

IP 06-1175-C t/k Cooper v Astru
Judge John D. Tinder

Signed on 9/27/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KARLESA COOPER,)	
)	
Plaintiff,)	
vs.)	NO. 1:06-cv-01175-JDT-TAB
)	
JO ANNE B. BARHNART,)	
)	
Defendant.)	

Ms. Cooper has femoral patellar syndrome,² has undergone left knee surgery, and alleges continuing pain and swelling in both knees. (R. 400.) She also takes Morphine and Percocet for pain. (R. 402.) Ms. Cooper's daily or weekly activities include shopping, cooking, doing laundry, cleaning, sometimes driving, and occasionally babysitting a friend's children. (R. 76-77, 406-07.) Ms. Cooper goes to church regularly with a friend, Jeff Sultzer, who testified at her hearing. (R. 411.) She also attends school from home. (R. 405.)

Ms. Cooper filed an application for Disability Benefits under the Social Security Act on May 20, 2003, due to femoral patellar syndrome. (R. 46-48.) Her initial disability application and subsequent reconsideration were denied. Following a hearing, the ALJ issued a decision on September 23, 2005, denying benefits, finding Ms. Cooper capable of performing some of her past relevant work as well as other light work. (R. 13-18.) The Appeals Council denied her request for review, making the ALJ's decision the final decision of the Commissioner and ripe for review. (R. 5-7.)

Ms. Cooper now appeals. She bases her appeal on three arguments. First, that the ALJ did not properly consider and weigh the opinions of Ms. Cooper's nurse practitioner and chiropractor. Second, that the ALJ wrongfully found Ms. Cooper capable of certain light work. And third, that the ALJ did not properly evaluate Ms.

² This is just one name used for Ms. Cooper's diagnosis. Congenital misalignment of her femurs and patellofemoral syndrome are just a couple of the others. Ms. Cooper described it as a growth disease in which her "legs are facing the opposite way. They curve and turn as you grow until they curve completely opposite." (R. 401.) Based on the Record overall, the key features appear to be a misalignment and improper rotation resulting in pain and swelling.

Cooper's subjective symptoms. The court finds that the ALJ did not err in his decision.

II. Disability Determination Under the Social Security Act

Social Security disability eligibility is determined with a five-step test. The five-step test is a sequential evaluation of the following: (1) Whether the applicant is engaged in significant gainful employment. If yes, then the applicant is not disabled. (2) Whether the severity of the applicant's impairment significantly restricts the applicant's ability to perform basic work activities. If there is no significant impairment, then the applicant is not disabled. (3) Whether the impairment(s) meets or equals one in the Listing of Impairments. If so, then the applicant is conclusively deemed disabled. (4) If the applicant's impairment does not meet one in the Listing, whether the applicant's residual functioning capacity ("RFC") prevents her from performing her past relevant work. If unable to perform past work, the applicant is not disabled. (5) If the RFC does not permit the applicant to perform past relevant work, then the analysis proceeds to whether the applicant can perform other work, based on her RFC as well as her age, education, and work experience. In this final step the burden is on the Commissioner to show that a significant number of these jobs exist. 20 C.F.R. §§ 416.920, 404.1505; *see also Arnold v. Barnhart*, 473 F.3d 816, 820-21 (7th Cir. 2007). Ms. Cooper takes issue with the ALJ's determinations at steps four and five.

III. The ALJ's Decision

The ALJ found that Ms. Cooper did not have any impairments that met the Listing requirements in Appendix 1, Subpart P, Regulations No. 4. He then found, relying primarily on the State Agency medical consultant's report, that she was capable of performing a "full range of light work" with specific limitations:

lifting and carrying no greater than 20 pounds occasionally and no greater than 10 pounds frequently, sitting, standing, and walking for up to 6 hours total in an 8-hour day, with the option to alternate positions of sitting, standing, and walking, no frequent pushing or pulling with the lower extremities, no climbing of ladders, ropes, or scaffolds, no kneeling or crawling, no more than occasional climbing of stairs and ramps, and no more than occasional stooping and crouching.

(R. 17.) The ALJ, relying on testimony from a vocational expert, then established that Ms. Cooper was capable of performing some of her past relevant work: PBX operator, receptionist, and bookkeeper. The ALJ also found Ms. Cooper capable of performing other jobs including bookkeeping and accounting, timekeeper, new account clerk, and receptionist. On this basis, the ALJ found Ms. Cooper not disabled. (R. 17-18.)

IV. Standard of Review

The review of the ALJ's decision by the district court is limited. It is not an opportunity to re-weigh the evidence or second-guess the ALJ. The ALJ's findings of fact are conclusive provided they were supported by substantial evidence and there was no error of law. 42 U.S.C. § 405(g); *see also, e.g., Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001). Substantial evidence exists if it is "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Dixon* 270 F.3d at 1176. The ALJ must "build an

accurate and logical bridge from the evidence to his conclusion.” *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000). In this case the ALJ’s decision is supported by substantial evidence and contains no error of law.

V. Analysis

A. The ALJ Did Not Commit Error in the Weight He Accorded to the Nurse Practitioner’s Assessment or in the Weight He Accorded to the Chiropractor’s Evidence.

Ms. Cooper’s first claim is that the ALJ’s treatment of the evidence from her nurse practitioner was in error. Ms. Cooper submitted as evidence an RFC assessment completed by her nurse practitioner, Catherine Macke. (R. 364-66.) This assessment indicates that Ms. Cooper can only sit, stand, or walk continuously for 15 minutes; can frequently lift or carry up to 5 lbs and occasionally lift up to 20 lbs; can occasionally bend trunk, rotate trunk, squat, kneel, crawl, climb and frequently reach over head, extend arms, and flex neck; can use hands frequently or continuously for grasping, pushing/pulling arm controls, and for fine manipulation; cannot use legs in frequent or repetitive movements for leg controls; has moderate restrictions for being around unprotected heights and moving machinery, and mild restriction for driving automotive equipment; and has subjective symptoms of pain that would moderately affect her ability to perform non-exertional work related activities. (R. 364-66.)

Ms. Cooper claims that the ALJ rejected this evidence simply because Ms. Macke was a nurse practitioner, and therefore did not afford Ms. Macke's report the proper weight under 20 C.F.R. § 404.1513(d). Ms. Cooper further claims to have submitted "less than one week after the hearing date" a document identical in all respects to Ms. Macke's report except for the addition of an illegible, undated signature of a supervising doctor. Ms. Cooper asserts that this signature changes the nature of the document, requiring the ALJ to give it more weight under 20 C.F.R. § 416.913, and also that, under HALLEX I-2-730(C), it was error for the ALJ to not include this counter-signed document in the record.

i. The Counter-Signed Version of the Assessment

Regarding the countersigned document,³ Ms. Cooper is correct that the ALJ did not address it in his opinion. (R. 13-18.) However, she is incorrect regarding the implications of this omission. Ms. Cooper claims that Ms. Macke's assessment is a "treating source," making it worthy of additional weight in the ALJ's determination. "Treating source" opinions may be entitled to "more weight" or even "controlling weight." 20 C.F.R. §§ 416.927(d)(2), 404.1527(d)(2); SSR 06-03p. Only an "acceptable medical source" is considered a "treating source." SSR 06-03p; *see also* 20 C.F.R. §§ 404.1502, 416.902, 404.1527(d)(2), 416.927(d)(2). Acceptable medical sources are listed in 20 C.F.R. § 404.1513(a)(1)-(5) and 20 C.F.R. § 416.913(a)(1)-(5). The list does not

³ This analysis is based on the assumption that Ms. Cooper did in fact submit the countersigned document; however, she did not state in her brief on what date she sent it and presented no evidence establishing that it was indeed submitted or received by the ALJ.

include nurse practitioner. See also SSR 06-03p.

Ms. Cooper contends that the addition of the supervising physician's signature makes the RFC assessment an "acceptable medical source" and thus a "treating source." It does not. Ms. Cooper cites 20 C.F.R. § 404.1513(a)(6) as establishing that a report from an "interdisciplinary team that contains the evaluation and signature of an acceptable medical source" is itself an acceptable medical source. However, that interdisciplinary team provision no longer exists. 65 Fed. Reg. 34,952 (July 1, 2000). It was deleted because it was "redundant" and "somewhat misleading." *Id.* "[A]cceptable medical sources are individuals" and a report – team or otherwise – containing the "evaluation and signature of an acceptable medical source is such a source." *Id.* However, the assessment from Ms. Macke does not contain an *evaluation* from an accepted medical source.⁴ To the extent there was any evaluation at all, it was done by Ms. Macke, not the supervising doctor. There is no evidence that the doctor saw Ms. Cooper or that Ms. Macke consulted with the doctor in making her assessment. Thus, despite the counter-signature, the assessment is from Ms. Macke, a nurse practitioner, and not an accepted medical source. As such, it cannot be a treating source, and accordingly, the ALJ was not required to give the counter-signed document added or

⁴ Even under the former team-assessment provision the countersigned document would not suffice as it contained no *evaluation* from a doctor. *E.g., compare Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996) (finding that an interdisciplinary team report in which the nurse practitioner actually consulted with the supervising doctor was an acceptable medical source) *with Nichols v. Comm'r of Soc. Sec. Admin.*, 260 F. Supp. 2d 1057, 1066 (D. Kan. 2003) (finding that an *evaluation*, not the mere signature, is required to make an interdisciplinary team report an acceptable medical source).

controlling weight under 20 C.F.R. § 404.1527(d)(2).⁵

Ms. Cooper also cites HALLEX I-2-730(C), which explains how the ALJ is to send to the claimant's representative and to enter into the record a copy of a proffer letter and new evidence. However, HALLEX I-2-730(A) states that an ALJ does not need to proffer post-hearing evidence if the evidence was submitted by the claimant or the claimant's representative, as it was in this case. Thus, (C) is inapplicable in this situation. Moreover, any failure, objectionable under other HALLEX provisions, on the part of the ALJ to enter the countersigned document into the record is of no consequence since the record already contained a virtually identical document (R. 364-66) and, as explained above, the added signature does not change the document's character or the weight it should be afforded by the ALJ. Therefore, it was not error for the ALJ to address the first version rather than the countersigned version of Ms. Macke's assessment.

ii. The Original Version of the Nurse Practitioner's RFC Assessment

Aside from the counter-signature issue, Ms. Cooper alleges that the ALJ did not properly consider Ms. Macke's RFC assessment as originally submitted. Ms. Cooper is correct that an ALJ, under 20 C.F.R. § 404.1527(b) and 20 C.F.R. § 404.1513(d), must

⁵ Of note, even if it were a treating source, there are additional factors (including, significantly, the fact that the assessment was based mostly on the patient's subjective report) that would still need to be addressed before the source's opinion would be given controlling weight.

consider all medical opinions, regardless of source. Evidence that is not from an “acceptable medical source” can be used to show the severity of an individual’s impairment(s) and an individual’s ability to function. These “other sources” specifically include nurse practitioners. 20 C.F.R. § 404.1513(d). The ALJ is to use specific factors to weigh this evidence, including the following: length and frequency of the contact between the source and the individual; how consistent the opinion is with other evidence; the degree to which the source presents relevant evidence to support the opinion; how well the source explains the opinion; whether the source has a relevant area of expertise; and other factors tending to support or refute the opinion. SSR 06-03p.

In line with these factors, the ALJ gave Ms. Macke’s assessment minimal weight. As the ALJ explains in his opinion, it is because she was a nurse practitioner, she had only seen Ms. Cooper “occasionally,” and her assessment was based mostly on “subjective reports.” (R. 16.) The ALJ quoted Ms. Macke’s own written comments in justifying his determination that her assessment was “not fully credible.” (R. 16, 366.) While one could come to a different conclusion regarding Ms. Macke’s comment that she had seen Ms. Cooper “occasionally over a few years,” the court is not entitled to second guess the ALJ on that matter. Moreover, Ms. Macke’s RFC assessment contained no supporting evidence. While he could have made it more explicit, the ALJ’s reasons for giving Ms. Macke’s assessment minimal weight are in line with the factors outlined in SSR 06-03p. Therefore, the court finds that the ALJ’s credibility determination of Ms. Macke’s assessment contained no error of law and was based on

evidence that a “reasonable mind might accept as adequate to support the conclusion.”

iii. The Chiropractor’s Opinion

Ms. Cooper makes the rather skeletal claim in her brief that the ALJ committed error regarding her chiropractor’s opinion. The ALJ mentions the opinion but gives it “minimal weight” because it is from a chiropractor. (R. 14.) Chiropractor decisions are not entitled to receive added or controlling weight as they are not accepted medical sources or treating sources. 20 C.F.R. §§ 404.1513(a)(1)-(5), 416.913(a)(1)-(5), 404.1527(d)(2). While the ALJ must consider the evidence, in this case he permissibly found other evidence, the State Agency medical consultant’s opinion in particular, worthy of more weight. (R. 14, 16.)

B. The ALJ’s Determination that Ms. Cooper Was Capable of Light Work is Not in Error.

Ms. Cooper’s second claim is that the ALJ’s decision wrongfully found her capable of a range of light work activities. She claims that the ALJ’s decision does not set out a function-by-function analysis or logically connect the evidence to the conclusion that Ms. Cooper is capable of light work. While the ALJ’s discussion is brief, he did specifically find Ms. Cooper capable of:

lifting and carrying no greater than 20 pounds occasionally and no greater than 10 pounds frequently, sitting, standing, and walking for up to 6 hours total in an 8-hour day, with the option to alternate positions of sitting, standing, and walking, no frequent pushing or pulling with the lower extremities, no climbing of ladders, ropes, or scaffolds, no kneeling or crawling, no more than occasional climbing of stairs and ramps, and no more than occasional stooping and crouching.

(R. 17.) The ALJ bases this decision primarily on the State Agency medical consultant's report. (R. 16.) The ALJ also points out that no physician at any point indicated that Ms. Cooper was incapable of performing at least the light work activities with the noted limitations. (R. 16). The ALJ does not inappropriately jump to the conclusion that Ms. Cooper is capable of light work; rather, he grounded this conclusion in the evidence from the State Agency medical consultant and made findings as to her specific limitations regarding particular functions. The ALJ's analysis admittedly could benefit from more in-depth discussion; however, the decision is sufficient to create the "logical bridge" from the evidence to his conclusions.

C. The ALJ Did Not Err in His Subjective Symptom Evaluation

Ms. Cooper claims in her brief that the ALJ failed to adequately assess her subjective symptoms of pain and depression. The ALJ specifically addressed the depression claim by referencing the State Agency psychiatrist's evaluation, Ms. Cooper's daily activities, her prescription for Zoloft, and the overall lack of evidence regarding regular medical treatment for a mental impairment. (R. 16.) It is not the court's job to re-evaluate the facts – the ALJ addressed Ms. Cooper's alleged mental impairment and articulated his position referring to specific evidence.

He also discussed her pain. (R. 16.) The ALJ's discussion of pain generally follows the factors laid out in SSR 96-7p. These factors include the individual's daily activities; the location, frequency, duration, and intensity of pain; type, dosage, and side effects of any medication; any treatment; and any other measures taken by the

individual to relieve symptoms. SSR 96-7p. Ms. Cooper takes issue with the fact that the ALJ considered the daily activities listed in the State Agency consultant's assessment rather than the daily activities as expressed by Ms. Cooper. However, in her application, Ms. Cooper's daily activities, as described by her and her witness, are perfectly consistent, and nearly identical, with those described by the consulting psychiatrist. (R. 76-77, 80-81, 197.) Therefore, it is of no consequence that the ALJ cited in his opinion the daily activities as recorded by the psychiatrist rather than by Ms. Cooper. Ms. Cooper also complains in her brief about the ALJ's characterization of her 30 mg Morphine dose as "low." (R. 402, 16.) However, he is specifically entitled to consider dosage. SSR 96-7p. Given that Ms. Cooper previously had taken larger doses, it is not unreasonable to characterize this dose "low." Again, this court is not entitled to second guess the ALJ's fact finding. The ALJ's decision is supported by substantial evidence. And he presented it in a way that creates a bridge from the evidence to his conclusions.

VI. Conclusion

The court finds that the ALJ's decision is supported by substantial evidence and contains no error of law. The final determination by the Commissioner will be **AFFIRMED.**

ALL OF WHICH IS ENTERED this 27th day of October 2007.

John Daniel Tinder, Judge

United States District Court

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