

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

LINNEA BIRGITTA RICE,

Plaintiff,

v.

KILOLO KIJAKAZI,
Acting Commissioner of Social Security,

Defendant.

OPINION AND ORDER

21-cv-279-wmc

Plaintiff Linnea Rice seeks judicial review of the final decision of defendant Kilolo Kijakazi, Acting Commissioner of the Social Security Administration (“SSA”), finding that she was not disabled within the meaning of the Social Security Act. Rice contends that the administrative law judge (ALJ) who decided her case erred by: (1) failing to develop a full and fair record regarding her migraine headaches; and (2) failing to identify and evaluate her severe, medically determinable impairment of fibromyalgia.¹ Because the ALJ’s assessment of Rice’s migraines is not supported by substantial evidence, the court will remand this case for further proceedings.

¹ In addition to these claims, plaintiff contends that the decision denying benefits is invalid because Kilolo Kijakazi, the Acting Commissioner of Social Security, was not appointed in accordance with Article II of the Constitution. This claim is based on an arguable extension of the Supreme Court’s decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), but this court has repeatedly rejected *Seila*’s application to Social Security decisions. See *Schwechel v. Kijakazi*, No. 20-cv-700-wmc, 2022 WL 135022, at *5 (W.D. Wis. Jan. 14, 2022); *Kreibich v. Kijakazi*, No. 20-cv-1045-bbc, 2022 WL 538261 at *6 (W.D. Wis. Feb. 23, 2022)(collecting cases). Plaintiff’s argument here is rejected for the same reasons provided in those earlier decisions.

BACKGROUND

Linnea Rice applied for disability benefits in August 2019, when she was 47 years old. Rice alleged that she had been disabled since May of 2018, after being struck from behind by a car while on her motorcycle and sustaining a traumatic brain injury, as well as several fractures. (R. 22, 246.) Since the accident, Rice has suffered from chronic migraine headaches, insomnia, cervical pain, anxiety, depression, post-concussive syndrome, and prolonged, post-traumatic stress disorder (“PTSD”). (R. 57.)²

After her disability claim was denied initially and on reconsideration, Rice requested an administrative hearing, which was held via teleconference on December 2, 2020 before ALJ Christopher Messina. (R. 16, 32.) At that hearing, Rice testified that she was employed for many years as a certified medical assistant, but stopped working altogether after her 2018 accident because she was struggling with chronic migraines, severe anxiety, depression, neck pain, insomnia, and PTSD. (R. 34–52.) Specifically, Rice reported experiencing daily headaches, including migraines so severe that she could barely function over fifty percent of the time, even after trying Botox injections, nerve blocks, and various medications to treat them. (R. 40–45.) Further, Rice described needing to sit in a dark room during severe migraines to cope with the associated pain and dizziness, and testified that even her milder headaches rarely dropped below a seven or eight on a ten-point pain scale. (R. 40–42, 49–50.) In addition, Rice testified that cooking was too much work for her without her son’s help, although she could shower, get dressed, brush her teeth, and blow dry her hair on her own. (R. 47–49.)

² Record cites are to the pages of the administrative record (“R.”). (Dkt. #12.)

Nevertheless, in a December 2020 decision, the ALJ found that Rice was not disabled. R. 16–28. Specifically, following the five-step sequential process for evaluating disability claims, 20 C.F.R. § 404.1520(a), the ALJ found that: (1) Rice had not engaged in substantial gainful activity since her accident; (2) she had severe impairments of migraines, PTSD, anxiety, and depression; (3) none of these impairments, whether considered singly or in combination, was severe enough to be presumptively disabling; (4) her impairment prevented her from performing past relevant work; and (5) she could perform other jobs that existed in significant numbers in the economy. As a predicate to his findings in steps four and five, the ALJ also found Rice retained the residual functional capacity (“RFC”) to perform a reduced range of light work.

To determine Rice’s residual functional capacity, the ALJ considered her subjective accounts of symptoms, including her testimony that she had persistent head and neck pain, heightened sensitivity to light and sound, daily headaches often accompanied by dizziness, and debilitating migraines occurring more than fifteen days a month. R. 36–44. The ALJ accepted that Rice’s impairments could reasonably be expected to cause her reported symptoms, but found that her reports as to the intensity, persistence, and limiting effects of her symptoms were not consistent with the medical record and other evidence. (R 22.) Instead, the ALJ found his formulation of Rice’s RFC accurately incorporated medical evidence of Rice’s migraine headaches through exertion and postural limitations, consistent with her unremarkable cervical spine imaging and physical examination findings, provided her exposure to loud noises and crowds was restricted consistent with her coexisting diagnoses of depression, anxiety, and PTSD. (R. 23.) Thus, the ALJ limited Rice’s RFC to:

Perform[ing] light work . . . except she can never climb ladders, ropes, or scaffolds, but can frequently perform all other postural activities. She must avoid all exposure to excessive noise and hazards. She can understand, carry out, and remember no more than simple instructions, with occasional decision-making and occasional changes in the work setting. She can have no contact with the public, but can have occasional contact with coworkers and supervisors.

(R. 21.)

Finally, relying on a vocational expert's testimony, the ALJ found Rice was not disabled because she could work as a silver wrapper, routing clerk, and coin machine collector -- all positions that were sufficiently available in the national economy. (R. 28.)

The SSA's Appeals Council subsequently denied Rice's request for review, making the ALJ's decision the final decision of the Commissioner of Social Security. *Loveless v. Colvin*, 810 F.3d 502, 506 (7th Cir. 2016). Rice then filed this action seeking judicial review under 42 U.S.C. § 405(g).

OPINION

Rice challenges the ALJ's decision on two grounds: (1) failure to develop a full and fair record regarding his assessment of her migraine headaches; and (2) failure to find that she had a severe medically determinable impairment of fibromyalgia under Social Security Ruling (SSR) 12-2p.³ Thus, the principal question before this court is whether the ALJ identified relevant evidence and built an "accurate and logical bridge" between that evidence and his ultimate factual determinations as to both of these grounds. *Beardsley v. Colvin*, 758 F.3d 834, 837 (7th Cir. 2014), *see also Moon v. Colvin*, 763 F.3d 718, 721 (7th

³ While Rice also challenges the Appeals Council's denial of review in March 2021, the Appeals Council's ultimate judgment on whether additional evidence warrants review is discretionary and unreviewable. *Eads v. Sec'y of Dep't of Health & Hum. Servs.*, 983 F.2d 815 (7th Cir. 1993); *Perkins v. Chater*, 107 F.3d 1290, 1294 (7th Cir. 1997).

Cir. 2014). Relatedly, the ALJ’s “factual determinations must be” supported by “sufficient evidence” of record to uphold them. *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). This standard requires only “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)

I. Migraines

Rice asserts that the ALJ failed to develop a full and fair record regarding her migraine headaches. More specifically, she contends that the ALJ failed to conduct a legally sufficient analysis of her migraine headaches under SSA Listing 11.02 and did not adequately account for her testimony detailing the limitations caused by her migraines in determining her residual functional capacity. (Dkt. #15, at 16, 23.)

At step three, the ALJ must determine whether a claimant’s impairment or combination of impairments meet or medically equal the criteria for a listed impairment. 20 C.F.R. § 404.1520(d). If an ALJ determines that a claimant’s impairments meet or equal a listing, the claimant is presumptively disabled. In considering whether Rice’s recurring migraine headaches meets or equals Listing 11.02, therefore, the ALJ must “discuss the listing by name and offer more than a perfunctory analysis of the listing.” *Barnett v. Barnhart*, 381 F.3d 664, 668 (7th Cir. 2004). While there is no listing for primary headache disorders, the parties agree that Listing 11.02 is routinely applied in evaluating migraine headaches. *See Pawlowicz v. Saul*, No. 19-CV-537-BBC, 2020 WL 4001180 at *5 (W.D. Wis. July 15, 2020) (listings 11.02(B) and 11.02(D) guide the evaluation of migraines at step three); *Snow v. Berryhill*, 2019 WL 1873551, at *4 (N.D.

Ind. Apr. 26, 2019) (Commissioner routinely considers migraines under criteria for epilepsy listing).

Listing 11.02 has two relevant provisions implicated by this record under 20 C.F.R. Pt. 404, Subpt. P, Appx. 1 § 11.02. First, Listings 11.02(B) and 11.02(D) require dyscognitive seizures (or in this case migraines) occurring once a week or once every two weeks, respectively, for at least three consecutive months despite adherence to prescribed treatment. 20 C.F.R. Pt. 404, Subpt. P, Appx. 1 § 11.02(B), 11.02(D). Second, Listing 11.02(D) requires a marked limitation in one of the following areas: (1) physical functioning; (2) understanding, remembering, or applying information; (3) interacting with others; (4) concentrating, persisting, or maintaining pace; or (5) adapting or managing oneself. *Id.* at § 11.02(D)1–5. “Despite adherence to prescribed treatment” means that a claimant has taken medication or followed other treatment procedures for the disorder as prescribed by a physician for three consecutive months, but the impairment continues to meet the other listing requirements despite this treatment. 20 C.F.R. Pt. 404, Subpt. P, Appx. 1 § 11.00(C).

In this case, the ALJ determined that Rice’s impairments did not meet or medically equal a listed impairment. R. 19. The ALJ considered Rice’s impairments under several listings, including 1.02 (major joint dysfunction), 11.02 (epilepsy), 12.04 (depressive, bipolar, and related disorders), 12.06 (anxiety and obsessive-compulsive disorders), and 12.15 (trauma- and stressor-related disorders), but his decision omitted any meaningful discussion of Listing 11.02. In fact, the entirety of the ALJ’s analysis under Listing 11.02 consists of the following:

Here, the claimant's migraines do not meet or equal Listing 11.02 (epilepsy), which requires specified frequencies and durations of generalized tonic-clonic or dyscognitive seizures despite adherence to prescribed treatment, and/or resulting in a marked limitation in physical functioning or one of the "B" criteria mental impairments.

(R. 20.)

The Commissioner argues that "though the ... discussion at step three was brief, the ALJ did not err because he explicitly identified Listing 11.02 and [its] criteria . . . then proceeded to further discuss Plaintiff's migraines in his RFC analysis." The Commissioner further contends that even if the ALJ's step-three analysis was insufficient, "any error would be harmless" because the ALJ based his determination on the administrative findings of the state-agency consultative physicians. (Dkt. #17, at 20–26). In particular, the Commissioner contends the ALJ's discussion of Rice's migraines elsewhere in the decision demonstrates that the impairment did not meet or medically equal Listing 11.02. (*Id.* at 20.)

When discussing Rice's subjective allegations, however, the ALJ simply noted that "despite Plaintiff's ongoing reports of migraines and headaches, her examinations were frequently normal." (*Id.*) In support, the ALJ highlighted unremarkable physical examination, cervical spine, and head CT findings in the month after her accident, but failed to reference her simultaneous reports of worsening migraines and daily headaches that were increasingly "more frequent and more severe." (R. 24, 483.) In April 2019, almost a year after the accident, the ALJ also noted that Rice reported an 85% improvement in her neck and shoulder range of motion, but her neck pain and headaches remained relatively unchanged since the start of care. (R. 298.) Indeed, throughout his

assessment of Rice’s residual functional capacity, the ALJ cited medical records reflecting: her reports of worsening daily headaches since the accident; notes of medical providers acknowledging and expressing concern with the persistence of her headaches and dizziness; ongoing treatment by a neurologist for headaches from May 2018 to present; Botox injections, nerve blocks, and various medications attempting to treat her migraines; and her ongoing reports of pain and fatigue. (R. 21–28.)

Additionally, the ALJ mischaracterized treatment records, made misleading statements, and overstated the effectiveness of Rice’s migraine medications several times in his assessment. For example, the ALJ claimed that Rice reported an increased dose of gabapentin helped her headaches and sleep in August of 2018, when that medical record actually states, “She continues with headaches that are unchanging . . . She has increase[d] her dose of gabapentin but has *not* noticed a significant change [or] . . . decrease in headaches and improved sleep.” (R. 419) (emphasis added). The ALJ later mischaracterized Rice’s treatment history as “generally conservative, yet at least partially effective in controlling [her migraine] symptoms,” pointing to records showing improved vertigo and cervical pain. (R. 23.) While relying on a provider’s notes of “slow and steady” progress in Rice’s range of motion, the ALJ similarly failed to acknowledge that *at no time* did Rice or any provider indicate that her migraine symptoms were resolved or managed by treatment. Finally, the ALJ cited medical records as to the frequency and severity of Rice’s migraines without identifying contradictions or otherwise explaining their validity or usefulness in his assessment of her impairments under Listing 11.02.

For all these reasons, the ALJ’s evaluation of Rice’s migraines for purposes of his residual functional capacity determination fails to satisfy the medical-equivalence analysis

required at step three. In particular, the ALJ's discussion of Rice's migraines provides no comparison of her symptoms to the requirements of Listing 11.02 and no explanation for his conclusion that Rice's migraines did not medically equal the listing. While the Commissioner argues that normal physical examination and imaging results "support the conclusion that Plaintiff's headaches were not severe enough to equal Listing 11.02[.]" neither the ALJ nor the Commissioner provides a logical bridge explaining why normal exam findings undermine plaintiff's reported, credited, and treated migraine symptoms over time. *See Wessel v. Colvin*, No. 4:14-CV-00055-SEB-DM, 2015 WL 5036775, at *6 (S.D. Ind. Aug. 4, 2015) ("the ALJ cited no expert opinion that the normal neurologic examinations meant that Ms. Wessel does not truly experience the number or severity of migraines she reported"); *Viriden v. Colvin*, No. 14-CV-1219, 2015 WL 5598810, at *1 (C.D. Ill. Sept. 22, 2015) (physician "did not find 'significant abnormalities' during Plaintiff's neurological examination, and he suggested that she might suffer from migraine headaches."). Because Rice's reported symptoms since the alleged onset date appear to meet the listing criteria, and there is no evidence suggesting that she was non-compliant with her migraine treatment during that time, the ALJ's determination that Rice's migraine headache impairment failed to medically equal Listing 11.02 is *not* adequately supported.

The Commissioner alternatively argues the ALJ's step-three finding is sufficiently supported by the opinions of state-agency medical consultants. While the medical evaluations conducted by reviewing state-agency physicians reference Listing 11.02, and the ALJ assigned some weight to those opinions, these opinions alone are not enough to show that the ALJ's step-three determination was supported by substantial evidence. Rather, the state-agency doctors' identified Rice's migraines as a severe impairment, and

neither doctor made any specific findings about Rice’s migraines, nor did the ALJ cite these state-agency opinions when discussing Rice’s migraines under Listing 11.02. Finally, their reports contain no discussion about either doctor's analysis of Rice’s migraine impairments under Listing 11.02 or explanation of their conclusions. (R. 69–78.)

In sum, the ALJ’s evaluation of Rice’s migraine symptoms lacks explanation and support in the record. Accordingly, this case must be remanded so that the ALJ can perform a proper evaluation of Rice’s migraine symptoms, including in particular whether her related impairments satisfy Listing 11.02.

II. Fibromyalgia, Severe Fatigue, Myofascial Pain, and Chronic Insomnia

Rice also contends that the ALJ’s assessment of her residual functional capacity is not supported by substantial evidence, having failed to find that she had a severe medically determinable impairment of fibromyalgia and, therefore, neglected to account for its associated limitations. (Dkt. #15, at 33.) Specifically, Rice argues that the ALJ should have weighed symptoms associated with fibromyalgia, such as fatigue, widespread pain, insomnia, and anxiety in his assessment of her ability to return to work. (*Id.* at 27–31.)

As the Commissioner notes, however, there is no evidence in the record that the plaintiff had been diagnosed with fibromyalgia nor that she alleged disability or impairment due to fibromyalgia at any point in the administrative process. (Dkt. #17, at 18.) To reach the question of whether an impairment is severe or non-severe, an ALJ must first determine that an impairment is “medically determinable.” *See* 20 C.F.R. § 404.1521 (“After we establish that you have a medically determinable impairment, then we determine whether your impairment is severe.”). Moreover, an official diagnosis of

fibromyalgia is a *prerequisite* to establishing that it is a medically determinable impairment. SSR 12-2p, 2012 WL 3104869, at *2 (July 25, 2012) (“We will find that a person has an MDI of FM if the physician diagnosed FM and provides the evidence we describe... and the physician’s diagnosis is not inconsistent with the other evidence in the person’s case record.”). Because Rice does not point to any fibromyalgia diagnosis and her medical record fails to satisfy the criteria under SSR 12-2p, the ALJ did not err by failing to evaluate her for an impairment of fibromyalgia.

ORDER

IT IS ORDERED that the decision denying benefits to plaintiff Linnea Rice is REVERSED, and this case is REMANDED to defendant Kililo Kijakazi, Acting Commissioner of Social Security, for further proceedings consistent with this opinion.

Entered this 23rd day of February, 2024.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge