IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY W. PRESCOTT,

Plaintiff,

OPINION AND ORDER

12-cv-623-bbc

v.

CAROLYN COLVIN,

Defendant.[1]

- -

Plaintiff Jerry Prescott is seeking review of a decision denying his claim for disability benefits under the Social Security Act. 42 U.S.C. § 405(g). The administrative law judge concluded that plaintiff's chronic obstructive pulmonary disease was a severe impairment but that plaintiff was not disabled because he could perform a significant number of jobs in the national economy. Plaintiff says that the decision should be reversed because he is disabled as a matter of law under the Medical Vocational Guidelines and because the administrative law judge rejected the opinion of plaintiff's treating physician without explanation. Although I do not agree with plaintiff's assertion that he is disabled as a matter of law, I am reversing the decision and remanding for further proceedings because the administrative law judge did not explain his reasoning for rejecting the treating physician's opinion.

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[1] Carolyn Colvin became the Acting Social Security Commissioner on February 14, 2013. Pursuant to Fed. R. Civ. P. 25(d)(1), she has been substituted for Commissioner Michael J. Astrue as the defendant in this suit.

OPINION

A. Medical Vocational Guidelines

According to Rule 201.17 of the Medical Vocational Guidelines under 20 C.F.R. Appendix 2 of Subpart P of Part 404, a claimant is disabled if (1) he is limited to sedentary work as a result of a severe medical impairment; (2) he is between the ages of 45 and 49; (3) he is illiterate or unable to communicate in English; and (4) his previous work experience is unskilled. The parties agree that plaintiff meets the second and fourth requirements, but they dispute the other two. With respect to those, the administrative law judge found that plaintiff could perform "less than the full range of light work," AR 14, and that he has "a marginal education but is able to communicate in English." AR 17. Because plaintiff has not shown that the administrative law judge erred in declining to find that plaintiff was limited to sedentary work, I need not decide whether the administrative law judge should have found that plaintiff was illiterate.

For the purpose of this argument, plaintiff does not challenge the particular physical limitations the administrative law judge found:

> lift and/or carry 20 pounds occasionally and 10 pounds frequently; stand and/or walk 2 hours in an 8-hour workday; and sit without limitation. He can climb stairs but he cannot climb ladders, ropes, or scaffolds; work at heights or balance. His work environment should be air conditioned and free of excessive inhaled pollutants.

AR 14. However, plaintiff argues that these limitations are the equivalent of a limitation to sedentary work.

Plaintiff is correct that the administrative law judge's standing and walking limitation

is consistent with a sedentary work limitation rather than a light work limitation. SSR 83–10 ("[A]t the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday. . . .[T]he full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday."). However, the administrative law judge's carrying and lifting limitation is consistent with light work. 20 C.F.R. § 404.1567 ("Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds.").

In Haynes v. Barnhart, 416 F.3d 621, 627-29 (7th Cir. 2005), the court rejected the argument that, if an individual "cannot perform the full range of light work, he necessarily 'falls squarely' within the sedentary classification." Further, "when a claimant does not precisely match the criteria set forth in the grids [vocational guidelines], the grids are not mandated." Id. In that situation, the administrative law judge may seek the assistance of a vocational expert, Books v. Chater, 91 F.3d 972, 980-81 (7th Cir. 1996), which is what the administrative law judge did in this case.

Plaintiff argues for the first time in his reply brief that "[n]othing indicates that the [vocational expert] ever considered that the hypothetical question fell in between the two categories and what impact that would have had in relation to the Grids and the Ruling noted." Dkt. #12 at 6. This argument is forfeited because it is both undeveloped and untimely. Carmichael v. Village of Palatine, Illinois, 605 F.3d 451, 460-61 (7th Cir. 2010); Casna v. City of Loves Park, 574 F.3d 420, 427 (7th Cir. 2009). Plaintiff fails to explain why it matters whether the vocational expert knew that plaintiff's limitations fell between

two different categories on the grid. The case plaintiff cites, Strong v. Apfel, 122 F. Supp. 2d 1025, 1030 (S.D. Iowa 2000), involved a conflict between the limitations the administrative law judge gave to the vocational expert to consider and the limitations the administrative law judge found in his decision. In this case, the limitations provided to the vocational expert and the limitations found in the decision are the same, so Strong is not instructive.

B. Treating Physician

One of plaintiff's treating physicians, Ramirez Fargo, provided an opinion that plaintiff (1) could lift and carry 10 pounds occasionally and less than 10 pounds frequently; (2) could not sit, stand or walk for more than two hours of an eight-hour work day; and (3) would miss work more than three times each month because of respiratory problems. AR 290-97. The parties agree that if Fargo's opinion is accepted it would require a conclusion that plaintiff was disabled. However, the administrative law judge rejected Fargo's opinion on the ground that it was "inconsistent with other medical evidence, including Fargo's own treatment notes." AR 16.

The quoted statement represents the administrative law judge's entire reasoning for discounting Dr. Fargo's opinion. Although elsewhere in the administrative law judge's opinion he summarized the opinions of other doctors who reached different conclusions, he did not explain why he found those opinions to be more persuasive than Dr. Fargo's. With respect to Dr. Fargo's treatment notes, the administrative law judge did not identify or cite

the treatment notes, much less explain how they were inconsistent with Fargo's opinion.

"[W]henever an ALJ . . . reject[s] a treating source's opinion, a sound explanation must be given for that decision," Punzio v. Astrue, 630 F.3d 704, 709-10 (7th Cir. 2010), taking into account various factors required by the regulations. Campbell v. Astrue, 627 F.3d 299, 306-09 (7th Cir. 2010). This is a well-established proposition, Farrell v. Astrue, 692 F.3d 767, 772-73 (7th Cir. 2012); Larson v. Astrue, 615 F.3d 744, 749 (7th Cir. 2010); Ketelboeter v. Astrue, 550 F.3d 620, 625 (7th Cir. 2008); Schmidt v. Astrue, 496 F.3d 833, 842 (7th Cir.2007), so it is difficult to understand why the administrative law judge failed to follow it in this case.

Because the administrative law judge failed to explain his decision, a remand is required. In the event he reaches a different conclusion about plaintiff's limitations, he should reconsider plaintiff's argument under the Medical Vocational Guidelines.

ORDER

IT IS ORDERED that the decision of defendant Carolyn Colvin denying plaintiff Jerry Prescott application for Disability Insurance Benefits and Supplemental Security Income is REVERSED AND REMANDED under sentence four of 42 U.S.C. § 405(g). The

clerk of court is directed to enter judgment for plaintiff and close this case.

Entered this 25th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge