IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JAMES L. BISSETT,

Plaintiff,

No. 4:07-cv-0255-JAJ

VS.

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant.

ORDER

This matter comes before the court pursuant to briefs on the merits of this application for disability insurance benefits. This court remands the decision of the Social Security Administration to the ALJ for further explanation of the treating physician's opinion.

I. PROCEDURAL BACKGROUND

Plaintiff James L. Bissett (hereinafter "Bissett") filed an application for Disability Insurance Benefits on February 27, 2004, alleging an inability to work from May 1, 2003. The Social Security Administration ("SSA") denied Bissett's application initially and again upon reconsideration. Administrative Law Judge ("ALJ") George Gaffaney held a hearing on Bissett's claim on May 18, 2006.

The ALJ denied Bissett's appeal on October 27, 2006. The ALJ found that Bissett had not engaged in substantial gainful activity since his alleged onset date, May 1, 2003. The ALJ found that Bissett had several severe impairments, being depression, anxiety, osteoarthritis, pseudo-seizures, diabetes, obesity, and millitus with retinopathy. The ALJ determined that Bissett's impairments did not meet or equal one of the listed impairments. The ALJ found that Bissett had the residual functional capacity to,

[L]ift/or carry no more than 20 pounds occasionally and no more than 10 pounds frequently. He can sit 6 hours total in an 8-hour workday, and stand 45 minutes at a time for 2 hours

total in an 8-hour workday (Exhibit 11F). He can walk 200 feet (Exhibit 14F), and he can occasionally climb stairs, balance, stoop, kneel, crouch and crawl. He can never climb ladders. He is able to perform more than simple, routine work, but not complex work. He can frequently adjust to changes in the routine work setting, and he could miss 1 day of work each month due to pseudo-seizures.

(Tr. 19).

Based on those restrictions, the ALJ determined that Bissett could not perform his past relevant work. At the fifth step, the ALJ found that Bissett could perform work as a data entry clerk or telemarketer. Therefore, the ALJ concluded that Bissett is not disabled.

Bissett filed a request for review with the Appeals Council which was denied on April 19, 2007. Bissett filed this action for judicial review on June 12, 2007 (dkt. no. 1). On review, Bissett contends that the ALJ did not properly explain his reasons for rejecting the treating physician's opinion.

II. FACTUAL BACKGROUND

Bissett alleges disability based on osteoarthritis, pseudoseizures, COPD, diabetes, anxiety, major depressive disorder, carpal tunnel syndrome and neuropathy. Bissett was forty-five years old at the time of his alleged disability onset date. At the time of the hearing, Bissett was forty-eight years old. Bissett has completed high school and two years of college. His vocationally relevant work experience includes work as a customer service representative, delivery truck driver, data entry supervisor, assistant safety manager, roofing and insulation worker, mail sorter, apprentice electrician, and fry cook.

A. Residual Functional Capacity

The only issue in this appeal is whether the ALJ properly considered Dr. Jonathan Housley's functional capacity evaluation. Dr. Housley, a physician at Broadlawns Medical

Center, treated Bissett twelve times between April 1, 2004, and February 2, 2006. The parties do not dispute that Dr. Housley is a "treating physician" for purposes of the SSA regulations. See 20 C.F.R. § 416.902 (2007) ("Treating source means your own physician, psychologist, or other acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. . . "). On May 5, 2005, Dr. Housley completed a form that detailed Bissett's functional limitations. The evaluation was a two-page form provided by Bissett. The first page asked whether Dr. Housley agreed with the SSA's findings regarding Bissett's functional abilities. The second page asked narrative questions regarding Bissett's restrictions.

Dr. Housley agreed with the following restrictions: he could lift and/or carry twenty pounds occasionally and ten pounds frequently, sit for six hours in an eight-hour workday, climb, stoop, kneel, crouch, or crawl for up to 1/3 of the day, and occasionally reach, handle, finger or feel. He wrote, "Patient able to sit and work as long as everything is within reach." (Tr. 347). Dr. Housley disagreed with the SSA's determination that Bissett could stand or walk for two hours in an eight-hour workday. He indicated that Bissett would be able to stand or walk for less than two hours and wrote below the question, "Patient has severe bilateral knee pain with walking. I don't believe he is able to stand or walk for more than 30-45 minutes at a time." (Tr. 347).

On the second page, which included the narrative comments, Dr. Housley wrote that he had treated Bissett since April 1, 2004, for osteoathritis, seizure disorder, mild COPD, nicotine abuse (indicating that he quit), obesity, anxiety, type-II diabetes and "HTN." In response to a question about Bissett's ability to work on a sustained basis, defined as eight hours per day, five day per week, Dr. Housley responded,

Due to the bilateral knee pain I don't believe he is capable of working more than a limited amount during the day if even that. Patient has been undergoing treatment for pain and needs

bilateral knee replacement[.] [H]owever[,] due to D.M., COPD, HTN, etc., he is a poor candidate. I don't anticipate the prognosis on a long term basis to be good.

(Tr. 348).

Dr. Housley wrote that he "concur[red] with [patient's] stated condition," in response to a statement that Bissett's can only sit for 15 minutes and then "must stand up or sit on the floor with his legs straight out in front of him for about 5 to 10 minutes to relieve pain." (Tr. 348). The next question then asked Dr. Housley to confirm, medically, Bissett's assertion that he "must take a nap 1 to 2 times per day for at least 20 to 60 minutes due to his fatigue." (Tr. 348). Dr. Housley replied that he didn't know "if a nap is necessary but rest is needed for the fatigue. I agree with amount of rest each day." (Tr. 348).

B. Hearing Testimony

ALJ George Gaffaney held Bissett's hearing on May 18, 2006. Bissett was represented by his attorney, Niki Fisher, and VE Marian Jacobs testified.

After interviewing Bissett about his medical problems and past work experience, the ALJ posed two hypotheticals to VE Jacobs. The first,

I've limited lifting to 20 pounds occasionally and ten frequently, stand two hours in an eight hour workday, sit for six, walking limited to 200 feet at a time, no ladder climbing, occasional stair climbing, balance, stoop, kneel, crouch and crawl, able to do more than simple routine work, but not complex, in other words, semiskilled, but not skilled and frequent only, rather than constant changes in routine work setting, and miss one day a month of work. With this residual functional capacity, could any of the past relevant work be performed?

The VE responded that with those restrictions, Bissett would not be able to perform his past work but could perform other jobs in the national economy. The VE testified that he could work as a data entry clerk. There are 3,400 data entry clerk positions in Iowa

and 257,000 nationally. He could also be a telemarketer, of which there are approximately 7,500 jobs in Iowa and 295,000 nationally. The ALJ then modified the first hypothetical to add one unscheduled rest break of one hour per day. The VE responded that with the added restriction, there are no jobs that Bissett could perform on a full-time, competitive basis.

Bissett's attorney, Fisher, then questioned the VE, modifying the ALJ's first hypothetical. "[H]e would need to sit for about 15 minutes and then he must stand up or sit on the floor with his legs straight out in front of him for about five to ten minutes to relieve pain and we'll say he has to do this every two hours." (Tr. 435). With those restrictions, said the VE, he would not be able to perform as a data entry clerk and telemarketer. There would be no other positions in the national economy that would accommodate those restrictions.

Fisher modified the ALJ's first hypothetical again, adding a restriction that Bissett would need to walk and stretch once an hour for around seven to ten minutes. The VE said that amount of time would be unacceptable and there would be no full-time, competitive jobs available for a person with those restrictions.

Fisher next asked the VE to add a restriction of poor concentration, resulting in Bissett not being productive for a total of one hour per day. The VE responded that those restrictions would again preclude competitive employment. The VE also testified that if he had three or more absences per month, there would not be jobs in the economy that he could perform.

The ALJ then modified his hypothetical: "If we added [to] the first hypothetical, [that he] could sit for 45 minutes and would need to briefly . . . stand and then []resume sitting after a minute, would he still be able to perform the work you cited?" (Tr. 438). The VE replied that he would be able to perform the first two jobs, telemarketing and work

as a data entry clerk. The ALJ then stated, "That's in line with Exhibit 11F." Exhibit 11F is Dr. Housley's assessment at issue in this appeal.

The ALJ then stated, "My recollection is there was a question about whether the person answering that agreed that . . . Mr. Bissett could stand for two hours in an eight hour day and the handwritten answer was that he could stand 30 to 45 minutes at a time." (Tr. 438). The ALJ then asked Bissett questions about how long he could stand and Bissett stated that he did not think he could stand for thirty to forty-five minutes at a time.

III. CONCLUSIONS OF LAW

Bissett argues that the ALJ erred when he failed to discuss and adopt the opinion of his treating physician, Dr. Housley. The Commissioner concedes that the ALJ did not discuss Dr. Housley's functional capacity assessment. ("It is correct that the ALJ did not provide a written summary of analysis of the medical opinion." (Appellee Br. at 5.)) The Commissioner argues, however, that the ALJ incorporated Dr. Housley's assessment into the hypothetical presented to the VE and then incorporated the restrictions into his RFC determination. The error, therefore, was harmless. In his reply, Bissett argues that the ALJ did not incorporate all of Dr. Housley's limitations and therefore it was not harmless error. Bissett believes that the ALJ should have adopted the following restrictions from the second page of Dr. Housley's assessment: (1) Dr. Housley's statement that he concurs with Bissett's claim that he can only sit for fifteen minutes before he needs to stand up or sit on the floor with his legs straight out; (2) Dr. Housley's statement, "I don't believe he is capable of working more than a limited amount, if even that" (Tr. 348); (3) Dr. Housley's response to the question, "Would Mr. Bissett need to walk and stretch for 10 minutes every hour resulting in the need to be away from the work station?," which was, "If patient is able to do that it would most likely help with the pain" (Tr. 348); and (4) Dr. Housley's recommendation that "rest is needed for the fatiguing," agreeing with Bissett's

statement that he must nap one to two times per day for twenty to sixty minutes each time (Tr. 348).

The Commissioner responds that the narrative comments were just an explanation of the restrictions Dr. Housley listed on the first page. Assuming, however, that they were additional restrictions, the Commissioner argues that the narrative statements are inconsistent with the statements on the first page and the ALJ need not rely on such inconsistent statements when formulating his RFC. The Court agrees with Bissett; the ALJ should have explained his reasons for rejecting Dr. Housley's limitations.

As a preliminary matter, the court finds that the ALJ presented all of the restrictions on the first page to the VE in his hypotheticals. These limitations were also incorporated into the ALJ's RFC finding. Thus, the crux of the issue involves whether the second page of Dr. Housley's assessment contained additional or inconsistent limitations and if it did, whether the ALJ appropriately considered those limitations.

The court finds several internal inconsistencies in Dr. Housley's assessment. The first inconsistency involves Bissett's ability to sit for significant periods of time. On the first page, Dr. Housley circled "agree" next to the statement "sit (with normal breaks) 6 hours in an 8 hour workday." (Tr. 347). On the second page, however, he concurred with the statement, "Mr. Bissett states that he can sit for about 15 minutes then he must stand up or sit on the floor with his legs straight out in front of him for about 5 to 10 minutes to relieve pain." (Tr. 348). Dr. Housley also agreed with Bissett's statement that he would need one or two naps of twenty to sixty-minute duration. The court finds these statements inconsistent. Five to ten minute breaks every fifteen minutes, along with one to two naps, do not equal sitting for six hours "with normal breaks." (Tr. 347). Bissett characterizes the comments on the second page as "merely modifying" the comments on the first page and not as an inconsistency, but the court disagrees. (See Pl. Rep. Br. at 5, n.1.). Taken together, these statements are inconsistent.

The next inconsistency involves the Dr. Housley's statement, "I don't believe he is capable of working more than a limited amount during the day if even that." (Tr. 348). This statement is inconsistent with Dr. Housley's statement on the first page that Bissett could "sit and work as long as everything is within reach." (Tr. 347). It is also inconsistent with his statement that Bissett could sit for six hours.

Having found inconsistencies, the next question is whether it was proper, as the Commissioner suggests, for the ALJ to disregard the inconsistent statements and just adopt the limitations from the first page.

Whether the ALJ gives great or small weight to the opinions of treating physicians, the ALJ must give good reasons for giving the opinions that weight. See Hamilton v. Astrue, 518 F.3d 607, 610 (8th Cir. 2008); 20 C.F.R. § 404.1527(d)(2). "When an ALJ discounts a treating physician's opinion, he should give 'good reasons' for doing so." Davidson v. Astrue, 501 F.3d 987, 990 (8th Cir. 2007) (quoting Dolph v. Barnhart, 308 F.3d 876, 878 (8th Cir. 2002)). An ALJ must normally grant the opinion of a treating physician substantial weight. Davidson, 501 F.3d at 990. However, "[t]he ALJ may discount or disregard [a treating] opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions." Hogan v. Apfel, 239 F.3d 958, 961 (8th Cir. 2001).

This case presents an unusual situation where the ALJ disregards only a portion of the treating physician's opinion, not the entire opinion. While the ALJ did incorporate portions of the assessment, the ALJ should have given reasons for ignoring significant portions of it. See Davidson, 501 F.3d at 990 (an ALJ must give "good reasons" for rejecting a treating physician opinion). Further, the error was not harmless. During the hearing, the VE testified that, with the addition of the second-page restrictions, Bissett would be unable to sustain full-time, competitive employment.

There may well be good reasons why the ALJ discredited the second page of restrictions. For example, the ALJ may have found it inconsistent with Bissett's own explanation of his daily activities, which include doing dishes, taking out the trash, grocery shopping, and caring for and playing with his granddaughter. (Tr. 71-71). However, without an explanation, the court is unable to provide meaningful review. The court therefore remands the case to the ALJ to provide reasons for rejecting portions of the treating physician's opinion in accordance with the SSA's regulations and Eighth Circuit Court of Appeals case law. See 20 C.F.R. § 404.1527(d)(2); Hamilton v. Astrue, 518 F.3d at 610; Davidson, 501 F.3d at 990.

Upon the foregoing,

IT IS ORDERED that the decision of the Commissioner of Social Security is hereby remanded.

DATED this 22nd day of September, 2008.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA