have difficulty with more detailed tasks.” (*Id.*)

Finally, the ALJ considered the report of Dr. Weber, rejecting his earlier conclusion that Malloy had moderate limitations in her ability to understand, remember and apply information, and marked limitations in her ability to concentrate, persist or maintain pace.⁶ With respect to Malloy’s ability to understand, remember and apply information, the ALJ rejected Dr. Weber’s opinion based on his findings that Malloy “had an adequate fund of information, intact remote memory, could repeat three of three words immediately and after seven minutes, and could recite 5 digits and 3 in reverse” and “had normal memory

⁵ The ALJ also reviewed records concerning Malloy’s history of alcohol and substance abuse, but this discussion does not appear to be material to any of Malloy’s bases for appeal.

⁶ The ALJ had previously found that Malloy had mild and moderate limitations in those two categories, respectively.

at her other exams.” (AR 36.) As for the marked limitation in her ability to adapt, the ALJ rejected this, too, because “she can care for her hygiene, cook, clean, look after her son, do the laundry, and grocery shop,” and she testified to having “a boyfriend with whom she recently went camping.” (*Id.*)

With the assistance of the vocational expert, the ALJ ultimately concluded that the claimant is not able to perform any past relevant work given that her two prior jobs were both skilled work. However, the ALJ determined that there were jobs in significant numbers in the national economy that Malloy *could* perform, citing toll collector, parking lot cashier and surveillance system monitor specifically. As such, the ALJ concluded that plaintiff was not under a disability from November 27, 2017, through the date of the decision.⁷

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,” therefore, this court cannot reconsider facts, re-weigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the

⁷ In her opening brief, Malloy refers to medical records detailing anxiety, back and hip pain, left knee swelling and pain, fibromyalgia and rib pain. (Pl.’s Opening Br. (dkt. #19) 7-10.) The court discusses those records where relevant in the opinion below.

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, the court must review plaintiff's three challenges on appeal under this deferential, yet discerning, standard.

I. Assessment of Opinions of State Agency Psychologists

Plaintiff argues that the ALJ erred in relying on state agency psychologist opinions that violated that Policy Operations Manual System ("POMS"). Specifically, plaintiff contends that the state agency psychologists' narratives failed to account for all of their individual findings with respect to plaintiff's CPP limitations. More specifically, plaintiff points out that both of the state agency psychologists -- Dr. Barthell initially and Dr. Palreddy upon reconsideration -- found Malloy was moderately limited with respect to the following CPP subcategories: (1) "ability to maintain attention and concentration for extended periods"; (2) "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances"; and (3) "ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." (AR 95, 132.) Both psychologists also provided virtually the same narrative for plaintiff's CPP limitation: "Clmt would have difficulty performing at a

consistent pace due to depression and anxiety,” although Dr. Palreddy added the phrase, “complicated with somatic complaints,” at the end of that sentence. (AR 95, 132.)

As it has in other recent cases, the court rejects at the outset plaintiff’s apparent assertion that POMS requires a state agency psychologist to prepare a narrative as to each of the CPP subcategories, much less that if he or she fails to do so, the narrative is incomplete.⁸ See *Baumann v. Saul*, No. 20-cv-11-wmc, 2020 WL 7237921, at *4 (W.D. Wis. Dec. 9, 2020). Still, as plaintiff points out, the Seventh Circuit has emphasized that an ALJ “may rely on a doctor’s bottom line assessment *where it adequately translates his findings*, including from the checklist portion of the agency form.” *Somers v. Saul*, No. 19-cv-51-wmc, 2020 WL 582370, at *4 n.2 (emphasis in original) (citing *Milliken v. Astrue*, 397 F. App’x 218, 221 (7th Cir. 2010); *Burmester v. Berryhill*, 920 F.3d 507, 511 (7th Cir. 2019); *Dudley v. Berryhill*, 773 F. App’x 838, 843 (7th Cir. 2019)).

As described above, both state agency psychologists found Malloy moderately limited with respect to three of the CPP subcategories. As plaintiff acknowledges, the ALJ’s limitation -- ability to maintain attention and concentration for extended periods -- addressed limitations in concentration. (Pl.’s Opening Br. (dkt. #19) 20.) At least viewed deferentially, this restriction also addressed Malloy’s moderate limitation under the second CPP for “understanding and memory,” since Dr. Palreddy explained in the narrative for this subsection that Malloy was “capable of simple 1-3 directions, may have more difficulty with more detailed directions d/t somatic complaints combined with depression, anxiety”

⁸ The court expects plaintiff’s counsel to either stop making this argument, or at the very least, acknowledge the contrary authority rather than leave it to the Commissioner’s counsel to do so.

(AR 131), and the ALJ's RFC appears to adopt this same narrative description by limiting her to simple, routine tasks and simple, work-related decisions. As to the last category, however, Malloy argues that the narrative does not address "any problem with punctuality or attendance." (*Id.* at 21.)

This argument is flawed on several levels. First, plaintiff stops short of explaining what limitations would address any punctuality or attendance concerns, and for good reason, since the record appears to undermine any concern on that front, in light of her bartending employer's statement that she was on time 99% of the time. (AR 31 (citing AR 326 (employer report indicating that for Malloy's employment as a bartender from June 8, 2017, through September 18, 2018, Malloy was "99% punctual").) Second, the state agency psychologists concluding that Malloy was moderately limited in a subcategory does not *require* a finding that she has issues with punctuality or attendance. In other words, in marking her moderately limited with respect to these subcategories, the psychologists could have simply concluded that she was limited with respect to issues with maintaining pace. Indeed, as described above, one subcategory at issue concerns "ability to perform activities within a schedule," while another involves the ability "to perform a consistent pace without an unreasonable number and length of rest periods." (AR 132.) Moreover, the psychologists' narrative supports this reading, since it highlights that Malloy "would have difficulty performing at a consistent pace." (*Id.*) As such, the court finds that the state agency psychologists' narratives adequately translate their findings with respect to these subcategories.

Of course, in crafting the RFC, the ALJ did not expressly incorporate the exact language in the psychologists' narratives -- both state that Malloy would have "difficulty performing at a consistent pace." Instead, she found that Malloy "can never perform fast paced production line work tasks that are timed, only goal oriented work tasks." (AR 32.) Moreover, as the Commissioner points out, plaintiff "has the burden of showing why the ALJ's RFC assessment does not accommodate restrictions." (Def.'s Opp'n (dkt. #20) 12 (citing *Jozefyk v. Berryhill*, 932 F.3d 492, 498 (7th Cir. 2019)).) Plaintiff's counsel acknowledged an argument that the ALJ was not required to adopt the same language, and indeed has criticized adopting broad limitations because they are unlikely to have limited meaning to a vocational expert.

Here, plaintiff does not assert a lack of evidence, but rather, criticizes the ALJ for failing to build a "logical bridge" between this language and her finding that Malloy had moderate limitations in CPP. On this, the court agrees. To begin, the ALJ certainly did not rely on the state agency psychological consultants in formulating her restriction; their reports say nothing about Malloy's ability to maintain pace if she is only working on "goal oriented work tasks," whatever that may mean, nor for that matter, do their reports that her inability to maintain a consistent pace applies only to "fast paced production line work tasks that are timed." (AR 32.) See *Burmester v. Berryhill*, 920 F.3d 507, 511 (7th Cir. 2019) (explaining that "an ALJ may reasonably rely upon the opinion of a medical expert who translates [CPP] findings into an RFC determination"). Instead, after discussing Malloy's own report of her activities and limitations, as well as mentioning general consideration of Dr. Weber's mental status evaluation addressed in more detail below, the

ALJ seems to arrive at her own formulation of a pace limitation out of whole cloth in the middle of her discussion as to whether Malloy meets any of the listed impairments in 20 C.F.R. 404. (AR 30.) Equally telling, neither counsel could explain how the jobs selected by the VE (Toll Collector, Parking Lot Cashier, Surveillance System Monitor) were consistent with that limitation, given the periods of fast paced, customer driven demands that each might require. *See Jozefyk*, 923 F.3d 492 at 498 (explaining that the court will affirm “RFC determinations . . . when they adequately account for the claimant’s demonstrated psychological symptoms”).

At most, the ALJ noted that: (1) Malloy had “adequate concentration to hold a conversation, read a newspaper article and use a digital device” in her evaluation with Dr. Weber; (2) also in that evaluation, she “could perform Serial 3s and follow simple instructions”; and (3) she “can finish what she starts.” (AR 31.) None of these findings directly address pace; even more of an issue, the ALJ does not explain how the restriction to “goal oriented work tasks” would address Malloy’s inability to maintain a consistent pace.⁹ As importantly, neither side’s counsel were able to articulate what the ALJ meant by “goal oriented work,” since that category has no clear counterpart in the Social Security Administration rulings or regulations. As such, the court concludes that remand is

⁹ The Commissioner argues in his opposition brief that “a limitation prohibiting production or pace work adequately accounts for pace limitations.” (Def.’s Opp’n (dkt. #20) 13 (citing *Cihlar v. Colvin*, No. 15-CV-560-BBC, 2016 WL 4742341, at *4 (W.D. Wis. Sept. 12, 2016), *aff’d sub nom. Cihlar v. Berryhill*, 706 F. App’x 881 (7th Cir. 2017).) In *Cihlar*, however, this court determined that the RFC precluding “production or pace rate work” specifically addressed the ALJ’s finding -- in turn, supported by the finding of a consultative examiner -- that the claimant “had difficulty doing tasks in a fast manner.” *Id.* at *4. Here, the ALJ failed to explain how precluding production work would address Malloy’s consistent pace issues.

necessary to further explore Malloy's CPP limitations, craft an RFC that adequately addressed that finding, and has meaning for a vocational expert to apply.

II. Evaluation of Dr. Weber's Opinion

Having found a basis for remand, the court will only briefly address plaintiff's other arguments, beginning with plaintiff's contention that the ALJ erred in failing to place more weight on the consultative examination report of Dr. Kurt Weber. Specifically, the ALJ rejected Weber's finding that Malloy has a "marked" limitation in her "ability to manage symptoms and adapt in a work-setting." (AR 35 (citing AR 752).) In rejecting this aspect of Weber's report, the ALJ appears to rely on "the longitudinal record does not support a marked limitation in the ability to adapt, as she can care for her hygiene, cook, clean, look after her son, do the laundry, and grocery shop," and on testimony that Malloy "has a boyfriend with whom she recently went camping." (AR 36.) Not only do these observations appear to be non sequiturs as to Malloy's finding of a marked limitation in managing symptoms and adapting, but the Seventh Circuit has repeatedly cautioned ALJs about equating an ability to do household chores with maintain pace and coping with stress in a work-setting.

While the Commissioner offers other grounds in this record to discount Weber's opinions, including Malloy's apparent ability to work full-time as a bartender for part of her claimed period of disability and period of discontinued mental health treatment, the ALJ mentions neither with respect to Weber's opinions. Plus, both are the subject of reasonable debate also not reflected in the ALJ's opinion. Moreover, plaintiff rightly points out that if the ALJ had credited Weber's testimony, then such a finding would have called

into question whether Malloy could maintain employment. (Pl.'s Opening Br. (dkt. #19) 27.)

In light of the Seventh Circuit's direction to review critically an ALJ's rejection of the opinion of the agency's own examining physician, *Beardsley v. Colvin*, 758 F.3d 834, 839 (7th Cir. 2014), and the rather thin explanation that the ALJ provided in rejecting Dr. Weber's finding, the court agrees with plaintiff that this is an additional area the ALJ should consider and address in more depth on remand, although the court stops short of finding that the ALJ's treatment of Dr. Weber's opinion would warrant remand if viewed in isolation.

III. Treatment of Fibromyalgia and Subjective Complaints of Pain

Finally, plaintiff argues that the ALJ failed to address Malloy's fibromyalgia diagnosis and subjective complaints of pain adequately. In particular, plaintiff takes issue with the ALJ's references to "a lack of evidence from an MRI and the unwillingness of doctors to perform knee replacement," coupled with references to "normal ambulation and gait," as irrelevant and demonstrating the ALJ's lack of understanding as to the impact of fibromyalgia. (Pl.'s Opening Br. (dkt. #19) 34.) If the ALJ had determined that fibromyalgia was not a severe impairment onto itself, then plaintiff's arguments may have more traction, but the ALJ found that Malloy's fibromyalgia *was* a severe impairment. However, such a finding, does not equate to a finding of disability. Instead, the ALJ must then determine how and to what extent Malloy's fibromyalgia limits her ability to engage in work.

While the ALJ mentioned the lack of findings on an MRI and the lack of availability of knee replacement surgery, nothing in this record suggests her observations were an attempt to undermine or cast doubt on her finding of Malloy's severe limitation for fibromyalgia. If anything, a lack of objective test results likely bolsters that diagnosis. Instead, in determining the specific limitations Malloy experiences because of fibromyalgia, the ALJ appropriately pointed out that she had normal gait and range of motion, reported her fibromyalgia pain was stable or even had improved, and was not in distress during examinations. (AR 33-34.) Accordingly, the court finds no error in the ALJ's treatment of Malloy's fibromyalgia.

ORDER

IT IS ORDERED that the decision of defendant Andrew Saul, Commissioner of Social Security, denying plaintiff Bobbie J. Malloy's application for supplemental security income is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

Entered this 20th day of May, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge