UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

KELLY J. CHAVEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. 1:16cv314
	)	
NANCY A. BERRYHILL, Acting Commissioner of Social Security,	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter is before the court for judicial review of a final decision of the defendant Commissioner of Social Security Administration denying Plaintiff's application for Disability Insurance Benefits (DIB) as provided for in the Social Security Act. 42 U.S.C. §416(i). Section 205(g) of the Act provides, inter alia, "[a]s part of his answer, the [Commissioner] shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the case for a rehearing." It also provides, "[t]he findings of the [Commissioner] as to any fact, if supported by substantial evidence, shall be conclusive. . . ." 42 U.S.C. §405(g). The law provides that an applicant for disability insurance benefits must establish an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. §416(i)(1); 42 U.S.C. §423(d)(1)(A). A physical or mental impairment is "an impairment that results from anatomical,

physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §423(d)(3). It is not enough for a plaintiff to establish that an impairment exists. It must be shown that the impairment is severe enough to preclude the plaintiff from engaging in substantial gainful activity. *Gotshaw v. Ribicoff*, 307 F.2d 840 (7th Cir. 1962), cert. denied, 372 U.S. 945 (1963); *Garcia v. Califano*, 463 F.Supp. 1098 (N.D.Ill. 1979). It is well established that the burden of proving entitlement to disability insurance benefits is on the plaintiff. *See Jeralds v. Richardson*, 445 F.2d 36 (7th Cir. 1971); *Kutchman v. Cohen*, 425 F.2d 20 (7th Cir. 1970).

Given the foregoing framework, "[t]he question before [this court] is whether the record as a whole contains substantial evidence to support the [Commissioner's] findings." *Garfield v. Schweiker*, 732 F.2d 605, 607 (7th Cir. 1984) citing *Whitney v. Schweiker*, 695 F.2d 784, 786 (7th Cir. 1982); 42 U.S.C. §405(g). "Substantial evidence is defined as 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Rhoderick v. Heckler*, 737 F.2d 714, 715 (7th Cir. 1984) quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1410, 1427 (1971); *see Allen v. Weinberger*, 552 F.2d 781, 784 (7th Cir. 1977). "If the record contains such support [it] must [be] affirmed, 42 U.S.C. §405(g), unless there has been an error of law." *Garfield*, *supra* at 607; *see also Schnoll v. Harris*, 636 F.2d 1146, 1150 (7th Cir. 1980).

In the present matter, after consideration of the entire record, the Administrative Law Judge ("ALJ") made the following findings:

1. The claimant has not engaged in substantial gainful activity since November 16, 2010, the application date (20 CFR 416.971 *et seq.*).

2. The claimant has the following severe impairments: obesity, migraine headaches, a history of acoustic neuroma of the left skull base/brain treated with Cyberknife radiosurgery in 2007, lumbar degenerative disc disease, left knee pain/patellar tendinitis with possible meniscus tear, anxiety and depression (20 CFR 416.920(c)).

3. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).

4. After careful consideration of the entire record, the undersigned finds that the claimant has the physical residual functional capacity to perform light work as defined in 20 CFR 416.967(b). The claimant retains the mental residual functional capacity to perform unskilled, simple and routine tasks, a small number of tasks, in a relatively unchanging work setting and work process which do not require a fast pace. As to social interactions, she is not able to interact with the general public. She can interact with others as long as it is not on more than a brief and superficial basis. It is best that she work with things and not with people or data.

5. The claimant has no past relevant work (20 CFR 416.965).

6. The claimant was born on March 29, 1983, and was 27 years old, which is defined as a younger individual age 18-49, on the date the application was filed (20 CFR 416.963).

7. The claimant has at least a high school education and is able to communicate in English (20 CFR 416.964).

8. Transferability of job skills is not an issue because the claimant does not have past relevant work (20 CFR 416.968).

9. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 416.969 and 416.969(a)).

10. The claimant has not been under a disability, as defined in the Social Security Act, since November 16, 2010, the date the application was filed (20 CFR 416.920(g)).

(Tr. 620-641)

Based upon these findings, the ALJ determined that Plaintiff was not entitled to disability

insurance benefits. The ALJ's decision became the final agency decision when the Appeals Council denied review. This appeal followed.

Plaintiff filed her opening brief on February 21, 2017. On May 26, 2017, the defendant filed a memorandum in support of the Commissioner's decision, to which Plaintiff replied on June 13, 2017. Upon full review of the record in this cause, this court is of the view that the ALJ's decision should be affirmed.

A five step test has been established to determine whether a claimant is disabled. *See Singleton v. Bowen*, 841 F.2d 710, 711 (7th Cir. 1988); *Bowen v. Yuckert*, 107 S.Ct. 2287, 2290-91 (1987). The United States Court of Appeals for the Seventh Circuit has summarized that test as follows:

> The following steps are addressed in order: (1) Is the claimant presently unemployed? (2) Is the claimant's impairment "severe"? (3) Does the impairment meet or exceed one of a list of specific impairments? (4) Is the claimant unable to perform his or her former occupation? (5) Is the claimant unable to perform any other work within the economy? An affirmative answer leads either to the next step or, on steps 3 and 5, to a finding that the claimant is disabled. A negative answer at any point, other than step 3, stops the inquiry and leads to a determination that the claimant is not disabled.

Nelson v. Bowen, 855 F.2d 503, 504 n.2 (7th Cir. 1988); *Zalewski v. Heckler*, 760 F.2d 160, 162 n.2 (7th Cir. 1985); accord *Halvorsen v. Heckler*, 743 F.2d 1221 (7th Cir. 1984). From the nature of the ALJ's decision to deny benefits, it is clear that step five was the determinative inquiry.

In support of remand or reversal, Plaintiff argues that the VE's opinion concerning the number of jobs available nationwide is the result of an arbitrary and defective methodology.

The Seventh Circuit Court of Appeals has repeatedly acknowledged the importance of

VEs at ALJ hearings. As the Seventh Circuit has noted, ALJs regularly employ the services of VEs at step five to determine whether a claimant retains work skills that can be used in other work and the specific occupations in which those skills may be used. 20 C.F.R. § 416.966(e); *see also Taylor v. Colvin*, 829 F.3d 799, 801 (7th Cir. 2016) (use of VEs "customary"); *Jentzen v. Colvin*, No. 14-cv-2029, 2016 WL 8672692, at *4 (N.D. Ind. Mar. 18, 2016) (noting frequent use of VEs). The Seventh Circuit has regularly upheld an ALJ's reliance on a VE to determine whether there is work which exists in significant numbers in the national economy that a claimant could perform where the hypothetical posed to the VE is based on substantial evidence. *See Liskowitz v. Astrue*, 559 F.3d 736, 745–46 (7th Cir. 2009) ("Where, as here, the VE identifies a significant number of jobs the claimant is capable of performing and this testimony is uncontradicted (and is otherwise proper), it is not error for the ALJ to rely on the VE's testimony"); *Kelley v. Sullivan*, 890 F.2d 961, 965 (7th Cir. 1989) (VE's testimony meets Secretary's burden at step five of the sequential analysis); 20 C.F.R. §§ 416.920(g), 416.966(e).

In the present case, the ALJ posed a hypothetical to the VE to determine whether jobs existed nationally that Plaintiff could perform (Tr. 685-87). The Seventh Circuit has set a clear standard regarding the resolution of perceived discrepancies with the VE's testimony or methodology. In *Donahue*, the Seventh Circuit stated: "If the basis of the VE's conclusions is questioned at the hearing, however, then the ALJ should make an inquiry (similar though not necessarily identical to that of Rule 702) to find out whether the purported expert's conclusions are reliable." *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002).

Plaintiff relies on *Jentzen* to support her argument that the VE's methodology is flawed. However, the District Court in *Jentzen* concluded that when questions surround the VE's

testimony, an ALJ has a "duty to investigate further." *Jentzen*, 2016 WL 8672692, at *5. In the present case, at the February 2016 administrative hearing, the ALJ solicited jobs from the VE given a hypothetical that matched Plaintiff's RFC (Tr. 685-87). When given the opportunity to question the VE, Plaintiff's counsel asked the VE about his methodology (Tr. 687-88). In response, the VE explained that he used job data from the Bureau of Statistics and an equal distribution method, where he took the number of jobs in each Standard Occupational Classification (SOC) group divided by the number of occupations per group, and multiplied this number by the number of light and unskilled jobs in order to estimate the number of jobs for the entire group (Tr. 687). Plaintiff's counsel objected to this methodology (Tr. 688).

After acknowledging Plaintiff's objection, the ALJ investigated the VE's methodology further (Tr. 688). The ALJ questioned the VE on the types of methodologies used, to which the VE clarified that the two most common methodologies employed by VEs were the equal distribution method or the occupational density method (Tr. 688). Asked why he chose to use the equal distribution method, the VE explained that he preferred the equal distribution method over the occupational density method because the occupational density method relied on information from Job Browser Pro, a SkillTRAN product, and provided job estimates in the national economy lower than what the VE found to be normal in his experience (Tr. 688).

The VE further stated that regardless of the methodology employed, no methodology could provide anything other than estimates and ranges of jobs, numbers generally sourced from job surveys (Tr. 689-90). The VE also testified that VEs across the nation picked between the two methods, but each method was imperfect due to reliance on surveys and data as opposed to exact numbers, which do not exist (Tr. 690). Plaintiff objected to the methodology for purposes of

preserving the objection on record, and the ALJ indicated that she would take her objections into account (Tr. 691).

The Commissioner argues that the record clearly establishes that the ALJ followed the guidance of *Donahue* and *Jentzen*. That is, when questions arose about the VE's methodology, the ALJ did not simply accept the job number provided by the VE, but instead further investigated and, per *Donahue*, made an inquiry and determined that the VE's conclusions were reliable.

Plaintiff appears to suggest than a case should automatically be remanded whenever an ALJ relies on the testimony of a VE who uses the equal distribution method. However, the Commissioner has not promulgated regulations that prescribe any specific methodology for VEs to use to estimate how many jobs are in a particular occupation. *See* 20 CFR 416.966(e). As the VE testified in this case, it would be all but impossible to develop statistics addressing the vocational impact of all possible combinations of impairments and limitations, and there do not appear to be any realistic alternatives to relying on the current methods employed by VEs (Tr. 689-90).

Plaintiff correctly notes the Seventh Circuit has criticized VE methodology in several recent cases. *See, e.g. Taylor* 829 F.3d at 802(criticizing VE methodology); *Hill v. Colvin*, 807 F.3d 862, 870 n.10, 870-72 (7th Cir. 2015) ("It is time the Social Security Disability Office cleaned up its act") (Posner concurrence); *Alaura v. Colvin*, 797 F.3d. 503, 507-08 (7th Cir. 2015) (deeming VE methodology "preposterous"); *Voigt v. Colvin*, 781 F.3d 871, 879 (7th Cir. 2015) (calling VE methodology "unacceptably crude"); *Browning v. Colvin*, 766 F.3d 702, 708-09 (7th Cir. 2014) ("We also have no idea what the source or accuracy of the number of jobs that the

vocational experts…claim the plaintiff could perform that exist in the plaintiff's area, the region, or the nation"); *Hermann v. Colvin*, 772 F.3d 1110, 1113-14 (7th Cir. 2014) ("We do not know how the vocational expert in this case calculated the numbers to which he testified. Nothing in the record enables us to verify those numbers, which the administrative law judge accepted"). However, all of these criticism are *dicta*, and all of these cases were reversed on other grounds.

Plaintiff also cites to *Alaura* to support her claim that an ALJ may not rely on VE methodology such as the equal distribution method. *Alaura*, 797 F.3d 503 at 507-08. In *Alaura*, the Seventh Circuit stated "[w]e need to say something about the vocational expert's conclusion," and went on to broadly criticize the "source and validity of the statistics that vocational experts trot out in Social Security disability hearings," and deemed the VE's methodology as "preposterous," and also bemoaned the outdated nature of the DOT. *Id*. at 507-08 (7th Cir. 2015). However, the *Alaura* Court did not overturn the controlling precedent of *Donahue*, did not offer what methodologies (underpinned by what principles) would satisfy the Court, and did not provide a brightline rule as to when remand was necessary based on defective VE methodology. *See id.* Thus, Plaintiff's reliance on *Alaura* is misplaced, and this Court must abide by the ruling in *Donahue*.

Other District Courts within the Seventh Circuit, while acknowledging the complaints of the Seventh Circuit, have explained that "the [Seventh Circuit] has not explicitly reversed an ALJ's conclusion simply because the vocational expert's testimony did not explain where his statistics were derived." *Hoffman v. Colvin*, No. 15-cv-940, 2016 WL 5107063 at *6 (E.D. Wisc. Sept. 20, 2016). The District Court in *Hoffman* identified the criticism in *Alaura* as "classic dicta." *See id.* Without any holding reversing *Donahue*, Courts have refused to remand solely for

challenges to VE methodology, citing a lack of guidance from the Seventh Circuit: "[Plaintiff's] argument [about VE methodology] is well taken. But [Plaintiff's] criticism of the VE's methodology is not a basis for remand until appellate precedent instructs that relying on the methodology is reversible error." *Weir v. Colvin*, No. 15-cv-532, 2016 WL 4083524, at *3 (W.D. Wisc. Aug. 1, 2016) (affirming ALJ's decision). Had the Seventh Circuit intended the equal distribution method to be ruled impermissible, it would have said so. Thus far, it has not. Accordingly the decision of the ALJ must be affirmed.

Conclusion

On the basis of the foregoing, the ALJ's decision is hereby AFFIRMED.

Entered: July 24, 2017.

s/ William C. Lee
William C. Lee, Judge
United States District Court