

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIREKaren L. Cole

v.

Civil No. 13-cv-83-JD
Opinion No. 2014 DNH 040Carolyn W. Colvin,
Acting Commissioner,
Social Security AdministrationO R D E R

Karen L. Cole seeks judicial review, pursuant to 42 U.S.C. § 405(g), of the decision of the Acting Commissioner of the Social Security Administration, denying her application for disability insurance benefits and supplemental security income. In support, Cole contends that the Administrative Law Judge ("ALJ") erred in assessing her mental and physical residual functional capacity, improperly interpreted raw medical data, and relied on the vocational expert's opinions based on an incomplete hypothetical question. The Acting Commissioner moves to affirm.

Standard of Review

In reviewing the final decision of the Commissioner in a social security case, the court "is limited to determining whether the ALJ deployed the proper legal standards and found facts upon the proper quantum of evidence." Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999); accord Seavey v. Barnhart, 276 F.3d 1, 9 (1st Cir. 2001). The court defers to the ALJ's factual

findings as long as they are supported by substantial evidence. § 405(g). "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Astralis Condo. Ass'n v. Sec'y Dep't of Housing & Urban Dev., 620 F.3d 62, 66 (1st Cir. 2010).

Discussion

A five-step process is used to evaluate an application for social security benefits. 20 C.F.R. § 404.1520(a)(4); § 416.920(a). At step five, the Acting Commissioner bears the burden of providing evidence of specific jobs that the claimant can do. Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001). The Acting Commissioner may satisfy that burden by relying on the testimony of a vocational expert as long as the opinion elicited is based on an accurate hypothetical question. Rose v. Shalala, 34 F.3d 13, 19 (1994); Stanley v. Massanari, 2001 WL 873064, at *5 (D.N.H. July 31, 2001). In addition, the ALJ must resolve any conflicts between the vocational expert's opinions and the Dictionary of Occupational Titles. Freeman v. Barnhart, 274 F.3d 606, 609 (1st Cir. 2001); Social Security Ruling 00-4p, 2000 WL 1898704, at *2-*3.

At the hearing, after the vocational expert testified about the exertional levels of the work Cole had done in the past, the

ALJ explained that he would not ask any hypothetical questions because he was waiting for additional medical records. The ALJ then asked Cole's attorney if she had any questions.

Cole's attorney first posed a hypothetical question with limitations for only twenty-five minutes of sitting and thirty-two minutes of standing. The vocational expert interpreted the question to mean that the worker could only sit and stand for that total amount of time during a work day and responded that no jobs existed that the worker could do. The ALJ then interjected that the sitting and standing limits were to allow the worker to change position during an eight hour work day, and the attorney agreed.

In response, the vocational expert identified three jobs: cashier II, DOT code 211.462-010; surveillance system monitor, DOT code 379.367-101; and auto locator, DOT code 296.367-010. She further explained that the cashier position was sedentary with an SVP 2, the monitor position was sedentary with an SVP 2, and the locator position was sedentary with an SVP 3.

The attorney then asked a hypothetical that included "deficits of ambulation and material handling." The ALJ stated that the hypothetical had to be worded in terms of how the limitation would affect an occupation. The attorney tried again, but the ALJ was not satisfied. The ALJ and the attorney then discussed what limitations should be included pertaining to

concentration and fatigue. The vocational expert testified that severe fatigue and being unable to "sustain concentration that amount of time [sic]" would eliminate the monitor position and might eliminate the locator position but not the cashier position.

The attorney then posed a hypothetical with the same physical requirements, with moderate limitations in the ability to work with supervisors and co-workers and in responding to work situations, and with high anxiety causing hypersensitivity to criticism and other deficits. In response, the vocational expert said that those limitations precluded all of the jobs. The ALJ asked both the vocational expert and the attorney for the definition of "moderate", which the vocational expert defined.

The attorney asked three more hypothetical questions with marked limitations in the worker's ability to maintain attendance and to function effectively. The vocational expert testified that the marked limitations would eliminate all of the jobs.

In his decision, the ALJ found that Cole retained the ability to do sedentary work that required only twenty-five minutes of sitting and thirty-two minutes of standing before changing position and that was limited to moderately complex one to four step tasks. The ALJ acknowledged that the limitation for moderately complex one to four step tasks was not presented to the vocational expert. The ALJ reasoned, however, that the new

limitation did not undermine the vocational expert's opinion because the job classifications found by the vocational expert were SVP 2 and SVP 3. The ALJ equated SVP 2 and 3 level jobs with work that was no more than moderately complex.

In the motion to affirm, the Acting Commissioner argues that the difference between the hypothetical and the residual functional capacity assessment was not material and did not require a remand. Contrary to the Acting Commissioner's argument, the difference between the ALJ's finding and the hypothetical posed to the vocational expert is material because it adds a limitation not considered by the vocational expert. The discrepancy here is unlike the cases cited by the Acting Commissioner where minor changes in wording did not require remand. See Greene v. Astrue, 2012 WL 1248977, at *4 (D. Mass. Apr. 12, 2012) (citing cases).

Although the ALJ addressed the new limitation in his decision, his reasoning is not convincing. The vocational expert identified the cashier position as sedentary work, but the Dictionary of Occupational Titles classifies that job as light work. Neither the vocational expert nor the ALJ addressed the conflict. Because the ALJ's residual functional capacity is limited to sedentary work, that job classification is eliminated.

The ALJ stated that the new limitation for only one to four step tasks would not eliminate the jobs identified by the

vocational expert that required SVP levels of 2 or 3. As the Acting Commissioner explains, SVP 1-2 corresponds to unskilled work while SVP 3-4 corresponds to semi-skilled work. The Acting Commissioner argues that SVP 2 work, at the unskilled level, is not precluded by the new limitation for one to four step tasks. With that restriction, only the surveillance monitor job remains as a viable job category.

The SVP levels in the Dictionary of Occupational Titles pertain to the time it takes to learn a new job but do not necessarily describe the specific skills needed or the number of tasks involved in the job. See Langley v. Social Sec. Admin. Comm'r, 2012 WL 379937, at *10 (D. Me. Feb. 3, 2012); see also Baker v. Astrue, 2011 WL 6937505, at *5 n.6 (D.N.H. Nov. 15, 2011). While an SVP 2 job may equate to unskilled work, it is not clear that SVP 2 necessarily equates to a job requiring only one to four tasks.

Further, it is not clear why the ALJ included the new limitation. If the limitation pertains to Cole's ability to concentrate or maintain pace in her work, those issues might well preclude work as a surveillance monitor, as the vocational expert testified.

Given the error of including a new limitation in the residual functional capacity that was not presented to the vocational expert and the uncertainties pertaining to the jobs

identified by the vocational expert, the vocational expert's opinion does not provide substantial evidence that jobs exist in the national economy that Cole can do. Therefore, the Acting Commissioner has not sustained her burden at Step Five.

Conclusion

For the foregoing reasons, the plaintiff's motion to reverse (document no. 8) is granted. The Acting Commissioner's motion to affirm (document no. 11) is denied. As this is a Sentence Four determination, the clerk of court shall remand the case for further administrative proceedings.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

February 27, 2014

cc: Ruth Dorothea Heintz, Esq.
T. David Plourde, Esq.