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

MELVIN ZEMAN,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner
For Social Security,

Defendant.

OPINION AND ORDER

20-cv-591-wmc

Plaintiff Melvin Zeman seeks judicial review of a final decision that he is not disabled within the meaning of the Social Security Act. Zeman contends that Administrative Law Judge ("ALJ") David Skidmore erred by: (1) arbitrarily determining that he could perform medium work despite his fibromyalgia; (2) failing to give adequate consideration to the opinion of his treating physician; and (3) not ensuring that the vocational expert's ("VE") job numbers were the product of a reliable method. For the reasons discussed below, the court will affirm the decision of the Commissioner.

BACKGROUND[1]

A. Medical Record

Plaintiff Melvin Zeman suffers from fibromyalgia, anxiety, and depression, conditions, which he claims rendered him unable to work beginning on November 4, 2016.

On March 15, 2016, Zeman met with his primary care physician Bradley Boettcher,

[1] The following, relevant facts are drawn from the administrative record, which can be found at dkt. #13.

M.D., for his periodic health exam. (AR at 502.) Dr. Boettcher noted that Zeman had a history of anxiety and depression, but that these conditions were stable at the time. (AR at 502-06.) Although not specifically discussed by Dr. Boettcher, Zeman's medication list included Xanax and Paxil, which are generally used to treat depression. (AR at 502-03.) Dr. Boettcher also noted that Zeman had a history of diffuse muscle pain for which he had recently received a fibromyalgia diagnosis from a neurologist. (AR at 502.) Zeman reported using marijuana daily to help with muscle pain, along with taking cyclobenzaprine, a muscle relaxant. (AR at 502.) Dr. Boettcher additionally wrote a new prescription for daily doses of Lyrica in light of his fibromyalgia. (AR at 504-06.) Two weeks later, Zeman returned to Dr. Boettcher for a "recheck," apparently because his insurance would not cover the Lyrica prescription until he saw a rheumatologist, which was then scheduled. (AR at 38, 509-10, 519.)

Zeman's rheumatology consult occurred on June 6, 2016, with Jan Ciejka, M.D. (AR at 519-30.) Dr. Ciejka noted that Zeman reported chronic, all-over pain that waxed and waned on a daily basis. (AR at 520-21.) According to Zeman, cannabis was the only treatment that gave him reasonable relief. (AR at 521.) Dr. Ciejka's physical exam of Zeman showed fourteen tender points, causing him to concur with the fibromyalgia diagnosis.[2] (AR at 522.) Otherwise, Dr. Ciejka's physical exam showed good range of motion without pain and generally normal findings. (AR at 521-22.) As for treatment,

[2] One way that physicians diagnose fibromyalgia is by performing digital palpation at eighteen tender point sites. SSR 12-2p. If the patient experiences any pain when this pressure is applied, that is a positive tender point. *Id.* At least eleven tender point sites must be found to support a diagnosis of fibromyalgia using this method. *Id.*

Dr. Ciejka not only agreed with Dr. Boettcher's Lyrica prescription, but gave Zeman a prescription for physical therapy and recommended cognitive behavioral treatment. (AR at 522.) Dr. Ciejka also ordered imaging of Zeman's back, which was completed the same day by David Isaacs, M.D., who found "[m]ild bilateral degenerative changes of the sacroiliac joints without specific evidence for sacroiliitis." (AR at 526.)

Approximately five months later, on November 7, 2016, Zeman underwent a psychological intake evaluation with Michael Surendonk, MSSW, LSCW. (AR at 532.) During the intake, Zeman described struggling with "chronic pain, anxiety, and depression," as well as recently leaving his job "due to stress and chronic pain and the toxic environment that was his workplace." (AR at 532.) Zemen stated that he had "had suicidal thoughts in the past, primarily due to his being depressed and having significant pain" but that these thoughts were "fleeting" and unspecific, and Surendonk concluded that he was at a "low to moderate risk" for suicide attempt. (AR at 533.) Zeman also reported to Surendonk that his fibromyalgia caused him "pain levels of 2 to 3 on a scale of 0 to 10 most days, with spikes 2 to 3 days per month at 8 or 9 out of 10" although he also stated that he believed Lyrica to be effective for him in managing the overall pain. (AR at 534.) Ultimately, Surendonk affirmed Zeman's diagnosis of major depressive disorder and concluded that he would benefit from further therapy as well as a psychiatry consult. (AR at 534.)

Zeman returned for therapy on November 14, 2016, November 28, 2016, December 7, 2016, and December 12, 2016. (AR at 536-39.) During these sessions, Surendonk noted that Zeman continued to report anxiety and depressive symptomatology,

although progress was noted. (AR at 536-39.) He did not again bring up his fibromyalgia or chronic pain during these follow-up sessions. (AR at 536-39.) By December 31, 2016, Zeman determined that he had made sufficient progress and chose to discontinue treatment. (AR at 541.)

Zeman returned to Dr. Boettcher on April 4, 2017, over one year after his previous appointment. (AR at 514-16.) Dr. Boettcher concluded that Zeman's fibromyalgia was stable, writing:

> Had side effects from higher doses of Lyrica. On 75 milligrams twice daily he felt panic and anxiety. Taking Lyrica 50 milligrams twice a day []is tolerated without problems. His fibromyalgia symptoms are reduced from 4-5 on a scale of []10 without medications to a[] 2 at this point. He states his episodes [of] fibromyalgia do not last this long. His episodes are less frequent. His episodes used to be every 2 weeks and are no more than every 2 months.

(AR at 514.) Zeman's depression was only brought up in the context of the earlier referral to psychiatry (presumably, the referral suggested by Surendonk in November of 2016). (AR at 514-16.)

On July 17, 2017, at the request of Zeman via his counsel, Dr. Boettcher completed a "Physical Work Capacity & Pain Questionnaire." (AR at 551.) In this questionnaire, Dr. Boettcher noted that he had been Zeman's primary care physician for the past thirteen years and saw him for "physicals, as needed." (AR at 551.) As for Zeman's limitations, Dr. Bottcher opined in relevant part that: (1) Zeman would have to lie down at unpredictable intervals approximately every 2 hours for 30 minutes during a work shift; (2) he was intolerant to heat, humidity, and noise; (3) his pain and symptoms would frequently interfere with his attention and concentration; (4) even low stress jobs would

be impossible for him; (5) he could only walk about ten feet on a bad day, which occurs 5-8 days per month; (6) he could continuously sit for only 1 hour, and stand for only 10 minutes; (7) with normal breaks during an 8 hour work day, he could not sit or stand/walk for more than 2 hours respective; (8) he would need unscheduled 5 minute breaks every 30 minutes; and (9) he would need to elevate his legs 100% of the time when sitting. (AR at 551-58.)

At the request of the Social Security Administration, Zeman underwent a psychological evaluation with Catherine Bard, Psy. D., on September 25, 2017. (AR at 559.) When asked why he was applying for disability benefits, he responded that he has "had chronic pain and muscle problems for several years and it is only getting worse" and that his "anxiety and depression have also worsened." (AR at 559.) Dr. Bard's summary concluded that Zeman suffered from:

> an Adjustment Disorder with both anxiety and depression as features of that Adjustment Disorder. The Adjustment Disorder is a reaction to upset from an array of medically-based problems. . . . It appears that the primary reason that this individual is out of the workforce is due to medically-based problems. This claimant complaints of fibromyalgia and ongoing pain that is highly unpredictable, but intense. . . . It is beyond the scope of this psychologist's expertise and training to address medically based problems.

(AR at 562.)

On October 5, 2017, state agency doctor Ronald Shaw, M.D., reviewed Zeman's medical record and concluded that Zeman could perform medium exertional work with no additional limitations. (AR at 147.) Also on October 5, 2017, Zeman returned to Dr. Boettcher for a recheck of his blood pressure. (AR at 574.) Neither his fibromyalgia nor

his mental impairments were discussed at this appointment. (AR at 574-77.)

A medical examination of Zeman was completed at the request of the Disability Determination Service on February 15, 2018, by A. Neil Johnson, M.D. (AR at 583-86.) The physical exam showed that Zeman could walk normally, but slowly; had difficulty tandem walking and moderate difficulty squatting; was tender at the base of his head, down his neck and low back, and in his arms and elbows; and demonstrates generally normal range of motion, full muscle strength, and intact sensation. (AR at 583-86.)

After this medical examination was completed, state agency doctor Marcia Lipski, M.D., opined on February 22, 2018, that Zeman had the residual functional capacity ("RFC") to perform medium exertional work, that he could perform postural maneuvers only "frequently" (as opposed to with no limitation) and should avoid concentrated exposure to noise. (AR at 163-64.)

On March 5, 2018, Zeman had a periodic health exam appointment with Dr. Boettcher. (AR at 590.) Zeman "[c]omplain[ed] of stable fibromyalgia" which flared up "every couple weeks." (AR at 590.) According to Zeman, marijuana gave him the most relief of his symptoms, and he did not know if Lyrica or cyclobenzaprine were helpful. (AR at 590.) Zeman explained that he wanted to get off Lyrica "because of this being a controlled substance," and Dr. Boettcher recommended reducing his dosage and potentially stopping the Lyrica altogether if his symptoms were stable. (AR at 593.) Dr. Boettcher also noted Zeman's "stable" anxiety and depression. (AR at 590.) Zeman met with Dr. Boettcher again about a month later, on April, 2, 2018. (AR at 596.) Zeman reported that he was weaning off of Lyrica and that he had side effects at first but they

were short-lived. (AR at 596.) Zeman also tried stopping cyclobenzaprine, but that caused him more spasms at night, and he restarted it. (AR at 596.)

Zeman's next medical appointment was approximately six months later, again with Dr. Boettcher. (AR at 612.) He made the appointment because of skin lesions; he did not discuss his fibromyalgia, depression, or anxiety at this appointment. (AR at 612-14.)

On March 20, 2019, Zeman again had a periodic health exam appointment with Dr. Boettcher. (AR at 627.) At this appointment, he reported that he experienced "[o]ccasional flares" of his fibromyalgia. (AR at 627.) Zeman continued to report that CBD oil and marijuana help him best, and he had not restarted Lyrica. (AR at 627.) His fibromyalgia, depression, and anxiety were all again noted as "stable." (AR at 630.)

B. Hearing

After Zeman's application was denied initially and again on reconsideration, a video hearing was held on August 29, 2019. Present at the hearing was ALJ Skidmore, Zeman, Zeman's counsel attorney Patrick Scharmer, and VE Heather Mueller. At the hearing, Zeman testified that he was unable to work due to a number of issues, including: (1) the unpredictability of his impairments, including episodes of severe pain; (2) that he becomes exhausted easily; (3) spasms, numbness, and tingling; (4) his need for naps; (5) his anxiety, depression, and brain fog. (AR at 105-18.) Although he testified that Lyrica was effective, he discontinued it due to cognitive side effects, and instead used marijuana to help with his inflammation, pain, and spasms. (AR at 118-20.)

After Zeman's testimony, VE Mueller was then called to testify, at which point attorney Scharmer objected to "her qualifications with respect to estimating job numbers,"

although he did not object to "her qualifications on general vocational matters." (AR at 127.) Mueller's resume, which was entered into evidence at the hearing, shows that she worked as a job placement specialist/computer monitor at MedVoc Rehabilitation from August 2012 to the date of the hearing, that she received a Masters of Science in Rehabilitation and Mental Health Counseling in 2018 from the Illinois Institute of Technology, and that she had worked as a VE with the Social Security Administration since June of 2018. (AR at 476-77.) At the hearing, Attorney Scharmer engaged in the following discussion with VE Mueller:

> Q Would you describe any experience, outside of testimonial, so at Social Security or other testifying, do you have experience estimating job numbers at the national level?
> A Not at the national level. My work outside of being an expert would be more to the Illinois area.
> Q Okay. And do you have any particular methodology you follow in estimating those numbers?
> A I do utilize Job Browser Pro on my computer. I look at each individual DOT code. I then look at -- I take in -- I add and remove the industries that the job or may not be performed in anymore, and I also eliminate all the part-time work.
> Q Okay. And are you familiar with how Job Browser Pro calculates the numbers?
> A I know there's an article on it, but I do not know it off the top of my head.

(AR at 127-28.) The ALJ then further questioned VE Mueller:

> Q And what -- Job Browser Pro, what is -- who publishes Job Browser Pro? Do you know?
> A It is SkillTRAN.
> Q Okay. And is it a -- and it's a database? What -- how would -- what would you -- how would you describe Job Browser Pro?
> A database would probably be your best --
> Q A database of jobs?
> A Um-hum, of the DOT codes and the jobs, yes.
> Q And is it used -- do you use it in your work outside of your work as a -- testifying in Social Security hearings?
> A I do.

(AR at 128-29.) The ALJ then asked Mueller whether there existed jobs in significant numbers in the national economy that an individual with the same RFC as Zeman could perform. (AR at 129-37.) Mueller responded that such an individual could work in the following representative occupations: (1) Office Helper (DOT 239.567-010), approximately 35,000 positions nationwide; (2) Mail Clerk (DOT 209.687-026), approximately 32,000 jobs nationwide; and (3) Housekeeping/Cleaner (DOT 323.687-014), approximately 115,000 positions nationwide. She additionally attested that these numbers were consistent with the Dictionary of Occupational Titles ("DOT"), except that she additionally drew from her professional experience to address certain limitations not accounted for in the DOT. (AR at 135.)

Attorney Scharmer then further confirmed:

> Q And then just going back to the [job estimate] numbers you cited, you mentioned earlier when I -- we did voir dire that -- you talked about you get the job numbers from Job Brower Pro. When you get those numbers out, do you adjust them in any way?
> A Just looking at the industry, like adding and taking out industries, and then removing part-time work.

(AR at 137.)

C. ALJ Decision

On October 30, 2019, ALJ David Skidmore issued a written decision denying Zeman's request for benefits, following the five-step sequential evaluation process set forth in the regulations. (AR at 31-45.) At step one, ALJ Skidmore concluded that Zeman had not engaged in substantial gainful activity since his alleged onset date. (AR at 33.) And although the ALJ found at step two that Zeman suffered from three severe impairments --

fibromyalgia, anxiety, and depression -- at step four he concluded that none of Zeman's impairments met or equaled the listing level impairments. (AR at 33-35.)

At step four, ALJ Skidmore concluded that Zeman had the RFC to do medium work with some additional postural, environmental, and mental limitations. (AR at 36.) In arriving at this conclusion, ALJ Skidmore considered Dr. Boettcher's opinion evidence as provided in his July 2017 questionnaire, but ultimately found it "unpersuasive." (AR at 42.) At the same time, he found the state agency doctors' opinions about Zeman's physical limitations to be "only partially persuasive," and found the state agency psychologists' opinions about Zeman's mental limitations to be "largely persuasive." (AR at 41.)

Finally, at step five, the ALJ considered whether, given his RFC, there were jobs that existed in significant numbers that Zeman could perform. (AR at 42.) ALJ Skidmore explained that VE Mueller testified that Zeman could perform at least three occupations that existed in significant numbers in the national economy. (AR at 43.) The ALJ noted plaintiff's counsel's objection to VE Mueller's testimony regarding job numbers, but the ALJ overruled the objection, concluding that the VE's estimates were based on a reliable method. (AR at 43-44.)

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," 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, plaintiff's three core challenges on appeal must be considered under this deferential standard, which the court will address in turn.

I. Exertional Level

First, plaintiff argues that the ALJ erred by "by arbitrarily determining that despite Zeman's fibromyalgia he could perform work at the medium exertion level." (Pl.'s Br. (dkt. #18) 11 (capitalization omitted).) According to plaintiff, Zeman should have been limited to sedentary work, a conclusion which would have required a finding of disability under the Medical-Vocational Guidelines. (*Id.* at 6-7.)[3]

The regulations classify jobs under five exertional categories: sedentary, light, medium, heavy, and very heavy. 20 C.F.R. § 404.1567. Medium work "involves lifting

[3] As the Commissioner points out, although the ALJ concluded that Zeman could perform medium work, the jobs identified by the VE and adopted by the ALJ were all light work jobs. (Def.'s Opp'n (dkt. #23) 15.) Accordingly, plaintiff must show that Zeman is incapable of even *light* work for there to be any harmful error.

no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 404.1567(c). Sedentary work, by contrast,

> involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). Here, the ALJ's finding that Zeman was capable of medium work with some additional limitations is supported by substantial evidence in the record, including the opinion evidence of Drs. Shaw and Lipski, the medical record, and Zeman's activities of daily living. Of course, Dr. Boettcher's questionnaire does include significantly greater limitations than those found by the ALJ. However, the ALJ did not find this opinion to be persuasive, and as discussed below, this court concurs that Dr. Boettcher's opinion was properly discounted.

As to the opinions of Drs. Shaw and Lipski, both opined that plaintiff had the exertional ability to perform medium work. (AR at 147, 163.) As state-agency physicians, both doctors were "highly qualified and experts in Social Security disability evaluation." *See* 20 C.F.R. § 404.1513a(b)(1); *see also* 20 C.F.R. § 404.1520c(c)(5) (a medical source's "understanding of our disability program's policies and evidentiary requirements" is a factor in weighing that source's opinion).

The overall medical record also supports the ALJ's conclusion. First, Zeman's treatment history was very limited and consistent primarily of annual exams with Dr. Boettcher. Zeman attended only a single rheumatology consult, which was apparently

scheduled so that his Lyrica prescription would be covered by his insurance. Although the rheumatologist recommended physical therapy, Zeman never followed-up on this recommendation. Moreover, although Zeman was prescribed Lyrica and reported it to be "effective," he later stopped taking it because of his desire not to take a "controlled substance" (AR at 593) and/or the cognitive side-effects it caused (AR at 118-20). Plaintiff argues that the ALJ had "an affirmative duty to seek an explanation for the failure to follow prescribed treatment or to seek treatment" and that the ALJ erred in relying on Zeman's limited treatment without seeking such an explanation. (Pl.'s Br. (dkt. #18) 10.) But other than Zeman's reasons for stopping Lyrica, which the ALJ *did* ask about at the hearing (AR at 118-19), the record contains no hint that there were alternative explanations for Zeman's lack of treatment. *See Nicholson v. Astrue*, 341 F. App'x 248, 252 (7th Cir. 2009) ("Nicholson also testified that he was not seeing a psychiatrist or psychologist for his depression. He did not hint that his infrequent treatment or failure to seek treatment was due to inability to pay for treatment. . . . This lack of treatment supports the ALJ's adverse credibility finding.") Nor has plaintiff provided an alternative explanation for Zeman's lack of treatment on appeal. *Gilbertson v. Berryhill*, No. 17-CV-631-JDP, 2018 WL 3122060, at *6 (W.D. Wis. June 26, 2018) ("Gilbertson does not offer any alternative explanation, such as limited financial resources or lack of insurance, to explain any failure to follow recommended treatment. Standing alone, the ALJ's failure to specifically inquire about her failure to follow recommended treatment does not warrant remand."). An ALJ is entitled to rely on a plaintiff's treatment history, of lack thereof, 20 C.F.R. § 404.1529(c)(3)(iv), (v), and ALJ Skidmore's consideration of Zeman's treatment history

here was proper.

In addition to the limited nature of Zeman's treatment, when he *was* treated, his providers did not note any limitations indicating that he could not perform medium work. Physical exams showed that he had good range of motion without pain, full muscle strength, and otherwise generally normal physical findings. Although Zeman complained of chronic pain during his appointments, during the relevant period his fibromyalgia largely seemed to be under control. By April of 2017, Zeman rated his fibromyalgia symptoms a 2 out of 10 with episodes occurring no more than every 2 months. These symptoms remained relatively stable throughout 2017, 2018, and into 2019. Plaintiff suggests that the ALJ improperly took "stable" to mean improved, rather than not worsening. (Pl.'s Br. (dkt. #18) 15.) But there is nothing to suggest that the ALJ improperly understood the term.

Finally, plaintiff argues that the ALJ improperly considered Zeman's activities of daily living. He argues that "merely finding that Zeman does some chores and tries to fish when he is up to it does not equate with the ability to perform full-time, sustained work." (Pl.'s Br. (dkt. #18) 13.) This may be true as a general proposition, but it is not what the ALJ did here. Instead, the ALJ considered Zeman's activities as one factor among many in assessing his RFC. This is proper, as the regulations specifically contemplate consideration of a claimant's "activities of daily living" in determining whether an individual is disabled. 20 C.F.R. § 404.1529(a). *See also* SSR 96-8p ("The RFC assessment must be based on *all* of the relevant evidence in the case record, such as . . . [r]eports of daily activities.") (emphasis in original). Because plaintiff has failed to show that the ALJ's

finding that Zeman could perform medium work, the court concludes that the ALJ did not err in assessing Zeman's exertional capacity.

II. Treating Physician Opinion

Plaintiff next argues that the ALJ failed to give adequate consideration to Dr. Boettcher's opinion that Zeman was disabled and could not work. Apparently recognizing that Dr. Boettcher's opinion was an outlier, plaintiff argues that "[e]ven if the extreme limitations were discounted, Dr. Boettcher's opinion supported Zeman's testimony and a finding that Zeman would be limited to sedentary work." (Pl.'s Br. (dkt. #18) 16-17.) In making this argument, plaintiff attacks the validity of the social security regulations themselves.

At issue is the agency's recission of what was known as the "treating physician rule," which was in force prior to March 27, 2017, and provided that an opinion from a claimant's "treating source" should be given "controlling weight" if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence." 20 C.F.R. § 404.1527(c)(2). If a treating source's medical opinion is not given controlling weight, then the ALJ must weigh the opinion using a number of factors, including the length and nature of the treating relationship, whether the medical opinion is well-supported, the consistency of the opinion with the record as a whole, the source's specialization, and "other factors." 20 C.F.R. § 404.1527(c).

In January of 2017, the Social Security Administration adopted new rules governing agency review of disability claims involving opinions from a claimant's treating physician. 82 Fed. Reg. 5844-84 (Jan. 18, 2017). The new regulations provide in relevant part that,

in evaluating claims filed March 27, 2017, or later, the agency "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from [the claimant's own] medical sources." 20 C.F.R. § 404.1520c(a). Under the new regulations the "most important factors" in weighing a medical source's opinions are supportability and consistency. 20 C.F.R. § 404.1520c(b)(2).

Plaintiff acknowledges that the Social Security Administration amended its regulations, but argues that the treating physician rule is established in Seventh Circuit case law and "has viable separation from the Commissioner's regulatory authority." (Pl.'s Br. (dkt. #18) 19.) While the court is skeptical of plaintiff's argument, *see Morrical v. Kijakazi*, No. 20-CV-602-WMC, 2021 WL 4452310, at *5 (W.D. Wis. Sept. 29, 2021), here, under *either* rule, the ALJ's properly discounted Dr. Boettcher's opinion.

Certainly, under the new regulations, the ALJ's consideration of Dr. Boettcher's opinion was proper. As the ALJ explained (and as plaintiff himself even partially admits), Dr. Boettcher's opinion reflected "extreme" limitations not supported by the rest of the medical evidence. Indeed, Dr. Boettcher's own treatment notes show that Zeman's fibromyalgia was controlled by medication and stable throughout 2017, 2018, and 2019. Additionally, the ALJ explained that Dr. Boettcher "did not identify any clinical findings or objective signs, leaving the area blank on the form." (AR at 41.) Thus, the ALJ's decision to discount his opinion because it was neither consistent with nor supported by the objective medical evidence was proper under the new regulations.

But even if the treating physician rule were to apply, the ALJ's did not err. The ALJ

found that Dr. Boettcher's opinion was not supported by diagnostic techniques and was inconsistent with the other medical evidence, and so it was not entitled to controlling weight. Moreover, the ALJ acknowledged that Dr. Boettcher had been treating Zeman for thirteen years with annual physicals as needed, but given the lack of supportability and consistency, the ALJ reasonably found the opinion to be not persuasive. It is significant to note that other than Dr. Boettcher's opinion, plaintiff points to *no* other evidence supporting his argument that Zeman should be limited to sedentary rather than medium work. Accordingly, plaintiff has failed to prove that the ALJ's treatment of Dr. Boettcher's opinion was improper.

III. Job Numbers

Plaintiff's final argument is that the VE did not provide a sufficient foundation for her job estimate numbers, and that the ALJ erred by relying on the VE's allegedly unreliable testimony. The substantial evidence standard requires an ALJ to ensure that the VE's job-number estimates are the product of a reliable method. *Chavez v. Berryhill*, 895 F.3d 962, 968 (7th Cir. 2018) (citing *Donahue v. Barnhart,* 279 F.3d 441, 446 (7th Cir. 2002)). Thus, "[a] finding based on unreliable VE testimony is equivalent to a finding that is not supported by substantial evidence and must be vacated." *Britton v. Astrue*, 521 F.3d 799, 803 (7th Cir. 2008). More specifically, where a claimant challenges a VE's job estimate number, the ALJ "'must require the VE to offer a reasoned and principled explanation' of the method he used to produce it." *Brace v. Saul*, 970 F.3d 818, 822 (7th Cir. 2020) (quoting *Chavez*, 895 F.3d at 970).

Even so, the Seventh Circuit has recognized that a VE's job estimate number is

necessarily an approximation and acknowledged that there is "no way to avoid uncertainty" in arriving at such a figure. *Chavez*, 895 F.3d at 968. The Supreme Court has explained that a reviewing court's inquiry into the reliability of VE testimony "is case-by-case" and should "take[] into account all features of the vocational expert's testimony, as well as the rest of the administrative record." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1157 (2019). The Court also held that a VE need not produce the data or methods underlying her estimate for it to be considered reliable. *Id.*

Specifically at issue in this case is whether the VE's use of the Job Browser Pro software. This court recently considered similar challenges in *Westendorf v. Saul*, No. 19-CV-1019-JDP, 2020 WL 4381991 (W.D. Wis. July 31, 2020), and *Dolan v. Kijakazi*, No. 20-cv-364 (W.D. Wis. Jan. 4, 2022) (dkt. #34). In *Westendorf*, Judge Peterson concluded that an ALJ committed reversible error by failing to ensure that the VE's job estimate numbers -- which were based in part on Job Browser Pro -- were the product of a reliable method. 2020 WL 4381991 at *4. In particular, he noted that the document provided by the VE to explain the methodology of the software was outdated and further that the VE did not appear to apply her own experience to support the estimates. *Id.* Similarly, in *Dolan*, the court remanded because the "VE provided no discussion of other sources, including her own experience, that she relied on as a check on the Job Browser Pro's estimation of job numbers by DOT code." *Dolan*, slip op. at *10.

In *Kenealy v. Saul*, No. 19-CV-40-JDP, 2019 WL 6463840 (W.D. Wis. Dec. 2, 2019), by contrast, Judge Peterson upheld an ALJ's reliance on VE testimony where the VE "considered job-number data from JobBrowser Pro . . . then adjusted these numbers

based on her experience as a vocational rehabilitation counselor in talking to employers and in placing workers into these positions." *Id.* at *6. Other courts have concluded that the VE's reliance on the Job Browser Pro software was reliable because it was used in conjunction with other sources and the VE's own experience. *E.g. Dahl v. Saul*, No. 18-C-676, 2019 WL 4239829, at *4 (E.D. Wis. Sept. 6, 2019); *Clinton S. v. Berryhill*, No. 1:17-CV-1492, 2018 WL 6247261, at *15 (C.D. Ill. Nov. 29, 2018); *Irwin v. Berryhill*, No. 1:17-CV-00408-SLC, 2018 WL 5873877, at *14 (N.D. Ind. Nov. 8, 2018).

Here, the VE explained that she used JobBrowser Pro as a starting point, but then added and removed industries as well as eliminating part-time work. Thus, this case is more akin to *Kenealy* than *Westendorf* or *Dolan*. Because the VE did not simply rely on the software, but use it in conjunction with her experience, her job number estimates cannot be said to be unreliable, and so ALJ did not err in using them in his opinion denying Zeman's benefits.

ORDER

IT IS ORDERED that the decision of defendant Andrew Saul, Commissioner of Social Security, is AFFIRMED and plaintiff Melvin Zeman's appeal is DISMISSED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 4th day of January, 2022.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge