

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

LISA SCHMITT,

Plaintiff,

OPINION AND ORDER

v.

20-cv-554-wmc

KILOLO KIJAKAZI, Acting Commissioner
for Social Security,

Defendant.

Pursuant to 42 U.S.C. § 405(g), plaintiff Lisa Schmitt 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") Deborah E. Ellis erred in three respects: (1) failing to give proper weight to the consulting psychologist Dennis Elmergreen, Psy.D.; (2) finding only moderate limitations in concentrating, persisting, or maintaining pace and failing to accommodate these limitations in the residual functional capacity; and (3) failing to resolve an apparent conflict between the vocational expert's testimony and the Dictionary of Occupational Titles. For the reasons that follow, the court will remand this case for further review, finding that the ALJ failed to support her rejection of the consultative psychologist's opinion with substantial evidence.

BACKGROUND¹

A. Overview

Plaintiff Lisa Schmitt has at least a high school education, is able to communicate in English, and has past work experience as a person care worker, medical cleaner and floor housekeeper supervisor. Schmitt has not engaged in substantial gainful activity since February 26, 2013, the same date as her alleged onset disability date. Schmitt applied for social security disability benefits and supplemental security income on April 8, 2016. With a birth date of March 26, 1980, Schmitt was 32 years-old at the time of her alleged disability onset date, defining her as a “younger individual.” 20 C.F.R. §§ 404.1563, 416.963. Schmitt claimed disability based on degenerative joint disease lumbosacral spine, sacroiliac joint dysfunction, lumbar facet joint pain, fibromyalgia, lumbar myofascial syndrome, cervical myofascial syndrome, chronic migraine without aura, chronic pain, chronic anxiety and depressive disorder. (AR 134.)

B. ALJ Decision

ALJ Ellis held a video hearing on November 13, 2018, at which Schmitt appeared personally and by counsel. On May 15, 2019, the ALJ issued an opinion finding that Schmitt 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 Schmitt had the following severe impairments: “spine disorders, fibromyalgia, obesity and affective and anxiety-related disorders.” (AR 21.) In so finding, the ALJ determined

¹ The following facts are drawn from the administrative record, which can be found at dkt. #20.

that a number of other impairments were not severe, a finding Schmitt does not challenge on appeal.

Next, the ALJ considered whether Schmitt's impairments or combination of impairments met or medically equaled various Listings, concluding that they did not. (AR 22-25.) Schmitt 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). At this step, the ALJ further considered whether plaintiff's mental impairments met or medically equaled the mental impairment listings in section 12.00 of Appendix 1. Under the "paragraph B" criteria, the ALJ concluded that Schmitt had mild limitations with respect to understanding, remembering or applying information and adapting or managing oneself, and moderate limitations with respect to interacting with others and concentrating, persisting and maintaining pace ("CPP"). In so finding, the ALJ relied on plaintiff's functional reports and hearing testimony. (AR 23-24.) The ALJ also noted that both of the state agency psychological consultants, Soumya Palreddy, Ph.D., and Kathleen O'Brien, Ph.D., also concluded that plaintiff's mental impairments did not meet or medically equal a listing. (AR 24.)

At step four, the ALJ determined that even with these limitations, Schmitt had the residual functional capacity ("RFC") to perform light work with the following exertional limitations: "she can stand and/or walk four hours total in a workday and, if sitting, would need the option to stand and stretch each hour"; "can occasionally climb ladders, ropes, and scaffolds"; "must avoid concentrated exposure to unprotected heights and moving mechanical parts." (AR 25.) As for mental limitations, the ALJ concluded that Schmitt

is capable of simple routine work with only occasional contact with the public, coworkers, and supervisors. She can tolerate simple changes in routine and make and carry out simple plans. She would be absent one or two days per month, but not consistently.

(Id.)

In formulating her RFC, the ALJ specifically considered Schmitt's statements about her physical and mental limitations. Material to plaintiff's challenges on appeal, the ALJ specifically noted plaintiff's "chronic anxiety, depressive disorder, medication side effects, exhaustion, impaired concentration and memory, the need to take frequent breaks when performing household tasks, and nervousness around others." (AR 25.) The ALJ also acknowledged plaintiff's testimony at the hearing that "she was not currently seeing a mental health counselor but had been hospitalized twice for mental health issues." (AR 26.) The ALJ, however, discounted her subjective statements with respect to her mental status functioning. The ALJ noted diagnoses of "major depressive disorder, generalized anxiety disorder, and bipolar disorder, with frequent episodes of crying," which required inpatient treatment in April 2014. (AR 29.) Subsequent treatment records noted that "her anxiety currently appeared to be well controlled with Clonidine," but that six months later in November 2013, she reported topping all of her medication because she believed them to be ineffective. *(Id.)* The ALJ also reviewed medical records noting a "'down' mood and constricted affect," but also that "her thought process, orientation, attention, and memory were all intact." *(Id.)* In 2014, Schmitt reported "racing thoughts and irritability," but the treatment provider also noted "good eye contact, a good mood, full affect, good impulse control and judgment, and intact orientation, attention, and memory, and she was

cooperative and calm.” (AR 30.) In May 2016, she was noted as “alert and cooperative” and had “a normal mood, affect, attention span, and concentration.” (*Id.*)

The ALJ also noted Dr. Elmergreen’s July 2016 consultative examination, in which he diagnosed major depressive disorder and generalized anxiety disorder and “observed that the claimant seemed depressed and cried intermittently, but had good hygiene and grooming and was cooperative and moderately talkative.” (AR 30.) The ALJ also noted that Schmitt responded “Don’t know” to a number of questions testing her mental functioning. (*Id.*) The ALJ also considered Schmitt’s October 2016 functional report noting that she “enjoyed fishing, journaling, and writing, and had done painting of wooden items and crafts in the past.” (*Id.*) Medical records from late 2016 through mid-2018, described Schmitt as “moderately depressed” or “moderately anxious,” but otherwise noting “substantially normal mental status exam findings.” (*Id.*)

The ALJ also noted that the records demonstrated that her mental health issues were “aggravated by high stress and intense interpersonal interactions.” (AR 30.) Based on the review of that record, the ALJ concluded that Schmitt is “limited to simple routine work with only occasional contact with the public, coworkers, and supervisors;” that she “can tolerate simple changes in routine and can make and carry out simple plans”; and that she “would be absent one or two days per month, but not consistently,” as set forth in the ALJ’s RFC. (*Id.*)

Next, the ALJ considered the medical opinion testimony, placing some weight on the state agency psychological consultants’ opinions. Specifically, the ALJ relied on the opinions of Drs. Palreddy and O’Brien in defining most of the nonexertional limitations in

the RFC, though the ALJ determined that, contrary to their opinion that plaintiff could not sustain basic demands associated with relating routinely with the general public, Schmitt could “occasionally interact with the public.” (AR 30-31.) In support for this finding, the ALJ noted that Schmitt “had had numerous medical treatment with various providers with no significant difficulty interacting.” (AR 31.)

With respect to Dr. Elmergreen’s opinion that Schmitt has moderate to marked limitations in understand, remember, and carry out simple instructions, and marked impairments with respect to the other three categories -- respond appropriately to supervisors and coworkers; CPP; and withstand work stressors and adapt to change -- the ALJ gave “little weight.” (AR 31.) Specifically, the ALJ noted: (1) that her “above-summarized record does not document a degree of mental status functioning to support marked limitations”; and (2) that “the claimant’s presentation during Dr. Elmergreen’s assessment of mental status was inconsistent with her functioning throughout the record,” specifically noting that she “engaged in work activity, as well as rather significant activities of living, including fishing, helping a friend, and cleaning her mother’s house.” (*Id.*)

With the assistance of the vocational expert, the ALJ concluded that Schmitt is not able to perform any past relevant work given that these jobs were either skilled and/or medium exertion work. However, the ALJ determined that there were jobs in significant numbers in the national economy that Schmitt *could* perform, citing power screwdriver operator, marker, and router clerk as examples. (AR 33.) The ALJ specifically noted that the VE’s testimony “was consistent with the *Dictionary of Occupational Titles* (DOT),

pursuant to the requirements of 00-4p, or otherwise consistent with her experience in the vocational field. (*Id.*)

Material to plaintiff's last challenge on appeal, during the hearing, the ALJ specifically posed a second hypothetical to the VE in which the individual was limited to light work with the additional exertional restrictions described above in her RFC and also would "be able to stand and walk for four hours of the day and the person if sitting would have to stand, stretch at the workplace each hour, if necessary." (AR 84.) The ALJ asked if this additional limitation would alter the jobs and job numbers she had provided in response to the first hypothetical. In response, the VE explained: (1) that it would reduce the number of marker jobs by half to account for some jobs not having a chair or stool available; (2) that the router clerk job would still be available and in the same numbers because of the availability of a sit/stand option; and (3) that it would remove the package sorter job, but a power screwdriver operator job would be available as a replacement, albeit at half the job numbers to account for those jobs without a stool available. (AR 84-86.) Plaintiff offered no objection to this testimony and did not otherwise point out any conflict between the VE's testimony and the DOT.

Based on these findings, the ALJ concluded that plaintiff was not under a disability from February 26, 2013, through the date of the ALJ's decision.

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 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. Evaluation of Opinion of Consultative Psychologist Dennis Elmergreen, Psy.D.

Plaintiff’s primary challenge concerns the ALJ’s treatment of the opinions of consultative examiner Psychologist Dennis Elmergreen. “An ALJ can reject an examining physician’s opinion only for reasons supported by substantial evidence in the record; a contradictory opinion of a non-examining physician does not, by itself, suffice.” *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003).

As detailed above, Elmergreen met with Schmitt for a mental status evaluation on July 25, 2016, referred by the Department of Social Security Disability. In his detailed report, Elmergreen described Schmitt’s background, her account of an average day, her

appearance and affect, and conducted a number of mental functioning tests, concluding that

[h]er thoughts were moderately organized. She seemed to have much difficulty concentrating on the mental status tasks and questions. Psychomotor speed was slow. Intellectual functioning was estimated to be below average probably suppressed by her poor emotional and physical functioning. . . . Her executive functioning, abstract thinking and memory appeared intact. Her judgment was reality based. There is no evidence of psychotic process. She expressed her thoughts clearly, but her poor emotional functioning is likely to greatly reduce her ability to relate to other people effectively.

(AR 1399.) Elmergreen also reviewed the medical record, namely records from North Central Health Care Center in May 2013. In his summary, Elmergreen concluded that Schmitt “seemed quite depressed during the interview and had difficulty concentrating and focusing and it is likely that her intellectual capacity is greatly reduced by her physical and emotional functioning.” (*Id.*) Elmergreen also stated that she “does not appear to have the capacity to initiate finding a job and handling at this point,” and that “her prognosis for recovery to the point of being able to handle work at this point appears mixed to poor.”

(AR 1400.) As described above, Elmergreen concluded that she had moderate to marked limitations with respect to understanding, remembering and carrying out simple instructions and marked limitations with respect to the other three categories. As plaintiff notes, marked limitations in at least two categories satisfies the mental impairment listings under section 12.00 of Appendix 1.

The ALJ gave little weight to the opinion, offering two principal reasons for rejecting it: (1) the medical record does not support a finding of marked limitations and (2) plaintiff’s description of her functioning, including engaging in work activity, fishing,

helping a friend and cleaning her mother's home, is inconsistent with marked limitations. As for the first reason, as plaintiff points out in her brief, the Social Security Department requested a consultative examination because of the limited records, at least recent records, of treatment for her mental health issues. Other than the 2013 records when plaintiff received inpatient treatment for a panic attack and subsequent outpatient treatment, there are simply a handful of reports describing her mental health status. As the ALJ acknowledged, while some of these reports describe "normal mental status exams," all of them also describe some mental health challenges, commonly depression, including frequent references to her crying, and anxiety. (AR 30.) As such, it is difficult for the court to discern what "above-summarized record" -- or the portion of the record -- would be inconsistent with marked limitations in paragraph B criteria. At minimum, the court agrees with defendant that the ALJ failed to build a logical bridge to support her discounting of Dr. Elmergreen's opinion based on purported inconsistencies with the medical record.

The ALJ also contends that Dr. Elmergreen's findings are inconsistent with plaintiff's own statements about her functioning, including engaging in work activity, fishing, helping a friend, and cleaning her mother's home. Here, too, the court struggles to unpack how these examples of daily activities would be inconsistent with findings of marked limitations. With respect to engaging in work activity, earlier in the ALJ's opinion, the ALJ acknowledged that Schmitt "reported numerous short-term jobs that she performed in 2013, 2014, and 2015, some of which were fulltime work," but that she "generally indicated that the jobs were accommodated or were stopped due to her physical and/or mental conditions." (AR 21.) The ALJ even described these jobs as "generally

consistent with *unsuccessful* work attempts” (*id.* (emphasis added)), which would appear to bolster plaintiff’s account of her mental health challenges. Moreover, the ALJ offers no explanation for why fishing, which the ALJ acknowledged she testified she did “when she felt up for it,” helping a friend by appearing at a court appearance with him and setting up a sale of some property, or cleaning her mother’s house when she needed gas money, would undermine a finding of marked limitations. (Pl.’s Br. (dkt. #24) 20-21 (citing AR 31, 1517).)

The ALJ also pointed to the state agency psychological consultants’ findings of either mild or moderate limitations in the four categories and their respective opinions that plaintiff could carry out simple instructions, maintain attention for up to two hours, relate adequately with supervisors and co-workers (but not the general public) and tolerate simple changes in routine. As plaintiff points out, the state agency psychological consultants reviewed plaintiff’s mental health treatment records from 2013 and early 2014, but also noted that a consultative examination was ordered because of the lack of recent records. (AR 101, 151.) Nonetheless, both of them discounted Elmergreen’s findings purportedly because they were inconsistent with the medical record, although, it is not clear what portions of the record Drs. Palreddy and O’Brien are referring to. For these same reasons, and given the Seventh Circuit’s holding in *Gudgel*, 345 F.3d at 470, that a “contradictory opinion of a non-examining physician does not, by itself” provide a basis for rejecting the opinion of a consultative examiner, the court agrees with plaintiff that this case must be remanded for further exploration of Dr. Elmergreen’s opinion.

II. Treatment of CPP Limitations

Having concluded that plaintiff's first challenge on appeal warrants remand, the court will touch briefly on the other two challenges plaintiffs raises. Plaintiff also contends that the ALJ erred in her treatment of Schmitt's CPP limitations. The first part of this argument is tied to the ALJ's rejection of Dr. Elmergreen's opinion. If the ALJ had placed weight on Dr. Elmergreen's conclusion that plaintiff had marked limitations in CPP (and at least two of the other categories), then plaintiff would have met or medically equaled one of the listings and been deemed disabled. In reconsidering how much weight to place on Dr. Elmergreen's opinion, the ALJ can also address Schmitt's limitations with respect to each of the paragraph B criteria.

Plaintiff also faults the ALJ for her treatment of moderate CPP limitations in the RFC, but this challenge has less traction. As the court previously explained in *Baumann v. Saul*, No. 20-cv-11-wmc, 2020 WL 7237921, at *4 (W.D. Wis. Dec. 9, 2020), 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. Still, 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 (W.D. Wis. Feb. 6, 2020) (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)). Here, the court concludes that the two state agency consultants

adequately translated their specific findings on CPP into their respective narratives, and that the ALJ effectively adopted their narratives in crafting her RFC for Schmitt. *See Burmester*, 920 F.3d at 511 (explaining that “an ALJ may reasonably rely upon the opinion of a medical expert who translates [CPP] findings into an RFC determination”). Viewing this argument in isolation, the court sees no error.²

III. Failure to Resolve Apparent Conflict between VE’s Testimony and DOT

Finally, plaintiff also challenges the ALJ’s failure to resolve the apparent conflict between finding that plaintiff could perform light work and limiting her to four hours of standing or walking. This argument fails to get off the ground. As described above, the RFC limits plaintiff to light work with the additional exertional limit of standing or walking for no more than four hours in an eight hour day. The ALJ specifically asked the VE to consider whether this additional limitation would alter the jobs and job numbers identified in an earlier hypothetical that did not limit plaintiff to standing or walking for only four hours in an eight hour day. The VE explained clearly her analysis in concluding that an individual with that additional restriction could perform two of the three jobs identified, albeit adjusting the job numbers available for one of the job categories, and further identified a third job and adjusted the job numbers for that job as well. As such, the ALJ resolved any apparent conflict between the VE’s testimony about available jobs given the hypotheticals presented by the ALJ and the DOT.

² The court is troubled by the ALJ’s rejection of both of the state agency physician’s conclusion that Schmitt could not work with the general public, but plaintiff does not challenge this specific aspect of the ALJ’s RFC. Regardless, the ALJ may reconsider this finding on remand.

ORDER

IT IS ORDERED that:

- 1) The decision of defendant Kilolo Kijakazi, Acting Commissioner of Social Security, denying plaintiff Lisa Schmitt's application for social security disability benefits and supplemental security income is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.
- 2) The clerk's office is directed to enter judgment in plaintiff's favor and close this case.

Entered this 29th day of September, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge