Gablehouse v. Commissioner, Social Security Administration Doc. 19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02758-NYW

KRISTIN BARBARA GABLEHOUSE,

Plaintiff,

v.

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This civil action arises under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401-33, for review of the Commissioner of the Social Security Administration's ("Commissioner" or "Defendant") final decision denying Plaintiff Kristin Gablehouse's ("Plaintiff" or "Ms. Gablehouse") application for Disability Insurance Benefits ("DIB"). Pursuant to the Parties' consent [#9], this civil action was referred to this Magistrate Judge for a decision on the merits. *See* [#18]; 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; D.C.COLO.LCivR 72.2. Upon review of the Parties' briefing, the entire case file, the Administrative Record, and the applicable case law, this court respectfully **REVERSES** the Commissioner's decision and **REMANDS** this matter for further proceedings consistent with this Memorandum Opinion and Order.

BACKGROUND

Ms. Gablehouse, born October 23, 1977, alleges she became disabled September 18, 2015, at 39 years-of-age, due to a traumatic brain injury and associated cognitive and mental ailments.

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See [#8-3 at 62; #8-5 at 139; #8-6 at 151, 162-63, 174].[1] Prior to her traumatic brain injury, Ms. Gablehouse worked as a veterinarian, but she ceased working because she could no longer perform the duties or high-level cognitive skills needed for her profession. [#8-6 at 152-53, 162]. Ms. Gablehouse alleges that she can no longer go grocery shopping without experiencing cognitive difficulties that take hours of rest to subside; that she cannot read or spend much time on the computer; that she can cook some meals and care for her dog; that she drives only during the day and with good weather; that she has no issues with personal care; and that she likes to run, bike, and hike. *See* [#8-3 at 67; #8-6 at 162, 165-72].

On May 11, 2016, Plaintiff filed her application for DIB. *See* [#8-3 at 61]. The Social Security Administration initially denied Plaintiff's application administratively on March 28, 2017. *See* [*id.*]. Ms. Gablehouse submitted a request for a hearing before an Administrative Law Judge ("ALJ"), which ALJ Terrence Hugar ("the ALJ") held on June 28, 2018. *See* [#8-2 at 38]. The ALJ received testimony from the Plaintiff and Vocational Expert Karen Black (the "VE") at the hearing. *See generally* [*id.* at 36-37].

Plaintiff testified that she graduated from veterinary school in 2005 and worked as a veterinarian until suffering a traumatic brain injury on or about August 30, 2015 while biking from Vienna, Austria to Venice, Italy. [#8-2 at 40, 42]. Though initially believing her injury was not severe, *see* [*id.* at 42-43], Ms. Gablehouse testified that her condition became increasingly worse and she could not maintain focus at work, [*id.* at 43]. Plaintiff further testified she experienced "a lot" of cognitive deficits, such as extreme fatigue and difficulty paying attention or maintaining

[1] When citing to the Administrative Record, the court utilizes the docket number assigned by the Electronic Court Filing ("ECF") system and the page number associated with the Administrative Record, found in the bottom right-hand corner of the page. For all other documents the court cites to the document and page number generated by the ECF system.

focus; trouble with speech; memory problems; vision problems, including double vision and sensitivity to light; sensitivity to sounds; vertigo, nausea, and constant migraines; loss of dexterity; and trouble sleeping. [*Id.* at 44-50]. Plaintiff stated she pursued vision therapy, physical therapy, and speech therapy 2-4 times per week, but now completes her therapy exercises at home. [*Id.* at 53].

Ms. Gablehouse continued that while she had difficulty walking after her traumatic brain injury, [*id.* at 54], she has since resumed running and even completed a 100-mile ultramarathon in 36 hours and helps with her physical therapist's yoga class, [*id.* at 54-56]. She also explained that she would like to return to work and attempted to complete "practice shifts" at her veterinarian clinic but could not complete even a reduced shift. [*Id.* at 50]. She also attempted "less cognitively demanding" work, such as steam pressing clothes and answering survey questions online, but experienced issues with each. [*Id.* at 51-52].

The VE also testified at the hearing. The VE first summarized Plaintiff's past relevant work as a veterinarian, a specific vocational preparation ("SVP")[2] 8, medium exertion job. [*Id.* at 56]. The ALJ then asked the VE what work, if any, an individual could perform if limited to light work, subject to some physical restrictions and limited to simple, routine, and repetitive tasks without reading fine print. [*Id.* at 57]. The VE responded that such an individual could perform the jobs of cleaner/housekeeper, light laundry worker, parking lot attendant, and cashier—each an SVP of 2. [*Id.*]. The VE also testified that a typical employer would not tolerate an employee

[2] SVP refers to the "time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.'" *Vigil v. Colvin*, 805 F.3d 1199, 1201 n.2 (10th Cir. 2015) (citing Dictionary of Occupational Titles, App. C, Sec. II (4th ed., revised 1991)); 1991 WL 688702 (G.P.O.). The higher the SVP level, the longer time is needed to acquire the skills necessary to perform the job. Jeffrey S. Wolfe and Lisa B. Proszek, SOCIAL SECURITY DISABILITY AND THE LEGAL PROFESSION 163 (Fig. 10-8) (2003).

being off task for more than 5% of the work day in addition to normal breaks, nor would an employer tolerate more than two absences per month. [*Id.* at 58-59]. The VE stated that her testimony was not inconsistent with the Dictionary of Occupational Titles, supplemented by her experience. *See* [*id.* at 58].

On October 1, 2018, the ALJ issued a decision finding Ms. Gablehouse not disabled under the Act. [#8-2 at 18-31]. Plaintiff requested Appeals Council review of the ALJ's decision, which the Appeals Council denied on July 31, 2019, rendering the ALJ's decision the final decision of the Commissioner. [*Id.* at 1-7]. Plaintiff sought judicial review of the Commissioner's final decision in the United States District Court for the District of Colorado on September 26, 2019, invoking this court's jurisdiction to review the Commissioner's final decision under 42 U.S.C. § 1383(c)(3). On appeal, Ms. Gablehouse challenges the ALJ's RFC assessment, arguing that the ALJ improperly weighed the medical source opinions. *See* [#12].

LEGAL STANDARDS

An individual is eligible for DIB benefits under the Act if he is insured, has not attained retirement age, has filed an application for DIB, and is under a disability as defined in the Act. 42 U.S.C. § 423(a)(1). An individual is determined to be under a disability only if her "physical or mental impairment or impairments are of such severity that [s]he is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). The disabling impairment must last, or be expected to last, for at least 12 consecutive months. *See Barnhart v. Walton*, 535 U.S. 212, 214-15 (2002). Additionally, the claimant must prove she was disabled prior to her date last insured. *Flaherty v. Astrue*, 515 F.3d 1067, 1069 (10th Cir. 2007).

The Commissioner has developed a five-step evaluation process for determining whether a claimant is disabled under the Act. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). These include:

1. Whether the claimant has engaged in substantial gainful activity;
2. Whether the claimant has a medically severe impairment or combination of impairments;
3. Whether the claimant has an impairment that meets or medically equals any listing found at Title 20, Chapter III, Part 404, Subpart P, Appendix 1;
4. Whether the claimant has the Residual Functional Capacity ("RFC") to perform her past relevant work; and
5. Whether the claimant can perform work that exists in the national economy, considering the claimant's RFC, age, education, and work experience.

See 20 C.F.R. §§ 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). *See also Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (describing the five steps in detail). "The claimant bears the burden of proof through step four of the analysis[,]" while the Commissioner bears the burden of proof at step five. *Neilson v. Sullivan*, 992 F.2d 1118, 1120 (10th Cir. 1993). "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." *Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007) (internal quotation marks omitted).

In reviewing the Commissioner's final decision, the court limits its inquiry to whether substantial evidence supports the final decision and whether the Commissioner applied the correct legal standards. *See Vallejo v. Berryhill*, 849 F.3d 951, 954 (10th Cir. 2017). "Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Flaherty*, 515 F.3d at 1070 (internal citation omitted); *accord Musgrave v. Sullivan,* 966 F.2d 1371, 1374 (10th Cir. 1992) ("Evidence is not substantial if it is overwhelmed by other evidence in the record or constitutes mere conclusion."). "But in

making this determination, [the court] cannot reweigh the evidence or substitute [its] judgment for the administrative law judge's." *Smith v. Colvin*, 821 F.3d 1264, 1266 (10th Cir. 2016).

ANALYSIS

In formulating a claimant's RFC, the ALJ must consider the combined effect of all the claimant's medically determinable impairments, including the severe and non-severe. *See Wells v. Colvin*, 727 F.3d 1061, 1065 (10th Cir. 2013); *Ray v. Colvin*, 657 F. App'x 733, 734 (10th Cir. 2016). A claimant's RFC is the most work the claimant can perform, not the least. 20 C.F.R. § 404.1545; SSR 83-10. "'The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations).'" *Hendron v. Colvin*, 767 F.3d 951, 954 (10th Cir. 2014) (quoting SSR 96-8p, 1996 WL 374184, at *7 ("The RFC assessment must include a discussion of why reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical and other evidence.")). The ALJ need not identify "affirmative, medical evidence on the record as to each requirement of an exertional work level before an ALJ can determine RFC within that category," and the court will uphold the RFC assessment if it is consistent with the record and supported by substantial evidence. *See Howard v. Barnhart*, 379 F.3d 945, 947, 949 (10th Cir. 2004).

In assessing a claimant's RFC, the ALJ must also address medical source opinions. *See Vigil v. Colvin*, 805 F.3d 1199, 1201-02 (10th Cir. 2015). The Social Security Regulations afford a treating source opinion controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in [the] case record." 20 C.F.R. § 404.1527(c)(2); *cf. Garcia v. Colvin*, 219 F. Supp. 3d 1063, 1071 (D. Colo. 2016) ("The distinction between *not inconsistent* and *consistent* is significant. The

treating source opinions should not be accorded controlling weight if they contradict other substantial evidence in the record, but they do not necessarily have to reach the exact same conclusions." (emphasis in original)). Generally, the opinion of an examining source is entitled to more weight than the opinion of a non-examining source. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014); 20 C.F.R. § 404.1527(c)(1). Indeed, the opinion of a treating or examining source is in no way "dismissable," *see Chapo v. Astrue*, 682 F.3d 1285, 1291 (10th Cir. 2012), and may be dismissed or discounted only upon an examination of the factors provided in the regulations and "specific, legitimate reasons for rejecting it[,]" *Doyal v. Barnhart*, 331 F.3d 758, 764 (10th Cir. 2003).

But even if the ALJ does not afford the treating source opinion controlling weight, the ALJ owes that opinion deference and should weigh that opinion using all the factors provided in 20 C.F.R. § 404.1527(c)(1)-(6). *See Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003); SSR 96-2p, 1996 WL 374188, at *4. These factors include:

1. the length of the treatment relationship and the frequency of examination;
2. the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed;
3. the degree to which the physician's opinion is supported by relevant evidence;
4. consistency between the opinion and the record as a whole;
5. whether or not the physician is a specialist in the area upon which an opinion is rendered; and
6. other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Langley v. Barnhart, 373 F.3d 1116, 1119 (10th Cir. 2004) (quotation marks omitted). Ultimately, the ALJ's findings must be "sufficiently specific to make clear" the weight assigned to the treating source opinion and the reasons for that weight. *Oldham v. Astrue*, 509 F.3d 1254, 1258 (10th Cir.

2007) (internal quotation marks omitted); *accord Golden-Schubert v. Commissioner, SSA*, 773 F. App'x 1042, 1050 (10th Cir. 2019) ("An ALJ is not required to expressly discuss each factor in deciding what weight to give a medical opinion.").

The ALJ determined that Ms. Gablehouse retained the RFC to "perform light work," subject to certain restrictions on reading fine print, exposure to hazards, and climbing ladders, stairs, or scaffolds, and further limited Ms. Gablehouse to simple, routine, and repetitive tasks. [#8-2 at 26]. Though believing Ms. Gablehouse's ailments caused some of the alleged disabling pain, the ALJ explained that the objective medical evidence and other evidence of record belied the severity of Ms. Gablehouse's allegations. *See* [*id.* at 27]. For instance, Ms. Gablehouse performed robust daily activities, including an ultramarathon; Ms. Gablehouse's November 2015 brain MRI showed a stable non-specific white matter abnormality but no evidence of a mass, stroke, or hemorrhage; Ms. Gablehouse's energy, endurance, and focus improved with oxygen therapy; Ms. Gablehouse's vision improved with treatment; Ms. Gablehouse's neurocognitive index improved over time; Ms. Gablehouse's August 2017 cognitive tests revealed above average intelligence and only minimal cognitive weaknesses; Ms. Gablehouse's headaches improved with treatment and neurological exams were largely normal; and Ms. Gablehouse's mental examinations revealed full orientation, normal cooperation, occasional depression and anxiety, and normal mood swings. [*Id.* at 27-28].

The ALJ then considered medical source opinions[3] in assessing Plaintiff's RFC. *See* [*id.* at 28-29]. On appeal, Ms. Gablehouse argues that the ALJ improperly assessed Plaintiff's treating source opinions, because each found Ms. Gablehouse far more limited functionally than the ALJ,

[3] On appeal, Ms. Gableouse challenges only the assessment of her treating sources, and thus I limit my analysis to those opinions as well.

and the ALJ failed to consider the opinion of Occupational Therapist Kristine Couch ("Ms. Couch"). *See* [#12 at 7-11]. According to Ms. Gablehouse, had the ALJ assessed these opinions according to the applicable Social Security Regulations, the ALJ would have found Ms. Gablehouse disabled under the Act. *See* [*id.* at 7-8, 11-21]. Because the court agrees that the ALJ erred by failing to consider Ms. Couch's opinion, I focus on this issue only. *See Watkins v. Barnhart*, 350 F.3d 1297, 1299 (10th Cir. 2003) ("We will not reach the remaining issues raised by appellant because they may be affected by the ALJ's treatment of this case on remand.").

On May 18, 2017, Ms. Couch completed a Functional Abilities Evaluation of Plaintiff. *See* [#8-10 at 454]. In sum, Ms. Couch explained that Ms. Gablehouse experienced issues with sitting, standing, and walking—being able to perform any of these tasks for a finite number of minutes before needing to change positions or stop. [*Id.* at 455]. Ms. Couch also noted that Ms. Gablehouse was limited in how much she could lift and concluded that Ms. Gablehouse's lifting capabilities were consistent with sedentary work. *See* [*id.*]. Ms. Couch also observed that Ms. Gablehouse experienced difficulties with grip/prehension, dexterity, standing and reaching, bending, twisting, repetitive bending of her forearms, and full body range of motion, which included below normal functionality, dizziness, disorientation, and other vestibular issues. *See* [*id.* at 456-58]. Finally, Ms. Couch documented cognitive weaknesses, including errors completing tasks, slow and stammered speech, fatigue, poor visual tracking, vestibular issues, sensitivity to stimuli, and an inability to multi-task. *See* [*id.* at 458].

The ALJ's decision contains no discussion or mention of Ms. Couch's opinion, either in the RFC assessment or otherwise. The Commissioner argues that this is merely harmless error, because the pertinent regulation regarding medical opinions from sources that are not acceptable medical sources like Ms. Couch requires nothing more than a discussion that "allows a claimant

or subsequent reviewer to follow the adjudicator's reasoning[.]" [#17 at 9-11]. This, however, is not a fair characterization of the pertinent regulations regarding medical opinions.

The pertinent Social Security Regulation requires the ALJ to "evaluate every medical opinion [she] receive[s]," regardless of its source. 20 C.F.R. § 404.1527(c) (emphasis added); *see also Hamlin v. Barnhart*, 365 F.3d 1208, 1215 (10th Cir. 2004) ("An ALJ must evaluate every medical opinion in the record."). This requirement applies to those sources, like Ms. Couch, that are not acceptable medical sources, and the ALJ "generally should explain the weight given to opinions from these sources or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case." 20 C.F.R. § 404.1527(f)(2). This the ALJ did not do—the ALJ makes no mention at all of Ms. Couch's opinion and thus failed to provide any justification for disregarding this opinion.[4] "This was, of course, clear legal error." *Victory v. Barnhart*, 121 F. App'x 819, 825 (10th Cir. 2005) (remanding to the ALJ where the ALJ failed to give any consideration to the medical opinions of an examining source).

Nor is the court convinced by the Commissioner's arguments that there is no inconsistency between the ALJ's RFC assessment and Ms. Couch's opinion. *See* [#17 at 10-11]. Whatever support (or lack thereof) Ms. Couch's opinion finds in the record is for the ALJ to determine in the first instance. *See Sandoval v. Colvin*, No. 14-CV-1852-WJM, 2015 WL 4245824, at *3 (D.

[4] For this reason, this is not a situation where the ALJ merely failed to explain what weight he assigned to Ms. Couch's opinion but nevertheless considered the opinion and gave reasons for or against it. *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1161-66 (10th Cir. 2012) (finding only harmless error where the ALJ failed to explain the weight assigned to certain medical opinions but the ALJ nevertheless discussed those opinions and whether they were supported by the medical record).

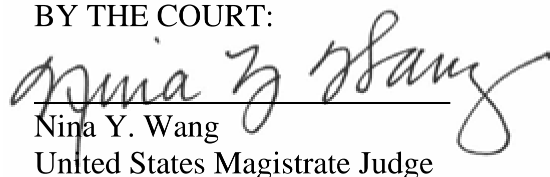
Colo. July 14, 2015) (reversing and remanding the Commissioner's denial of disability benefits because "it [was] not apparent whether the ALJ considered Dr. Glasco's opinion at all. The Court thus cannot say that no reasonable factfinder could have resolved the matter differently given that Dr. Glasco's opinion suggests Plaintiff has social impairments and restrictions in activities of daily living greater than those contained in the ALJ's decision. While Defendant argues that Dr. Glasco clearly expressed that Plaintiff's symptoms were temporary given that Plaintiff's surgery would 'markedly improve her major depression,' it is not the Court's function to weigh the evidence." (footnote omitted)). Indeed, it is axiomatic that an ALJ must discuss the evidence supporting his decision, "the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." *Clifton v. Chater*, 79 F.3d 1007, 1010 (10th Cir. 1996). And while the ALJ has the sole responsibility of resolving conflicts within the medical evidence and among medical opinions, *see Allman v. Colvin*, 813 F.3d 1326, 1333 (10th Cir. 2016), the ALJ cannot simply ignore evidence that does not support his decision, *see Robinson v. Barnhart*, 366 F.3d 1078, 1083 (10th Cir. 2004).

CONCLUSION

For the reasons stated herein, the court hereby **REVERSES** the Commissioner's final decision and **REMANDS** this matter to the ALJ for further consideration consistent with this Memorandum Opinion and Order.

DATED: September 10, 2020

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge