IP 08-0409-C H/K Specht v Astrue
Judge David F. Hamilton Signed on 03/03/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MELISSA SPECHT,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:08-cv-00409-DFH-TAB
	)	
MICHAEL J. ASTRUE,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MELISSA A. SPECHT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:08-cv-0409-DFH-TAB
	)	
MICHAEL J. ASTRUE, Commissioner of the Social Security Administration,	)	
	)	
Defendant.	)	

ENTRY ON JUDICIAL REVIEW

Background

Plaintiff Melissa Specht seeks judicial review of a final decision by the Commissioner of Social Security denying her application for disability insurance and supplemental security income benefits. Acting for the Commissioner, Administrative Law Judge ("ALJ") Albert J. Velasquez determined that Ms. Specht was not disabled under the Social Security Act because, in spite of her degenerative lumbar disc disease and back pain, she retained the residual functional capacity to perform light exertional work. Ms. Specht contends that the ALJ's decision was in error because he failed to consider all the available objective medical evidence in the record and because his credibility determination was based on an inaccurate assessment of her activities of daily living. As explained

below the ALJ's decision is supported by substantial evidence and is therefore affirmed.

I. *Medical Record*

On August 22, 2002, Ms. Specht reported that for two weeks she had had cramping in her left hip and that she felt pain going down the back of her leg. R. 191. She had not been injured. R. 191. A lumbar MRI revealed early degenerative changes at the L5-S1 level, with facet joint narrowing and early disc narrowing. R. 107. The MRI also revealed minimal disc narrowing at the L4-5 level, and mild scoliosis. R. 107. An MRI of her left hip was negative. R. 107. On September 6, 2002, she complained of what was noted as "left sciatica type pain." R. 190. Her doctor gave her a lifting restriction of no more than fifteen pounds and advised Ms. Specht to avoid bending her back. R. 190. An MRI dated March 17, 2004 revealed degenerative disc disease at L4-5 and L5-S1, a central disc extrusion posteriorly at L5-S1, and a focal central disc protrusion posteriorly at L4-5. R. 108.

In the meantime, in April 2004, Ms. Specht received physical therapy treatment at Procare Rehabilitation Services in Anderson, Indiana. R. 131. She reported at that time that her symptoms increased when she sat longer than 20 to 30 minutes, stood longer than 20 to 30 minutes, or when she bent. R. 131. Ms. Specht informed her therapist that for the past five to six weeks she had been able to work for only two or three hours before needing to lie down, and she found

it difficult to complete housework, walk for exercise, ride a bike, or carry groceries. R. 131. As of June 25, 2004, Ms. Specht had limited trunk and hamstring mobility and a poor gait, and had continued to have radicular symptoms in her legs. R. 119. Because she had made no progress, she was discharged from physical therapy and referred back to her physician.

In July 2004, Dr. Larry Blackenship reviewed Ms. Specht's March 2004 MRI and found "two herniated discs, one at 5-1, one at 4-5, the one at 4-5 seems to be more impressive." R. 169. She had no complaints of numbness or tingling in her extremities. He diagnosed Ms. Specht with lumbar radiculopathy secondary to herniated nucleus pulposus. R. 169. An epidural steroid injection did not help Ms. Specht's complaints of pain. R. 171, 317, 322, 324. Dr. Blackenship also administered bilateral sacroiliac joint injections, but Ms. Specht's pain did not recede. R. 320, 317, 318, 319.

On July 21, 2004, Ms. Specht was examined by Dr. Wail Bakdash, a consulting physician. R. 185-86. Dr. Bakdash noted that Ms. Specht walked very slowly with a slight limp and that she was able to get on and off of the exam table, but with difficulties. R. 185-86. Her straight leg test was positive at 10 degrees. R. 186. He wrote, "at this time [Ms. Specht] is in severe pain, she was unable [to] do any movement in her Lumbar Spine, so she has [a] severe restriction because of pain . . . ." R. 186. However, Dr. Bakdash also noted that Ms. Specht was able to lift, carry, and manipulate objects in both hands and could perform repeated

movements with both feet. R. 186. She was limited in her ability to bend and squat, but she could sit and stand normally. R. 186.

On August 27, 2004, Dr. Craig Mines examined Ms. Specht, noting that all of her studies to date, including the MRI and an EMG, had been normal and without signs of any neurological problems. R. 106. He wrote, "she has some early degenerative changes of her spine on MRI but nothing else," although Dr. Mines noted that her physical examination did not match these findings. R. 106.

On May 5, 2005, Ms. Specht was examined by a neurosurgeon, Dr. Francesca Tekula. Ms. Specht informed Dr. Tekula that she suffered from back pain and bilateral leg pain that radiated down to her knees and sometimes to her ankles. R. 332. She stated that her back ached constantly with sharp pain. R. 332. She rated her pain as a five to six on a scale of ten, and sitting or standing aggravated her symptoms. R. 332. Dr. Tekula found that she had palpable tenderness, mainly in her bilateral sacroiliac joints (to a lesser degree in her midline facet joints), and some paraspinous discomfort. R. 333. After reviewing Ms. Specht's March 2004 MRI, Dr. Tekula diagnosed Ms. Specht with lumbar disc disease, possible lumbar radiculopathy, and back pain. R. 333-34. Dr. Tekula did not report any abnormalities with Ms. Specht's gait, and her sensation, strength and coordination were normal. Her straight leg test was negative. R. 333.

A May 2005 MRI showed discogenic degenerative changes at the L5-S1 level with disc height loss and a posterior central disc spur coming close to but not touching the left S1 nerve root. R. 335. The MRI also revealed a subligamentous broad-based posterior central L4-5 herniated nucleus puposus. R. 336. Dr. Tekula compared the MRI results from May 2005 to those from March 2004 and found no significant changes. R. 331. Because Dr. Tekula did not find a neurological deficit, she did not believe that surgery would be beneficial to Ms. Specht. R. 331.

On March 3, 2006, Ms. Specht underwent a discogram administered by Dr. Neal Coleman. The results showed that Ms. Specht suffered from two degenerated discs, one at the L5-S1 level, and another at the L4-5 level. R. 425-26. Dr. Coleman reported that the L4-5 disc leaked from its subligamentous protrusion, seemed to leak into the epidural space, and was associated with increased radicular symptomatology.[1]

From December 2006 until March 2007, Ms. Specht was treated at the Frank Chiropractic Clinic for neck, lower back, and leg pain. R. 338, 383. Although on some occasions it was noted that her progress had been "slower than expected," R. 342, 349, 373, 375, and she showed no improvement at her

[1]Although Dr. Coleman's treatment records were forwarded to the ALJ three days after Ms. Specht's hearing on April 20, 2007, they did not become part of the record until the Appeals Council issued an order to include them on January 29, 2008. Pl. Ex. 1; R. 8. The court need not resolve any issue regarding the timeliness of the submission or inclusion of these records here.

January 19, 2007 visit, R. 357, she showed "minor" to "moderate" improvement through March 2007. R. 342, 344, 345, 349, 351, 353, 355, 359, 363, 369, 371. On January 29, 2007, Ms. Specht reported that on a one to ten scale of pain, her neck pain was a three, her low back pain was a four, her upper back pain was a three, and her mid back pain was a three. R. 348. Her assessment remained essentially unchanged until March 8, 2007, her last recorded visit, when she reported that on a one to ten scale, her neck pain was a four, her low back pain was a six, her upper back pain was a four, her leg pain was a six, and her mid back pain was a four. R. 338.

II. *Testimony at the Hearing*

On April 19, 2007, Ms. Specht testified before the ALJ. She stated she had a high school education and had worked as a photo lab tech, a hostess, a cashier, a produce clerk, a waitress, and a sales clerk. R. 468. Ms. Specht testified that she became disabled on April 23, 2004 after waking up with severe pain through her back and down her left leg to her foot. R. 470. She testified that her lower back pain was at least a three on a one to ten scale, and sometimes would be as bad as a nine or ten. R. 467. She felt the pain in her back all the way down her legs to her feet. R. 468.

Ms. Specht testified that she could not sit or stand longer than three hours at a time, making it impossible for her to work. R. 468. She lived in a second-floor apartment but usually would sit and scoot to go up and down the steps. R.

471. When her attorney asked her, "And you drove down here from Anderson. Is that right?" she answered, "yes," and stated that the drive took about an hour and a half. R. 476. To be able to work two hours at her part-time job, she stated, she needed to lie down for about an hour or two beforehand, and then she had to lie down again for a few hours when she returned home. R. 477. She estimated that she would lie down at least three or four times a day for at least an hour or two each time. R. 481. She had trouble lifting paper cartridges that weighed about eighteen or twenty pounds, and some days had trouble lifting ten pounds. R. 478.

Ray Burger, a vocational expert, presented evidence at the hearing. Burger testified that a hypothetical person of Ms. Specht's age, education, and work experience who was able to lift and carry 20 pounds occasionally and 10 pounds frequently, and who could stand and walk or sit for about six hours in an eight-hour workday provided that she could alternate between sitting and standing, and who could occasionally climb stairs, stoop, or kneel but who could not crawl or climb ropes, ladders or scaffolds, would be able to work as a light cashier, a light general office clerk, a light unskilled assembler, or as a light unskilled inspector or checker. R. 484-85. If the hypothetical individual had to lie down for an hour or two after standing for a period of two or three hours, Burger testified that no work would be available. R. 486.

Framework for Determining Disability and the Standard of Review

To be eligible for the disability insurance benefits and supplemental security income she seeks, Ms. Specht must establish that she suffered from a disability within the meaning of the Social Security Act. To prove disability under the Act, the claimant must show that she is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that could be expected to result in death or that has lasted or could be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Ms. Specht was disabled only if her impairments were of such severity that she was unable to perform work that she had previously done and if, based on her age, education, and work experience, she also could not engage in any other kind of substantial work existing in the national economy, regardless of whether such work was actually available to her in her immediate area, or whether she would be hired if she applied for work. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

This standard is a stringent one. The Act does not contemplate degrees of disability or allow for an award based on partial disability. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir. 1985). Even claimants with substantial impairments are not necessarily entitled to benefits, which are paid for by taxes, including taxes paid by those who work despite serious physical or mental impairments and for whom working is difficult and painful.

To determine whether Ms. Specht was disabled under the Social Security Act, the ALJ followed the familiar five-step analysis set forth in 20 C.F.R. § 404.1520 and § 416.920. The steps are as follows:

(1) Has the claimant engaged in substantial gainful activity? If so, she was not disabled.

(2) If not, did the claimant have an impairment or combination of impairments that are severe? If not, she was not disabled.

(3) If so, did the impairment(s) meet or equal a listed impairment in the appendix to the regulations? If so, the claimant was disabled.

(4) If not, could the claimant do her past relevant work? If so, she was not disabled.

(5) If not, could the claimant perform other work given her residual functional capacity, age, education, and experience? If so, then she was not disabled. If not, she was disabled.

See generally 20 C.F.R. §§ 404.1520, 416.920. When applying this test, the burden of proof is on the claimant for the first four steps and on the Commissioner for the fifth step. *Zurawski v. Halter*, 245 F.3d 881, 885-86 (7th Cir. 2001).

The ALJ found that Ms. Specht satisfied step one. She had not engaged in any substantial gainful activity at any time relevant to the ALJ's decision. At step two, the ALJ found that Ms. Specht had the following severe impairments: degenerative lumbar disc disease and back pain. These impairments did not meet or equal any of the listings that would have automatically qualified Ms. Specht for

benefits at step three. At step four, the ALJ determined that Ms. Specht was no longer able to perform her past relevant work.

At step five, the ALJ determined that Ms. Specht retained the residual functional capacity to perform light exertional work. Based on the testimony of the vocational expert, the ALJ found that a person with Ms. Specht's residual functional capacity would be able to work as a general office clerk, assembler, and inspector/checker. The ALJ therefore denied benefits.

The Social Security Act provides for judicial review of the Commissioner's denial of benefits. 42 U.S.C. §§ 405(g), 1383(c)(3). Because the Appeals Council denied further review of the ALJ's findings, the ALJ's findings are treated as the final decision of the Commissioner. *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). If the Commissioner's decision is both supported by substantial evidence and based on the proper legal criteria, it must be upheld by a reviewing court. 42 U.S.C. §§ 405(g), 1383(c)(3); *Briscoe v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005), citing *Scheck v. Barnhart*, 357 F.3d 697, 699 (7th Cir. 2004). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Diaz v. Chater*, 55 F.3d 300, 305 (7th Cir. 1995), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

To determine whether substantial evidence exists, the court reviews the record as a whole but does not attempt to substitute its judgment for the ALJ's judgment by reweighing the evidence, resolving material conflicts, or reconsidering the facts or the credibility of the witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000). Where conflicting evidence allows reasonable minds to differ as to whether a claimant is entitled to benefits, the court must defer to the Commissioner's resolution of the conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997). A reversal and remand may be required, however, if the ALJ committed an error of law, *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997), or based the decision on serious factual mistakes or omissions. *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). The ALJ's decision must be based upon consideration of all the relevant evidence, and the ALJ must articulate at some minimal level her analysis of the evidence so that the court can trace adequately the path of the ALJ's reasoning. *Diaz*, 55 F.3d at 307-08.

Discussion

I. *Residual Functional Capacity*

Ms. Specht argues that the ALJ erroneously found that she was capable of performing light exertional work because the ALJ failed to consider treatment records from Dr. Neal Coleman. Pl. Br. 6. She asserts that a discogram performed by Dr. Coleman in March 2006 was positive and that this result has "obvious significance" to her claim that she is completely disabled. *Id*. Ms. Specht

argues that the ALJ's failure to consider this line of evidence was error. Pl. Br. 6-7.

An ALJ may not select and discuss only the evidence that favors his ultimate conclusion. An ALJ also may not ignore an entire line of evidence that is contrary to the ruling. See *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (7th Cir. 2003) (remanding because ALJ improperly ignored three lines of evidence supporting plaintiff's claim). However, the ALJ is not required to provide an in-depth analysis of every piece of evidence the claimant provides. *Diaz*, 55 F.3d at 308. The ALJ must minimally articulate reasons for rejecting or accepting specific evidence of disability so that a reviewing court can trace the path of the ALJ's reasoning. *Id*. The question is not whether the ALJ discussed every piece of evidence; it is whether he built an accurate and logical bridge between the evidence in the record and the result he reached. *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002).

Although the ALJ referred to "new records" provided by Ms. Specht, he did not mention specifically Dr. Coleman's records. R. 20. However, this omission does not rise to the level of "failure to consider an entire line of evidence." *Diaz*, 55 F.3d at 307. The ALJ discussed evidence spanning the full record, noting negative findings (no neurological deficits, normal alignment, 5/5 strength in her neck, bilateral upper extremities, and bilateral lower extremities, normal range of motion, normal straight leg raise, and ability to heel/toe walk without difficulty)

as well as positive (a limp on her left side, some tenderness, and a limited range of motion in her lumbar spine). R. 20. His reasoned analysis incorporating findings from throughout the record meets the minimal level of articulation required. It also forms a sufficiently accurate and logical bridge between the body of evidence and his conclusion. *Steele*, 290 F.3d at 941. Moreover, Dr. Coleman's findings (two degenerative discs at L5-S1 and L4-5 that were "painful in axial pattern") were consistent with the other evidence in the record, and, in light of the objective evidence that was discussed by the ALJ, do not add support to Ms. Specht's argument that she was completely disabled. On this record, the ALJ's failure to discuss specifically Dr. Coleman's findings does not warrant remand. See, *e.g.*, *Rice v. Barnhart*, 384 F.3d 363, 371 (7th Cir. 2004) (remand not warranted where ALJ failed to provide a written evaluation of every piece of evidence in the record so long as ALJ satisfied minimal duty to articulate reasons for ultimate decision).

II. *Credibility*

Ms. Specht contends that the ALJ failed to build a logical bridge in assessing her credibility because his finding was based on "demonstrably wrong facts." See Pl. Br. 10, citing *Sarchet*, 78 F.3d at 309. In assessing Ms. Specht's credibility, the ALJ noted that her claims of disabling pain were inconsistent with objective record evidence and the fact that she took no pain medications, had not had surgery, lived in a walk-up apartment, and drove to the hearing. R. 19. Ms. Specht asserts that this assessment of her activities of daily living was inaccurate.

The ALJ is required to consider statements of the claimant's symptoms and how they affect her daily life and ability to work. 20 C.F.R. §§ 404.1529(a), 416.929(a). However, neither the ALJ nor this court is "required to give full credit to every statement of pain, and require a finding of disabled every time a claimant states that she feels unable to work." *Rucker v. Chater*, 92 F.3d 492, 496 (7th Cir. 1996); accord, 20 C.F.R. §§ 404.1529(d), 416.929(d). Instead, there is a two-part test for determining whether a claimant's complaints contribute to a finding of disability. First, the claimant must provide objective medical evidence of an impairment or combination of impairments that could be expected to produce the symptoms the claimant alleges. 20 C.F.R. §§ 404.1529(a)-(b), 416.929(a)-(b). Second, the ALJ must consider the intensity and persistence of the alleged symptoms. The ALJ considers the claimant's subjective complaints in light of the relevant objective medical evidence, as well as any other evidence of the following factors:

(1) The claimant's daily activities;

(2) Location, duration, frequency, and intensity of pain or other symptoms;

(3) Precipitating and aggravating factors;

(4) Type, dosage, effectiveness, and side effects of any medication;

(5) Treatment, other than medication, for relief of pain or other symptoms;

(6) Other measures taken to relieve pain or other symptoms;

(7) Other factors concerning functional limitations due to pain or other symptoms.

20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3).

Having considered these factors, which are intended to either corroborate or discredit the claimant's subjective complaints, the ALJ may make a reasoned credibility determination based upon the evidence about whether the claimant acts, day in and day out, like a person would act who is really suffering from the symptoms the claimant alleges. It is not necessary for the ALJ to mechanically recite findings on each factor, but the ALJ must give reasons for the weight given to the claimant's statements so that the claimant and subsequent reviewers will have a fair sense of how the claimant's testimony was assessed. See Social Security Ruling 96-7p, printed in 61 Fed. Reg. 34483, 34486 (July 2, 1996); see also *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003) (ALJ must comply with Social Security Ruling 96-7p in making a credibility determination by articulating the reasons behind the determination). The court will not set aside an ALJ's credibility determination if there is some support in the record unless it is "patently wrong." *Luna*, 22 F.3d at 690; *Herron v. Shalala*, 19 F.3d 329, 335 (7th Cir. 1994).

Here, the ALJ adequately supported his determination that Ms. Specht's subjective complaints were "not entirely credible." After considering the objective medical evidence, medical opinion evidence, Ms. Specht's treatment and medications, and her activities, the ALJ determined that, while Ms. Specht had impairments that could be expected to produce some discomfort and functional

limitations, the objective evidence did not support her description of the intensity, persistence and limiting effects of these symptoms. R. 19.

The ALJ considered the fact that Ms. Specht took no pain medication. R. 19. Ms. Specht contends that the ALJ's reliance on this fact was error, asserting that she testified that she was taking the generic form of Lodine and that she had tried other pain medications in the past but experienced allergies and other undesirable side effects. Pl. Br. 9-10. Ms. Specht may disagree with the conclusions drawn by the ALJ, but his reliance on the fact that she took no pain medication was not clearly erroneous. When asked at the hearing if she took any medications for her pain, she testified, "Not for the pain itself, no." R. 479. She then explained that she took Lodine, which she described as an arthritis medication. Although Ms. Specht testified that she had been allergic to pain medications she had tried in the past, an assertion that finds some support in the medical evidence,[2] the ALJ's failure to fully explore this explanation does not warrant remand. The objective medical evidence available in the record does not support Ms. Specht's claims of disabling pain. Accordingly, the ALJ's partial

---

[2]A nurse practitioner noted in Ms. Specht's treatment notes of May 17, 2005, that Ms Specht had:

> . . . tried extensive use of medications and none of those have been helpful. She has been on Hydrocodone, it makes her too drowsy and upsets her stomach. Naproxen does not help. Duragesic Patch caused severe itching. Ultracet causes muscle spasms. Neurontin also causes muscle spasms. Vioxx did not help. Primidone caused her to be dizzy and light headed. Codeine caused her nausea and shakes.

R. 327.

reliance on Ms. Specht's assertion that she did not take any medication for pain was not "patently wrong."

The ALJ also noted that Ms. Specht drove to the hearing, contrary to her claims of severe pain. R. 19. Ms. Specht admits that the ALJ's conclusion, drawn from her affirmative answer to her counsel's "inartful" question, "and you drove down here from Anderson. Is that right?" was "understandable." Pl. Br. 10; R. 476. Although "understandable," she contests the ALJ's conclusion on review, explaining that her own statement that formed the basis for the ALJ's conclusion was inaccurate. In support of her contention, she submits an affidavit in which she asserts that she did not drive herself to the hearing, but actually rode in an automobile that was driven by her friend. Pl. Br. 10; Pl. Ex. 2.

This court may not consider her submission, which is outside of the administrative record. *Eads v. Secretary Dept. of Health and Human Services*, 983 F.2d 815, 817 (7th Cir. 1993) (where the Appeals Council has denied review, so that the ALJ's decision is the final decision, the court may not consider additional evidence.) However, even if the court were entitled to consider Ms. Specht's affidavit, it alone would not support overturning the ALJ's credibility determination. As stated, the ALJ's determination was adequately articulated, rests on sufficient grounds (including a reasonable interpretation of her testimony about driving) and is supported by the objective medical evidence in the record. The court finds no error.

Conclusion

For the foregoing reasons, the ALJ's decision denying benefits is supported by substantial evidence and does not reflect a legal error that would require remand. Accordingly, the decision is affirmed and final judgment will be entered.

So ordered.

Date: March 3, 2009

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

Copies to:

Thomas E. Hamer
tom@tomhamerlaw.com, mrbankson@yahoo.com, mbankson@tomhamerlaw.com

Tom Kieper
UNITED STATES ATTORNEY'S OFFICE
tom.kieper@usdoj.gov