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

KARI L. SMITH,

Plaintiff,

v.

MARTIN J. O'MALLEY,[1]

Defendant.

OPINION AND ORDER

22-cv-197-wmc

Plaintiff Kari L. Smith has appealed the Social Security Commissioner's final determination that she was not disabled within the meaning of the Social Security Act. Specifically, Smith maintains that Administrative Law Judge ("ALJ") Ahavaha Pyrtel erred in two, material respects: (1) by failing to confront evidence of her hearing limitations; and (2) by failing to resolve apparent conflicts between the vocational expert's testimony and the Dictionary of Occupational Titles ("DOT"). Finding no merit in these challenges, the court will affirm the Commissioner's denial of benefits.

BACKGROUND[2]

Smith applied for disability benefits and supplemental security income in 2020, alleging that she became unable to work as of June 18, 2020, based on various conditions, including a hearing impairment.[3] After Smith's claim for benefits was denied by the local

[1] The court has amended the caption to reflect Martin J. O'Malley's appointment as Commissioner of Social Security on December 20, 2023.

[2] The following facts are drawn from the administrative record, which can be found at dkt. #7.

[3] Because Smith's hearing is the only impairment she contends the ALJ's residual functional capacity ("RFC") assessment did not adequately address, the court focuses its discussion of the record accordingly.

disability agency initially and on reconsideration, the ALJ held an evidentiary hearing and issued an opinion finding her not disabled because (1) she had the residual functional capacity to perform a reduced range of light work and (2) there were jobs existing in significant numbers in the national economy that she could perform. (AR 61-63.) The Appeals Council denied Smith's request for review in February 2022, making the ALJ's decision the final decision of the Commissioner. Smith seeks judicial review under 42 U.S.C. §§ 405(g), 1383(c).

Beyond noting that she had hearing aids, Smith did not testify about her hearing loss at the evidentiary hearing. (AR 95.) Even so, the ALJ found that Smith's hearing loss constituted a severe impairment based on medical evidence in the record, and further that Smith had the residual functional capacity to perform a reduced range of light work with a restriction to tolerating "up to moderate noise" only. (AR 52-53, 61.) In reaching that conclusion, the ALJ focused in part on December 2018 consultative examination notes, which indicated that Smith used "bilateral hearing aids" and heard conversational speech "not well beyond" three to four feet. (AR 57, 407.) That provider also noted that Smith had "a significant hearing problem," and when using the phone in particular, would have to take her hearing aids out and ask people to "speak up." (AR 407, 410.) The ALJ further noted that audiology testing in February 2019 had revealed evidence of moderate-to-severe "primary sensorineural hearing loss bilaterally" for which new hearing aids were prescribed after additional audiology testing in March 2020 to replace over-the-counter amplifiers that Smith had been using. (AR 57, 421.) After Smith was fitted with her hearing aids in

May 2020, however, the ALJ observed later entries in her treatment notes showing that Smith was pleased with how well she was hearing using the new aids. (AR 57.)

In addition to those notes, the ALJ considered the findings of a state agency reviewing physician, Dr. Mina Khorshidi, who had reviewed Smith's treatment records in October 2020 and only found that Smith should avoid "concentrated exposure to loud noise" due to her use of hearing aids and hearing loss. (AR 60, 116.) In May 2021, Dr. Ronald Shaw also reviewed Smith's updated records and found no evidence of progressive hearing loss, while noting that Smith now reported hearing people well on the phone, had "good benefit" from the hearing aids, and should avoid working in loud environments to protect her remaining hearing. (AR 60, 149.) While the ALJ was only partially persuaded by the state agency opinions because both Drs. Khorshidi and Shaw did not address Smith's need to alternate between sitting and standing, she also found those opinions to be "well supported by sufficient analysis of the evidence in the record" and "generally consistent with [Smith]'s good response to . . . hearing aid treatment." (AR 60.)

The ALJ also relied on Vocational Expert Marquita Miller, who testified that her opinions were consistent with DOT standards. Specifically, after Miller classified Smith's past work, the ALJ presented Miller with hypothetical questions. First, the ALJ asked Miller to assume an individual of Smith's age and education who was limited to light level work, including occasional ramps and stairs, never climbing ladders, ropes, or scaffolds, and the occasional need to stoop, kneel, crouch, and crawl. This hypothetical individual would also be capable of occasionally moving mechanical parts and tolerating up to "moderate noise," but be limited to performing simple, routine, repetitive tasks, including

few changes in a routine or work setting. In response, Miller testified that an individual with the RRC could *not* perform Smith's past work as a daycare worker or greeter, but *could* work as a housekeeper, cleaner or routing clerk.

The ALJ next asked Miller to consider an additional requirement that the hypothetical individual needed to alternate between sitting and standing every 30 minutes or every 15 minutes. In response, Miller testified that such an individual could not do light work as a housekeeper or cleaner, but could still work as a routing clerk, as well as a router or as an information clerk. Miller further reduced the job numbers for these positions to account for the sit/stand limitation, and noted that needing to alternate between sitting and standing every 15 minutes would be "the cut off," observing "[a]nything less than that would definitely interfere with their ability to complete tasks." (AR 100.) Smith's attorney raised no objection to Miller's testimony, nor did he ask Miller any questions.

In her opinion, the ALJ concluded that Miller's opinions were consistent with the DOT. Specifically, she noted that although jobs are classified in the DOT without provision for a sit/stand limitation, to the extent Miller's testimony differed from those classifications, her testimony as to job availability was based on her own knowledge and experience in the job market. Based on Smith's age, education, work experience, residual functional capacity, and Miller's expert opinion testimony, the ALJ found her "not disabled" because she could adjust to other work that exists in significant numbers in the national economy.

OPINION

I. ALJ's RFC Assessment as to Plaintiff's Hearing Impairment.

Plaintiff first contends that the ALJ's residual functional capacity ("RFC") assessment did not adequately account for plaintiff's hearing impairment. In particular, plaintiff asserts that "the ALJ failed to build a logical bridge between the evidence of [her] hearing loss and determining she can tolerate up to moderate noise." (Dkt. #10-1 at 23.) Thus, the question is whether the ALJ's decision set forth "substantial evidence" to justify her conclusion, meaning "sufficient evidence to support" her conclusion or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotation marks omitted and alteration adopted).

In applying this standard, reviewing courts may not "reweigh the evidence, resolve debatable evidentiary conflicts, determine credibility, or substitute [their] judgment for the ALJ's determination." *Reynolds v. Kijakazi*, 25 F.4th 470, 473 (7th Cir. 2022) (quotation marks omitted). However, the ALJ must explain his or her "analysis of the evidence with enough detail and clarity to permit meaningful appellate review." *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005). In other words, the ALJ must identify the relevant evidence and build an "accurate and logical bridge" between that evidence and the ultimate conclusion. *Beardsley v. Colvin*, 758 F.3d 834, 837 (7th Cir. 2014), *see also Moon v. Colvin*, 763 F.3d 718, 721 (7th Cir. 2014).

The ALJ's challenged RFC assessment meets these requirements. Specifically, the ALJ reviewed treatment notes indicating that plaintiff received effective hearing aids just

before the relevant period began in June 2020, and took note of agency medical findings concluding that plaintiff was limited from concentrated exposure to *loud* work. Moreover, at the evidentiary hearing, neither did plaintiff testify nor did her attorney dispute the accuracy of these notes or findings on her hearing impairment.

As noted above, the ALJ acknowledged on the available evidence that plaintiff's hearing loss was a severe impairment documented in 2018, and plaintiff's auditory testing in 2019 and 2020 reflected moderate-to-severe bilateral hearing loss. As the ALJ further observed, however, plaintiff received hearing aids before the relevant period and "was very pleased with how she was hearing with the aids." (AR 57.) Further, plaintiff does not specify *any* subsequent treatment notes that reflect any ongoing concerns about her hearing or that indicate some greater noise limitation was warranted. To the contrary, as the ALJ observed, Dr. Shaw's 2021 review of plaintiff's medical records found that: (1) plaintiff had received a "good benefit" from her hearing aids; plaintiff could hear people well on the phone; and there was no evidence of progressive hearing loss. (AR 149.) Thus, the ALJ reasonably relied on substantial evidence that plaintiff had responded well to her hearing aid treatment.

Plaintiff's criticisms of the ALJ's findings and conclusions are unavailing. First, plaintiff contends that the ALJ's RFC limitation does not adequately consider a 2018 finding that plaintiff had difficulty hearing conversational speech beyond three to four feet and difficulty hearing people on the phone. However, plaintiff does not explain why the RFC limitation should be modified based on observations that the ALJ found predated her receiving new hearing aids by nearly two years.

Second, plaintiff argues that the administrative medical findings of Drs. Khorshidi and Shaw advise plaintiff to avoid loud environments, which is somehow inconsistent with the ALJ's RFC limitation to no more than moderate noise. In fact, plaintiff cites a noise level hearing chart in the agency's Program Operations Manual System that expressly *distinguishes* between loud noise caused by large earth movers and heavy traffic and moderate noise in places like department and grocery stores. (Dkt. #10-1 at 21.) If anything, this chart establishes that a limitation to only moderate noise precludes exposure to loud noise just as Khorshidi and Shaw recommend. Indeed, Drs. Khorshidi and Shaw's opinion that plaintiff avoid loud noise is arguably *less* restrictive than the ALJ's limitation to moderate noise.

Third, plaintiff criticizes the ALJ's RFC assessment for failing to take into account an otolaryngologist's February 2019 assessment, which indicates that plaintiff was "counseled extensively to follow strict hearing conservation protection" and could respond well to hearing aids. (AR 421.) Again, however, plaintiff fails to explain how this note requires a more restrictive noise limitation than adopted by the ALJ. Even conceding this is relevant evidence, the otolaryngologist neither explains what "strict hearing conservation protection" means nor offers a specific limitation on plaintiff's hearing, and certainly did *not* find that plaintiff cannot work in a moderately noisy environment. Moreover, this finding pre-dates plaintiff's being fitted for hearing aids, which the otolaryngologist anticipated could benefit her.

Finally, and most importantly, these notes were available to Drs. Khorshidi and Shaw, who both concluded only that plaintiff should avoid loud environments. Because

the ALJ has linked her assessment of plaintiff's hearing impairment to substantial, supporting medical evidence *and* adopted the specific limitation advanced by two physicians, the court can discern no basis to remand this case.

II. Arguable Conflict with The Vocational Expert's Testimony

Nor will the court remand based on plaintiff's other assertion that the ALJ disregarded an apparent conflict between the vocational expert's testimony and DOT regulations or Social Security rulings. To begin, Social Security Ruling 00–4p requires the ALJ to identify and explain any conflict between the DOT and vocational expert testimony. *Prochaska v. Barnhart*, 454 F.3d 731, 735 (7th Cir. 2006). At the hearing, the vocational expert affirmed that her testimony would be consistent with the DOT without challenge by plaintiff or her counsel. Thus, the ALJ was "[e]ntitled to rely on unchallenged VE testimony" and only needed to "[i]nvestigate and resolve" any "apparent" conflict between the expert's testimony and the DOT regulations, meaning a conflict "[s]o obvious that the ALJ should have picked up on [it] without any assistance." *Zblewski v. Astrue*, 302 F. App'x 488, 494 (7th Cir. 2008); *Weatherbee v. Astrue*, 649 F.3d 565, 570 (7th Cir. 2011) (citing *Overman v. Astrue*, 546 F.3d 456, 463 (7th Cir. 2008)).

As relevant here, the ALJ's RFC assessment limits plaintiff to light work with additional limitations, including the ability to alternate between sitting and standing approximately every 15 to 30 minutes. (AR 55-56, 61.) Plaintiff asserts that this limitation "means that the hypothetical claimant could potentially sit for four out of eight hours per day," which is not addressed either way by DOT's definition of "light work." (Dkt. #10-1 at 11.) Instead, regulations define "light work" as including "a good deal of

walking and standing." 20 C.F.R. § 404.1567(b). A light work job *may* also involve "sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls." *Id.* One step below light work is "sedentary work," which includes "walking and standing . . . occasionally." *Id.* at § 404.1567(a). The Social Security Administration further clarified the amount of walking and standing required for light work and sedentary work. For sedentary work, "periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday." SSR 83-10. For light work, "the full range . . . requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday." *Id.*

However, the ALJ did *not* find plaintiff capable of performing the full range of light work, and the vocation expert's testimony specifically accounted for the RFC's sit/stand limitation. In particular, the ALJ asked the expert at the hearing to consider whether the additional stand/sit limitations would alter the jobs and job numbers identified in a previous hypothetical *not* including these limitations, to which she explained that an individual with either of the additional restrictions could not perform light work as a housekeeper or cleaner. Still, the expert opined that even with this limitation, plaintiff could still perform light work as a routing clerk, as well as a router or as an information clerk, and that these jobs were sufficient in numbers to make her employable. Ultimately, therefore, the ALJ found Miller's testimony to be generally consistent with DOT regulations, further noting that while jobs in the DOT are classified without provision for

a sit/stand option, the expert's knowledge and experience in the job market was sufficient to be credited.

Nevertheless, plaintiff now asserts that standing or walking for no more than 4 hours in an 8-hour workday is in "obvious" conflict with the agency's definition of "light work," and would fault the ALJ for not exploring this conflict further. (Dkt. #10-1 at 11, 17.) As a threshold matter, plaintiff assumes without establishing that her sit/stand limitation is the same as a limitation to sitting or standing only 4 hours a day, when it is not at all obvious that alternating between sitting or standing every 15 to 30 minutes is inconsistent with sitting or standing a total of 4 hours per day. Regardless, plaintiff's assertion in no way constitutes an *apparent* conflict between the DOT and vocational expert testimony that needed further exploration or explanation. As the ALJ noted in her opinion, "the DOT does not specify whether jobs allow changing from sitting to standing, [so] the VE's testimony supplemented the DOT and did not conflict with it." *Collins v. Berryhill*, 743 F. App'x 21, 26 (7th Cir. 2018); *see Zblewski*, 302 F. App'x at 494 ("[b]ecause the DOT does not address the subject of sit/stand options, it is not apparent that [a VE's] testimony conflicts with the DOT" on that point).

As this court has explained, there is no apparent conflict when the expert's testimony supplements the information in the DOT. *See Frye v. Saul*, No. 18-cv-550-wmc, 2020 WL 255815, at *5-6 (W.D. Wis. Jan. 17, 2020) ("no express conflict" where the expert's testimony "took up limitations simply not addressed by the DOT"). This is the case here, since the vocational expert's testimony merely supplements the DOT. Regardless, plaintiff forfeited her opportunity to challenge any supposed conflict by not

objecting to it contemporaneously at the administrative hearing itself. *See Brown v. Colvin*, 845 F. 3d 247, 254 (7th Cir. 2016) ("Brown concedes that [the VE's testimony about sit-stand options and allowable time off task] merely supplemented (and did not conflict with) the Dictionary of Occupational Titles (DOT), which means that she forfeited these arguments by failing to object to the testimony during the administrative hearing").[4] Plaintiff contends that her argument is not forfeited because in noting "the conflict in her decision," the ALJ had found it apparent. (Dkt. #14 at 10.) In reality, however, the ALJ simply asked the vocational expert to advise whether jobs in the DOT limited by a sit/stand requirement would materially impact the number of jobs available.

Finally, plaintiff argues that the ALJ should have limited her to sedentary rather than light work because of her sit/stand limitation, which would have directed a finding of "disabled" under the medical-vocational guidelines, or so-called "grid rules." As noted above, Social Security Ruling 00–4p requires unresolved conflicts between expert testimony and the DOT to be explained, *not* conflicts between such testimony and other sources. Nevertheless, plaintiff underscores that agencies are bound to follow their own policies, and criticizes the ALJ for accepting the expert's testimony regarding the light jobs she could perform given her sit/stand limitations to the extent inconsistent with an

[4] In her briefing, plaintiff relies on *Sean M. M. v. Commissioner of Social Security*, No. 17-CV-964-CJP, 2018 WL 3656399, at *5-*6 (S.D. Ill. Aug. 2, 2018), where the court remanded the case because the expert had testified about topics not covered in the DOT, on the ground that it would be "obvious" to "an ALJ who routinely handles social security disability hearings . . . that [the DOT's job] descriptions do not cover the areas noted by plaintiff." *Id.* at *5-*6. Because *Sean M.M.* does not comport with the law of the Seventh Circuit as expressed in *Brown* and *Zblewski*, the court declines to adopt its reasoning here. *See Frye v. Saul*, No. 18-cv-550-wmc, 2020 WL 255815, at *5 n.7 (W.D. Wis. Jan. 17, 2020) (declining to follow *Sean M. M.* in light of *Brown* and *Zblewski*).

approximate 6-hour standing or walking requirements for those jobs. However, even if plaintiff's sit/stand limitations are equivalent to sitting or standing only 4 hours a day, these agency sources generally address the walking or standing requirements for the *full range* of light work, which is "approximately" 6 hours per workday, and the ALJ did not find nor did the expert testify that plaintiff could perform the full range of light work. Rather, the expert testified that plaintiff's sit/stand limitation would *preclude* her working certain light jobs and would *reduce* the job numbers for the remaining light jobs she could perform. Again, therefore, the expert's testimony did *not* create conflict with the agency's regulations and ruling, much less an obvious one.[5]

Nor does the inclusion of a sit/stand restriction in an RFC assessment require the ALJ to apply the sedentary grid rules. *Devilbiss v. Saul*, No. 19-C-932, 2020 WL 5645691, at *5 (E.D. Wis. Sept. 22, 2020) (collecting cases). "After all, there is more to light work than standing and walking," *id.* at *7, and plaintiff does not argue that the ALJ erred in finding she could handle other requirements of light work, other than perhaps the limit on medium noise exposure. Instead, the ALJ obtained "the testimony of a vocational specialist concerning whether signification light jobs exist that could accommodate the claimant's special limitations." *Books v. Chater*, 91 F.3d 972, 980-81 (7th Cir. 1996). That is exactly what the ALJ did in this case.

[5] In reply, plaintiff relies on *Uhl v. Barnhart*, No. 05-C-610-S, 2006 WL 1520283 (W.D. Wis. Feb. 21, 2006), for the proposition that a 4-hour stand limitation is inconsistent with the agency ruling on light work. However, that case is not so useful here. In *Uhl*, the overarching concern related to the expert's testimony in response to an ALJ's hypothetical question not matching the eventual RFC, requiring a remand to "make [the ALJ]s] hypothetical question to the expert consistent with his [RFC] finding" *and* to explain his RFC assessment "more clearly." *Id.* at *5.

In sum, plaintiff applies agency rulings and regulations too rigidly, and the ALJ properly consulted the vocational expert about plaintiff's sit/stand limitation and reasonably relied on her unchallenged testimony. Without a basis for reversal, therefore, the court must deny plaintiff's motion for summary judgment and affirm the ALJ's decision.

ORDER

IT IS ORDERED that the decision of Martin J. O'Malley, Commissioner of Social Security, is AFFIRMED, and plaintiff Kari L. Smith's motion for summary judgment (dkt. #9) is DENIED. The clerk of court is directed to enter judgment and close this case.

Entered this 19th day of April, 2024.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge