IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY BOHRMAN,

Plaintiff,

v.

LARRY MASSANARI,
Acting Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

00-C-715-C

REPORT

This is an action for judicial review of a final decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Terry Bohrman applied for a period of disability, Disability Insurance Benefits and Supplemental Security Income on April 29, 1997, alleging that he had been disabled since October 11, 1996 as a result of a lower back injury and a learning disability. His application was denied initially and upon reconsideration. A hearing was held on October 1, 1998 before an Administrative Law Judge (ALJ). In a written decision dated November 16, 1998, the ALJ found plaintiff not disabled. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review. Plaintiff then filed this action for judicial review.

Plaintiff asks this court to reverse the decision of the Commissioner and award him benefits or remand the case to the agency for further proceedings. Plaintiff contends that

the ALJ committed the following errors that require reversal or remand: 1) the ALJ improperly rejected the opinion of plaintiff's treating physician, Dr. Zondag; 2) the ALJ improperly rejected the opinion of a consulting psychologist, Dr. Fuhrer; and 3) the ALJ's residual functional capacity assessment failed to account for all of plaintiff's physical limitations.

As discussed below, the ALJ painstakingly discounted virtually all of the physical, vocational and psychological evidence supporting plaintiff's claim. The record, however, does not support the ALJ's stated reasons for rejecting the disabling psychological limitations found by Dr. Fuhrer. Because accepting or rejecting Dr. Fuhrer's opinion changes the outcome, I am recommending that this court remand this case for limited further proceedings before the ALJ.

The following facts are drawn from the administrative record:

Facts

I. Plaintiff's Background and Testimony

Plaintiff is a 44-year-old former construction laborer with a ninth grade education. On October 8, 1996, plaintiff injured his back while shoveling sand at work. At the administrative hearing, plaintiff testified that since the injury, he has constant pain in his lower back and pain down the back of his left leg. He testified that he gets back and leg spasms approximately twice a week. He testified that although he takes prescription

medicine that helps him sleep, he often awakes in the middle of the night with back pain. He takes Tylenol 3 for pain, although it does not always help.

Plaintiff testified that as a result of his pain, he is limited in his daily activities. He testified that he is able to shower and dress himself, but he has to pull his leg up by the pants leg to put his shoes on. He does laundry by taking one piece at a time and does what other chores he can around the house. He testified that he can ride his riding lawn mower for about five minutes before having to rest. He estimated that he could walk approximately two blocks at a time, lift about 10 pounds and sit for 15 to 20 minutes. He testified that he no longer engages in hobbies such as fishing and hunting because of his pain and because he generally lacks interest in activities that he used to enjoy.

Plaintiff's wife also testified at the administrative hearing. She testified that plaintiff was able to do some chores around the house like vacuuming but it takes him longer to do these activities. She testified that as a result of the injury, plaintiff was no longer the easygoing person he had been before. She testified that plaintiff now became easily frustrated and angry and often lost his temper.

II. Medical Evidence

On October 11, 1996, plaintiff saw Dr. Brian Kelley, a chiropractor. Dr. Kelley diagnosed intervertebral disk syndrome and acute facet joint syndrome and referred plaintiff for an MRI scan. The MRI revealed that plaintiff had degenerative disk changes at L2-L4

with diffuse disk protrusion or bulges at these levels, an annular (ring-like) tear at L2 and mild extension of the bulges into the neural foramina at L4. An MRI of the thoracic spine revealed mild degenerative changes.

Plaintiff was seen by neurosurgeon A. Murrle on November 20, 1996. Physical examination of the spine revealed a normal spine curvature with no significant paravertebral muscle spasm or tenderness. Plaintiff complained of pain across the lower back upon forward bending but Dr. Murrle found no evidence of radiculopathy or any other neural compromise. Dr. Murrle concluded that plaintiff had a ligamentous or muscular injury. He referred him back to Dr. Kelley for heat, ultrasound and stretching exercises for a couple of weeks, opining that plaintiff should be able to return to work at the end of that time period.

On December 27, 1996, plaintiff saw Dr. Tuenis Zondag, an occupational health specialist. Plaintiff reported that he was still have symptoms despite receiving chiropractic care since his injury. Dr. Zondag diagnosed plaintiff as status post acute strain with an underlying mechanical back problem. He referred plaintiff to physical therapy for stretching and strengthening exercises for his lower spine. He prescribed Naprosyn and encouraged plaintiff to be "up and to be walking." He indicated that plaintiff could not return to construction work at that time, but could possibly work four to six hours doing very light work involving lifting no more than 15-20 pounds and no twisting, bending or prolonged riding.

At visits with Dr. Zondag on January 3 and 17, 1997, plaintiff reported that he was having increased pain with the physical therapy exercises. Dr. Zondag encouraged plaintiff to continue with the therapy and work with the therapist to identify those exercises that aggravated his back. He prescribed Tylenol 3 and encouraged plaintiff to walk and do his exercises. Dr. Zondag indicated that if plaintiff was at home, he could do work within the 20 to 25 pound range as long as he avoided repetitive bending and pushing overhead.

On February 14, 1997, plaintiff reported that his back had good days and bad days but that he could not tolerate former work activities such as shoveling. Dr. Zondag detected tenderness over L4-L5 and in the midback at T12. Physical capacities testing indicated that plaintiff was limited to the light exertional level for work. Plaintiff demonstrated a reduced tolerance for sitting and standing and had difficulty with stooping and kneeling. Dr. Zondag referred plaintiff to a two-week work hardening program to see if he could increase his tolerance for heavier work.

On March 20, 1997, plaintiff reported that the work hardening program had not helped and had actually increased his back pain. Dr. Zondag observed that plaintiff walked with a limp and had marked reduction in his range of motion. New physical capacities testing on March 21, 1997 showed that plaintiff had fewer abilities than he demonstrated during initial testing. Dr. Zondag found that plaintiff could lift 10-15 pounds occasionally; could occasionally stoop, kneel, crouch and climb stairs; could perform forward reaching for 70 percent of the day, overhead reaching 50 percent of the day and extended reaching 10-20

percent of the day; and could sit for two hours at a time for a total of six to eight hours a day. Dr. Zondag noted that plaintiff had a significant problem with reading, describing him as "nearly illiterate." He found that plaintiff had a permanent disability of eight percent of the body as a whole.

Plaintiff began working with the Wisconsin Department of Vocational Rehabilitation in June 1997. As part of his vocational programming, plaintiff was referred for a psychological assessment with Dr. Richard Fuhrer. Dr. Fuhrer noted that plaintiff became irate as testing progressed, stating repeatedly that he didn't want any "f-ing" desk job and that he wanted his old job back. Cognitive testing indicated that plaintiff had a borderline IQ of 77, a kindergarten reading level, a second grade spelling level and a third grade math level. Dr. Fuhrer diagnosed plaintiff with an adjustment disorder with depressed and irritable mood; borderline intellectual functioning (IQ between 71 and 84); a learning and reading disability; and a back injury. He gave plaintiff a score of 60 on the Global Assessment of Functioning Scale, indicating that plaintiff was having moderate symptoms or moderate difficulty in social or occupational functioning. *See Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) at 32. Dr. Fuhrer noted that the results of work sampling at UW-Stout would provide better information regarding plaintiff's work capacities.

From approximately August 15 to September 15, 1997 plaintiff worked part time for a construction company. Plaintiff worked approximately 20 hours per week performing light

carpentry work and helping on the job site. On approximately September 8, 1997, plaintiff had an acute onset of pain with radicular symptoms in his right leg. His chiropractor removed him from work. At an October 2, 1997 visit with Dr. Zondag, plaintiff reported that he "had pain across his back if he does a lot of bending, twisting or lifting even in the slight range only on part-time." AR 212. Plaintiff indicated that his part time job had required him to hand samples of siding and soffit up to another worker, which required him to do reaching and some bending and to stand for long periods of time. Physical examination revealed that plaintiff had mild reduction in range of motion and complaints of pain with straight leg raising at about 40 degrees. Dr. Zondag opined that plaintiff had a mild muscoloskeletal aggravation of his back. Dr. Zondag concluded from plaintiff's failed work attempt that he was not able to perform even part-time sedentary work, finding that plaintiff's part time work had been "in probably the sedentary range with minimal bending and twisting." AR 212. Dr. Zondag completed a state unemployment insurance form on which he indicated that plaintiff should avoid all lifting, perform no bending or twisting, and should avoid walking for more than one to two hours a day, standing for three hours and sitting for two hours. Dr. Zondag indicated that plaintiff could work only two to three hours a day. AR 267.

On November 5, 1997, Dr. Zondag wrote a letter to plaintiff's attorney stating his opinion that plaintiff was disabled as a result of a "chronic mechanical back problem with degenerative disk that is nonoperative." AR 293. Dr. Zondag stated that plaintiff's failed

attempt to perform alternate work in September 1997 showed that the restrictions previously given were "overly optimistic" and that plaintiff's true restrictions were those noted on October 2, 1997. Dr. Zondag also reported that he had reviewed Dr. Fuhrer's report regarding plaintiff's borderline intellectual functioning and his significant difficulties in reading. Dr. Zondag opined that these cognitive limitations compounded plaintiff's existing limitations by making it difficult for plaintiff to find and adjust to alternate work. Dr. Zondag noted that plaintiff "did attempt to return to alternate work in a situation in which he could learn on the job or be instructed on the job but was unable to work even within the sedentary type of work range with difficulties doing activities of bending, squatting, and lifting on a part-time basis." AR 294.

Plaintiff saw Dr. Zondag on May 28, 1998 to get his prescriptions refilled. Plaintiff rated his pain level at a 7-8 in the morning and 6-7 throughout the day. He was taking Tylenol 3 four times a day and experiencing some breakthrough pain. He also took Trazadone nightly to help him sleep. Dr. Zondag noted that plaintiff was "unable to effectively do much work except being around and take care of himself and his household." AR 298. Dr. Zondag observed that plaintiff walked with a listing gait and had a very limited range of motion, with tenderness over the L3-L4.

On August 20, 1998, Dr. Zondag completed a residual functional capacities assessment form on which he indicated that plaintiff had a limited tolerance for sitting, standing, lifting, bending, twisting and carrying and that he could not work more than four

hours total per day. He opined that plaintiff was limited to lifting 10 pounds occasionally. Dr. Zondag indicated that his findings were based upon plaintiff's multilevel degenerative disc disease and plaintiff's failed attempt to return to part time work in September 1997. He also noted that plaintiff was on chronic narcotics for pain control, which Dr. Zondag opined to be "reasonable and necessary." AR 292. Dr. Zondag indicated that plaintiff "just does not tolerate any work below his knees and does not tolerate working above his shoulders and tolerates minimal work in front of himself. He because of the positional intolerance because of the weight limits, the patient is unable to effectively work using his hands." *Id.*

Agency physician Dr. Michael Baumblatt completed a residual functional capacity assessment of plaintiff on November 12, 1997. From a review of the medical records, Dr. Baumblatt concluded that plaintiff was able to perform substantial gainful activity. Dr. Baumblatt disagreed with Dr. Zondag's conclusion that plaintiff could perform no lifting, bending or twisting, noting that physical examinations of plaintiff revealed no neurological defect, muscle weakness or reflex changes and that plaintiff was able to engage in a wide variety of daily activities. However, Dr. Baumblatt opined that plaintiff should be precluded from stooping, kneeling, crouching or crawling.

Agency physician Dr. Henry Kaplan completed a Psychiatric Review Technique Form on November 13, 1997. Dr. Kaplan concluded that although plaintiff had a learning

disability, his impairment was not severe. Dr. Kaplan noted that plaintiff received no psychiatric treatment or medications, socialized often and read at the fifth grade level.

Dr. Fuhrer completed a mental residual functional capacity form regarding plaintiff on September 14, 1998. Dr. Fuhrer opined that plaintiff had a limited ability to follow work rules, relate to coworkers, deal with the public, use judgment, interact with supervisors, deal with work stresses, follow simple job instructions or behave in an emotionally stable manner; a limited to poor ability to function independently without special assistance; and poor or no ability to maintain attention or concentration for extended periods of time or understand, remember and carry out detailed or complex job instructions. Dr. Fuhrer indicated that his conclusions were based on plaintiff's borderline IQ, chronic pain and low frustration tolerance, which combined to result in severe functional impairments.

Dr. James Hammersten, a consulting physician with specialties in internal and pulmonary medicine, testified as an impartial medical expert at the administrative hearing. Dr. Hammersten concluded that plaintiff had a back impairment, namely degenerative disk changes in the spine with an annular tear at L2-3, a borderline IQ and a reading disability but that his impairments were not severe enough to meet the listings. Dr. Hammersten opined that as a result of his impairments, plaintiff would be limited to sedentary work that did not require any repetitive bending or twisting, high concentration, walking for more than two blocks or standing for more than 15 minutes at a time. He opined that plaintiff should be limited to work requiring simple instructions and only brief and superficial contact with

coworkers and the public. As for sitting, Dr. Hammersten stated that "sitting should be half an hour and then be able to move around." AR 361.

III. Vocational Evidence

Plaintiff underwent a vocational assessment at UW-Stout from June 23 to June 27, 1997. Psychometric testing revealed that plaintiff's spelling was at the second grade level and arithmetic was at the fourth grade level. Plaintiff's scores on the Adult Basic Learning Exam indicated that he was able to read at the 4.6 grade level. Because this was inconsistent with the referral information that indicated that plaintiff was functionally illiterate, the evaluator administered a second reading exam. This second exam indicated that plaintiff's reading comprehension was at the 5.5 grade level. When the evaluator questioned plaintiff about why his test scores demonstrated a higher reading ability than plaintiff indicated, plaintiff replied that he does not read often because he does not enjoy it.

Plaintiff was able to complete work samples in the Mechanical Assembly and Bridge Assembly with average performance and above average quality and was able to follow written instructions in another work area. Plaintiff demonstrated good basic work behaviors and was able to follow verbal, demonstrated and simple written instructions. The evaluator observed that plaintiff had difficulty with both sitting and standing during the evaluation week, noting that plaintiff could stand only for an hour before needing to sit down and sit 45 minutes before having to stand up or walk around. In addition to plaintiff's physical

limitations, the evaluator noted that plaintiff's vocational limitations included limited range of travel; the need for a flexible schedule and break times; no transferable skills; limited interest areas; a dislike of close supervision; and an unwillingness to work at a job in which he was not interested. The evaluator opined that plaintiff was incapable of substantial gainful activity because of "his low academics and aptitudes, numerous physical restrictions, limited travel ability, and lack of transferable skills." AR 230.

Vocational consultant Thomas Findlay conducted a vocational evaluation of plaintiff on September 11, 1998. From an interview with plaintiff, a review of his medical records including the reports of Dr. Zondag and Dr. Fuhrer and a review of the results from the UW-Stout evaluation, Findlay concluded that plaintiff was unable to perform any competitive work.

Gerald Dale testified as a vocational expert at the hearing. In response to questioning by the ALJ, Dale testified that a hypothetical claimant of plaintiff's age, education and work experience who had plaintiff's back condition, a borderline IQ and was limited to work requiring lifting five pounds frequently and 10 pounds occasionally, standing for 15 minutes at a time for a total of six hours, sitting no more than half an hour at a time, no high levels of concentration, no repetitive bending or twisting, no lifting from the floor, no more than simple instructions and no more than brief and superficial contacts with the public, supervisors and co-workers would not be able to perform plaintiff's past work. However, he testified that such an individual could perform the job of assembler, of which there were

approximately 10,000 in the region that did not require lifting from the floor. In response to questioning by the ALJ, Dale testified that even if the residual functional capacity was further reduced to require only simple and unskilled work due to decreased levels of concentration and pain, there would still be 1,000 assembler jobs in Wisconsin that fulfilled the hypothetical criteria. Dale testified that none of the assembler jobs would be available if the individual had to leave his work station and walk around every 15 to 30 minutes. Further, he testified that all jobs would be eliminated if the mental limitations identified by Dr. Fuhrer in his report of September 14, 1998 were incorporated into the hypothetical.

IV. The ALJ's Decision

Following the five-step sequential evaluation process for disability claims, the ALJ determined that plaintiff suffered from a severe physical impairment, namely, degenerative changes of the thoracic and lumbar spine with an annular tear in the lumbar spine, but that plaintiff's impairments were not accompanied by the clinical findings necessary to meet or equal an impairment listed in Appendix 1, Subpart P, Regulations No. 4. Regarding plaintiff's alleged mental impairment, the ALJ found that plaintiff had a reading level consistent with the 4.6 to 5 grade level as demonstrated during testing at UW-Stout, intellectual functioning in the borderline range and an affective disorder in the nature of an adjustment disorder, but that none of these mental impairments either singly or in combination were severe enough to constitute a listed impairment.

The ALJ concluded that plaintiff retained the residual functional capacity for sedentary work with simple instructions; no high level of concentration; brief and superficial contact with co-workers, public, and supervisors; no lifting from the floor; lifting from waist level only; lifting five pounds frequently and lifting ten pounds occasionally; no repetitive bending or twisting of the trunk; being on one's feet six hours total out of eight hours; standing 15 minutes at a time; walking two blocks at a time at one's own pace; and sitting one-half hour maximum at a time. In reaching this conclusion, the ALJ rejected Dr. Zondag's October 2, 1997 opinion that plaintiff was limited to part time work with severe restrictions and adopted the conclusions of the consulting physician, Dr. Hammersten, who concluded that plaintiff was able to perform a limited range of sedentary work. The ALJ found that Dr. Hammersten's findings were more consistent with the objective medical evidence, plaintiff's demonstrated abilities during vocational testing and plaintiff's daily activities. The ALJ also rejected the mental restrictions found by Dr. Fuhrer, finding that they were based on the erroneous assumption that plaintiff was functionally illiterate, the overly restrictive physical limitations found by Dr. Fuhrer, and on plaintiff's agitated emotional state during the interview.

The ALJ found that although plaintiff was credible insofar as he testified that he experienced pain and limitations, plaintiff was incredible to the extent he contended that his pain and functional limitations prevented him from performing any work activity. As support for his credibility finding, the ALJ noted that plaintiff engaged in a full day of

activities, had indicated a willingness to work by applying for unemployment and had economic disincentives for seeking out employment. The ALJ also found that plaintiff's course of medical treatment had been relatively conservative; moreover, plaintiff had never been referred or advised to seek any mental health treatment or therapy for his mental condition. The ALJ also noted that plaintiff had performed adequately during work sampling and had been able to sustain full-time work activity in the past for many years despite his mental limitations.

The ALJ made the following specific findings:

1. The claimant has met the insured status requirements for Title II benefits at all time relevant to this adjudication.

2. The claimant has not engaged in substantial gainful activity at any time relevant to this adjudication.

3. The medical evidence establishes that the claimant is severely impaired by mild degenerative changes of the thoracic spine and degenerative changes and an annular tear in the lumbar spine, 12.04 Affective Disorder in the form of an adjustment disorder, and borderline intellectual functioning and reading deficits, but these impairments are not accompanied by the clinical findings necessary for a conclusion that they individually or in combination meet or equal any listing in the Listing of Impairments in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's allegations of disabling pain and physical and mental functional limitation are credible to the extent that the claimant's impairments could reasonable [sic] cause some discomfort and limitation of function. However, the allegations made by the claimant and his wife of total disability are not credible in light of the overall hearing record, objective medical evidence, claimant's own testimony, claimant's wife's testimony, and significant inconsistencies in the record as a whole.

5. At all times since October 11, 1996, the claimant has retained the residual functional capacity for sedentary exertional level work with simple instructions, no high level of concentration, brief and superficial contact with co-workers, public, and supervisors,

no lifting from the floor, lifting from waist level, lifting five pounds frequently and lifting ten pounds occasionally, no repetitive bending or twisting of the trunk, being on one's feet six hours total out of eight hours, standing 15 minutes at a time, walking two blocks at a time at one's own pace, and sitting one-half hour maximum at a time.

6. The claimant is unable to perform his past relevant work, because it is beyond his residual functional capacity.

7. At all times relevant to this adjudication, the claimant is a younger individual with a ninth grade limited education, and a reduction to simple instruction, low-stress work whether due to a reaction to pain and/or mental functional limitations.

8. When considering the claimant's age, education, and work experience in conjunction with his maximum sustained work capability and the credible and persuasive neutral vocational expert testimony, there are a significant number of other occupations existing within the regional or national economy which the claimant can perform.

9. The claimant has not been under a disability as defined in the Social Security Act at any time since October 11, 1996.

Analysis

I. Legal and Statutory Framework

Under the Social Security Act, a disability is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(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. § 1382c(a)(3)(C).

The Commissioner has promulgated regulations setting forth the following five-step sequential inquiry to determine whether a claimant is disabled:

> (1) Is the claimant currently employed?
>
> (2) Does the claimant have a severe impairment?
>
> (3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?
>
> (4) Can the claimant perform his or her past work? and
>
> (5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. § 416.920.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, the burden shifts to the Commissioner to show that plaintiff is able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

Under 42 U.S.C. § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." *See Stevenson*, 105 F.3d at 1153; *Brewer*, 103 F.3d at 1390. "Substantial evidence is more than a mere scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Stevenson*, 105 F.3d at 1153 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), as quoted in

Richardson v. Perales, 402 U.S. 389, 401 (1971)) (other citations omitted). A standard this low could allow for different supportable conclusions in a given claimant's case. That being so, this court cannot in its review reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *See Brewer*, 103 F.3d at 1390 (citations omitted); *Kapusta v. Sullivan*, 900 F.2d 94, 96 (7th Cir. 1990).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review, *see Brewer*, 103 F.3d at 1390, and the ALJ's written opinion need not evaluate every piece of testimony and evidence submitted, the ALJ "must at least minimally discuss a claimant's evidence that contradicts the Commissioner's position." *Godbey v. Apfel*, 238 F.3d 803, 808 (7th Cir. 2001). The ALJ's opinion must adequately articulate how the evidence was weighed so that this court may trace the path of his or her reasoning. *Id.* For example, ignoring an entire line of evidence would fail this standard. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). However, as with any fact finder, the ALJ is entitled to choose between competing opinions. *Luna v. Shalala*, 22 F.3d 687, 690 (7th Cir. 1994). Most importantly, "the ALJ must build an accurate and logical bridge from the evidence to his conclusion." *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000).

II. Dr. Zondag's Opinion

Plaintiff contends that the ALJ improperly rejected the opinion of Dr. Zondag, plaintiff's treating physician, in favor of the opinion of the non-examining physician, Dr. Hammersten. The ALJ cited the following reasons for rejecting Dr. Zondag's conclusion that plaintiff was unable to perform substantial gainful activity: Dr. Zondag's opinion was based primarily on plaintiff's self-reports of pain and on the assumption that plaintiff was functionally illiterate; it was not consistent with the objective medical evidence, laboratory findings or clinical data; and it was inconsistent with plaintiff's daily activities. In contrast, the ALJ found that the limitations identified by Dr. Hammersten were consistent with plaintiff's activities of daily living and with the abilities he demonstrated during vocational testing in June 1997.

Plaintiff argues that the ALJ improperly "played doctor" when he concluded that the objective evidence did not support Dr. Zondag's opinion that plaintiff was disabled. Plaintiff points out that Dr. Zondag considered various objective evidence in reaching his conclusion, including x-rays, MRI scans and his own clinical examinations. For the ALJ to consider this same evidence and conclude that it did *not* support a finding of disability, plaintiff argues, was to inappropriately substitute his own judgment for that of the medical witnesses.

Plaintiff compares this case to *Rohan v. Chater*, 98 F. 3d 966 (7th Cir. 1996), a case in which the court of appeals found that the ALJ improperly "played doctor" when he found that the plaintiff's psychiatrist's opinion that plaintiff suffered from severe, disabling

depression was inconsistent with plaintiff's ability to engage in a small machine repair/resale business. However, unlike the ALJ in *Rohan*, the ALJ in the case at bar did not simply substitute his own judgment for that of Dr. Zondag regarding plaintiff's limitations, but relied on the testimony of Dr. Hammersten, who opined from a review of the medical evidence and plaintiff's testimony that plaintiff could perform a limited range of sedentary work. The administrative law judge is not required or indeed permitted to accept medical evidence if it is refuted by other evidence, *see Wilder v. Chater*, 64 F.3d 335, 337 (7th Cir. 1995), and here Dr. Zondag's opinion was refuted by Dr. Hammersten's opinion.

Confronted with these two differing opinions, it was up to the ALJ to weigh them and determine which one should be afforded more weight in accordance with the considerations enumerated in 20 C.F.R. § 404.1527(d). Under the regulation, opinions from treating sources are generally given great weight. *See* 20 C.F.R. § 404.1527(d)(2). This policy is based upon the agency's belief that treating physicians "are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [the claimant's] medical impairment(s)." *See id*. Accordingly, if the ALJ finds that the opinion of a treating physician is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the claimant's] case record," it will be given controlling weight. *See id*. But when the opinion of a treating physician is not supported by medical evidence and is inconsistent with the substantial evidence in the claimant's record, the ALJ will not give the opinion controlling weight. *See id*. Instead, the

ALJ will determine independently the weight to give the opinion on the basis of the following factors: the length, frequency, nature and extent of the treatment relationship; the degree to which the medical signs and laboratory findings support the opinion; the consistency of the opinion with the record as a whole; and the specialization of the physician. *See* 20 C.F.R. § 404.1527(d)(2)-(5).

Here, although the ALJ recognized that Dr. Zondag was plaintiff's treating physician and an occupational medicine specialist, he found that his opinion that plaintiff could not work competitively was not well-supported by the medical evidence and was inconsistent with the record as a whole. Plaintiff contends that Dr. Zondag's opinion was supported amply by the results of MRI scans and x-rays which documented various degenerative changes in plaintiff's thoracic and lumbar spine. However, the fact that plaintiff may have had demonstrable severe impairments does not in itself support a finding of disability. (Unless of course, those impairments are severe enough to meet the listings, but plaintiff does not make this argument.) As the ALJ noted, the objective medical evidence indicated that although plaintiff has degenerative changes at various levels in his thoracic and lumbar spine and a tear in one disk, plaintiff has never had any of the radicular symptoms, loss of reflexes or strength that would tend to support plaintiff's claims of disabling limitations. Clinical signs and laboratory findings are useful indicators of disability and can assist the ALJ in making reasonable conclusions about the intensity and persistence of the claimant's symptoms and the effect those symptoms may have on the claimant's ability to work. *See*

20 C.F.R. § 404.1529(c)(2). Here, although plaintiff has various degenerative changes in his back, it was not unreasonable for the ALJ to conclude that plaintiff's normal strength and reflexes and lack of radicular symptoms were inconsistent with the severe disabling limitations found by Dr. Zondag.

Plaintiff also contends that the ALJ was "clearly wrong" when he concluded that Dr. Zondag's restrictions were based primarily on plaintiff's self-reports of his pain. In support of this contention, plaintiff notes that after he failed to complete work hardening successfully, Dr. Zondag stated that although plaintiff was cooperative and attempted to do his best, "it appears that low level work, a lot of twisting and bending only tends to aggravate and accelerate his back . . . ." AR 214. Although I am not sure I understand the point that plaintiff is making, he appears to be contending that, contrary to the ALJ's finding, Dr. Zondag did not rely on plaintiff's self-reports of pain but concluded for himself that plaintiff had disabling limitations. But even if this is the case, Dr. Zondag did not reduce plaintiff's residual functional capacity to the disabled level after plaintiff's failed attempt at work hardening. Rather, he assigned plaintiff physical restrictions that were consistent with those that the ALJ incorporated into his residual functional capacity assessment. It was only after plaintiff's failed attempt to work part time as a carpenter's helper that Dr. Zondag further reduced plaintiff's physical capacity for work to below the competitive level.

The ALJ found that the reason plaintiff's work attempt failed was because he had performed work outside his residual functional capacity. This conclusion was reasonable in

light of plaintiff's statement to Dr. Zondag that he experienced back pain if he did "a lot of bending, twisting or lifting even in the slight range," the very same activities that aggravated plaintiff's back during work hardening. Further, plaintiff reported that the job required him to perform a lot of reaching and stand for long periods of time. However, instead of reducing plaintiff's residual functional capacity to account for the activities that plaintiff reported being unable to perform, Dr. Zondag precluded plaintiff from all lifting, bending or twisting and limited him to working only two to three hours a day. Clearly, having not observed plaintiff on the work site or conducted new physical capacities testing, Dr. Zondag was relying on plaintiff's self-reports when he concluded that plaintiff was so limited.

It is not unreasonable for an ALJ to reject a physician's opinion that is based largely upon subjective complaints that the ALJ finds are not credible. *See Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995). In his opinion, the ALJ cited various reasons for rejecting plaintiff's contention that his pain prevented him from performing any substantial gainful activity. These included the fact that plaintiff engaged in various daily activities, had indicated a willingness to work by applying for unemployment compensation and had economic disincentives for seeking out employment. The ALJ also found that plaintiff's course of medical treatment had been relatively conservative; moreover, plaintiff had never been referred or advised to seek any mental health treatment or therapy for his mental condition. The ALJ also noted that plaintiff had performed adequately during work

sampling and had been able to sustain full-time work activity in the past for many years despite his alleged cognitive limitations.

The only of these findings that plaintiff challenges is the ALJ's analysis of his daily activities. The ALJ noted that plaintiff "spends his day riding to work with a neighbor and hanging around the job site, visiting, going down the street to visit his neighbor who repairs cars, and talking to this individual." AR 19. The ALJ also noted that plaintiff's wife testified at the hearing that plaintiff could vacuum, cook and do the dishes, although it took him longer to do these chores. Additionally, the ALJ noted that plaintiff testified that he changes the oil in his minivan and that he would have been able to hunt from his car if he wanted to; does laundry; uses the riding lawnmower to mow the lawn for short periods of time; walks two blocks at a time; and walks his dogs and plays catch with them. The ALJ described plaintiff's activities as an "active daily routine" that was inconsistent with disability.

Plaintiff argues that the ALJ's conclusion cannot be sustained in light of various cases that hold that a plaintiff's ability to take care of himself and perform various household tasks does not mean that the individual is not disabled. *See, e.g.*, *Rohan*, 98 F.3d at 970 (ability to engage in small machine repair/resale business not inconsistent with diagnosis of disabling depression); *Rousey v. Heckler*, 771 F.2d 1065, 1070 (7th Cir. 1985) (plaintiff's testimony that she must rest between any sort of activities, must visit her husband in hospital in her own wheel chair because of exertion of walking, cannot wash all her own dishes or cook

without assistance, and cannot carry groceries or laundry was inconsistent with ALJ's finding that plaintiff had ability to perform sedentary work). In these cases, however, the ALJ relied almost solely on the plaintiff's daily activities to reject the uncontradicted, dispositive opinions of the plaintiff's treating doctors who found that the plaintiff was disabled. In contrast, the ALJ in this case cited plaintiff's daily activities as one of several reasons why he was accepting Dr. Hammersten's opinion of plaintiff's abilities over the opinion of Dr. Zondag.

Admittedly, plaintiff's daily activities are rather limited and would not *necessarily* be inconsistent with a finding of disability. Plaintiff's wife testified that he does household tasks slowly, and although the ALJ suggested that plaintiff rides to work with his neighbor every day, the record reflects that plaintiff only sometimes engages in this activity. Nonetheless, plaintiff's daily activities do not jibe with the severe limitations found by Dr. Zondag, who limited plaintiff to a total of seven hours of sitting, standing and walking in a day and precluded him from any lifting. Adopting Dr. Zondag's restrictions would mean that plaintiff would spend the remaining nine hours of his day laying down, a fact that is not in the record. Moreover, it would be impossible for plaintiff to wash dishes if he could not lift anything or change the oil in his car if he could never stoop or bend. Although different fact finders might disagree, it was not unreasonable for the ALJ to conclude that plaintiff's daily activities were more consistent with the functional restrictions identified by Dr. Hammersten than they were with Dr. Zondag's opinion that plaintiff was disabled.

In the end, when there are conflicting medical opinions, "it is up to the ALJ to decide which doctor to believe--the treating physician who has experience and knowledge of the case, but may be biased, or . . . the consulting physician, who may bring expertise and knowledge of similar cases–subject only to the requirement that the ALJ's decision be supported by substantial evidence." *Books v. Chater*, 91 F.3d 977, 979 (7th Cir. 1996) (quoting *Micus v. Bowen*, 979 F.2d 602, 608 (7th Cir. 1992)). Here, the ALJ explained in detail his reasons for finding Dr. Hammersten's opinion to be more credible than Dr. Zondag's. Because the ALJ properly applied the regulations and built an accurate and logical bridge from the evidence to his conclusion, this court must uphold the ALJ's decision to adopt Dr. Hammersten's limitations over those of Dr. Zondag.

IV. Dr. Fuhrer's Opinion

Dr. Fuhrer was the only psychologist who evaluated plaintiff. Plaintiff contends the ALJ improperly rejected the September 14, 1998 opinion of Dr. Fuhrer wherein he rated plaintiff's ability to perform the mental demands of work as "poor to none" in some categories and "limited" in several other categories. The vocational expert testified that such restrictions would preclude plaintiff from competitive employment as an assembler. Specifically, the vocational expert identified the following limitations as eliminating the assembly jobs that he had identified: poor or no ability to maintain attention and concentration for extended periods of time; limited ability to understand, remember and

carry out simple job instructions; limited ability to complete a normal work week without interruptions from psychologically-based symptoms; and a limited ability to respond appropriately to changes in the work setting. The ALJ found that Dr. Fuhrer's opinion was entitled to little weight because it was based on the assumption that plaintiff was functionally illiterate, Dr. Zondag's overly restrictive assessment of plaintiff's physical limitations and on plaintiff's angry emotional state during the evaluation which impacted his responses, reactions and testing. The ALJ also noted that Dr. Fuhrer had examined plaintiff on only one occasion and had not performed any neuropsychiatric tests.

Plaintiff contends that the ALJ misconstrued the record and played amateur psychologist by ignoring the fact that Dr. Fuhrer's assessment was based on a "thorough evaluation" which included an interview and standardized tests. Moreover, argues plaintiff, the ALJ should have recontacted Dr. Fuhrer for clarification if concluded that Dr. Fuhrer's opinion lacked adequate support. The Commissioner responds that the record was developed further, in that it record included the test results from the evaluation at UW-Stout that indicated that plaintiff was not functionally illiterate.

I agree with the Commissioner to the extent that there is substantial evidence in the record to support the ALJ's conclusion that plaintiff's reading abilities are higher than that found by Dr. Fuhrer. The ALJ had before him the results of the testing at UW-Stout that indicated that plaintiff read at a significantly higher level than found by Dr. Fuhrer. Faced with this competing evidence, it was up to the ALJ to determine which was more reliable.

In light of plaintiff's admissions that he was upset before and during the testing and that he did not read because he did not enjoy it, it was not unreasonable for the ALJ to accord more weight to the reading test results from UW-Stout.

However, plaintiff's functional illiteracy was not the only basis for Dr. Fuhrer's opinion that plaintiff had disabling limitations. In his September 15, 1998 letter to plaintiff's counsel, Dr. Fuhrer stated the following:

> Based on my interview with [plaintiff], and observations of his behavior, it was noted that he showed low frustration tolerance, poor stress tolerance, and a tendency to easily become emotionally distressed. These emotional factors no doubt additionally significantly impair his day-to-day functioning.
>
> It should be noted that we did not complete extensive neuropsychological testing. His behavior is suggestive of an individual who has impaired executive functioning (planning and practical judgment). If findings related to disability status hinge on his level of cognitive functioning and the current data is not deemed adequate, it would be recommended that more extensive neuropsychological testing be completed.

AR 302.

Dr. Fuhrer also agreed with Dr. Zondag's conclusion that because of chronic pain, plaintiff's was functioning even lower than the level predicted by his "borderline range" IQ scores. In particular, Dr. Fuhrer found that pain would interfere with plaintiff's ability to concentrate for extended periods of time.

The ALJ rejected Dr. Fuhrer's findings in part because they were "based on plaintiff's emotional state . . . ." AR 32. Specifically, the ALJ found that "the claimant has admitted that he was angry during the psychological evaluation which impacted his responses,

reactions, and testing." AR 32. In other words, the ALJ appears to have concluded that Dr. Fuhrer's assessment of plaintiff's emotional state was unreliable because of plaintiff's emotional state at the time of the assessment.

Regardless whether this particular conclusion qualifies as a Catch-22, it is not supported by the record. Unlike Dr. Fuhrer's evaluation of plaintiff's achievement levels and reading ability which depending on the results of standardized tests, his assessment of plaintiff's emotional state was based on his observations and interview of plaintiff. The ALJ cited no medical evidence or other support for his conclusion that plaintiff's emotional state during the evaluation was not an accurate reflection of his typical level of mental functioning, or that Dr. Fuhrer's observations and assessment were unreliable because plaintiff was angry. Indeed, plaintiff's emotional state during his interview with Dr. Fuhrer was consistent with his wife's testimony at the administrative hearing that plaintiff had become noticeably more irritable and frustrated since his back injury. In the absence of any reasoned basis (supported by evidence in the record) for rejecting Dr. Fuhrer's assessment of plaintiff's emotional state and its impact on his ability to work, the ALJ's decision was an improper substitution of his own judgment for that of the medical expert.

I note that the ALJ also found that Dr. Fuhrer's assessment was entitled to little weight because it was based on the "generic disabling conclusions set forth by Dr. Zondag." AR 32. The record does not adequately support this conclusion. Although Dr. Fuhrer referred to Dr. Zondag's opinion in his letter of September 14, 1998, he simply stated that

he agreed with Dr. Zondag to the extent that plaintiff's chronic pain would result in functional abilities even lower than indicated by his IQ scores. Thus, Dr. Fuhrer did not rely on Dr. Zondag's opinion, but he simply agreed with it, based on his own independent observations.

Further, the ALJ indicated that Dr. Fuhrer's opinion was entitled to little weight because he did not perform neuropsychiatric tests. However, Dr. Fuhrer explicitly recommended further testing if the absence of such tests might make a difference to the disability evaluation. In spite of Dr. Fuhrer's recommendation, the ALJ did not seek to develop the record further by recontacting Dr. Fuhrer or by sending plaintiff to a consulting psychologist for a mental status evaluation. "Although a claimant has the burden to prove disability, the ALJ has a duty to develop a full and fair record." *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000) (citing *Thompson v. Sullivan*, 933 F.2d 581, 585 (7th Cir. 1991)).

Failure to fulfill this obligation is "good cause" to remand for gathering of additional evidence. *Id.* In light of the fact that the absence of neuropsychological tests was only one of several reasons the ALJ cited for discounting Dr. Fuhrer's opinion, it is not surprising that he did not see a need to develop the record further. However, because I have found that the ALJ's other reasons for discounting Dr. Fuhrer's opinions are not supported by substantial evidence, the failure to order neuropsychological testing or otherwise to develop the record on this point assumes a heretofore indiscernible significance.

In reaching this conclusion, I am not fishing for ways to overturn the ALJ's decision, or seeking an unnecessarily thorough and polished decision from the Commissioner. It may be that the ALJ will develop additional evidence that will allow him reasonably to hew to his original decision, and this court will defer to such. Plaintiff, however, is entitled to a bit more than he got on this point.

I note that the ALJ's residual functional capacity assessment (and his hypothetical question to the vocational expert) did reduce plaintiff's functional capacity to account for limitations that resulted from his pain and/or mental condition. Specifically, the ALJ found that plaintiff should be limited only to superficial contact with the public, coworkers and supervisors and to simple instruction, low-stress work. These restrictions would appear to account for the most of the limitations identified by Dr. Fuhrer on his mental residual functional capacity assessment. However, when questioned by plaintiff's attorney, the vocational expert testified that some of the more severe limitations identified by Dr. Fuhrer would preclude plaintiff from all competitive work. From this, I must infer that the vocational expert concluded that Dr. Fuhrer's limitations were more severe than those proposed by the ALJ in his hypothetical question. Accordingly, there is no basis in the record from which this court can conclude that the ALJ accounted adequately for the limitations identified by Dr. Fuhrer when he found at step five that there are jobs in the regional economy that plaintiff can perform.

In sum, because the reasons cited by the ALJ for rejecting Dr. Fuhrer's opinion lack support in the record, I recommend that this court remand this case to the Commissioner for further proceedings.

IV. Residual Functional Capacity

Plaintiff contends that even if this court upholds the ALJ's conclusion that Dr. Hammersten's opinion was entitled to more weight than Dr. Zondag's, the ALJ omitted a critical limitation identified by Dr. Hammersten when he determined plaintiff's residual functional capacity. Specifically, plaintiff argues that the ALJ omitted Dr. Hammersten's conclusion that plaintiff would need to have the opportunity to "move around" after sitting for one-half hour. In his opinion, the ALJ found no support for plaintiff's assertion that his need to "move around" required the ability to walk away from the work station and could not be accommodated by moving about within the work station. Plaintiff contends that this conclusion was erroneous, arguing that a need to "move around" as found by Dr. Hammersten is not accommodated by simply shifting between sitting and standing positions, but requires the ability to walk away from the work station. This omission was significant, argues plaintiff, because the vocational expert testified that the jobs that he had identified would be eliminated if the need to walk around every 30 minutes was included in the residual functional capacity assessment.

I conclude that the meaning of the phrase "move around" is not self-evident. Although plaintiff's interpretation is reasonable, it was not unreasonable for the ALJ to conclude that Dr. Hammersten simply meant that plaintiff required the ability to move around within the work station. Although plaintiff argues that his interpretation of Dr. Hammersten's recommendation is supported by various notes in which Dr. Zondag stated that he had encouraged plaintiff to walk, the quoted excerpts indicate that Dr. Zondag simply encouraged plaintiff to remain active and to walk for exercise and do not address the specific issue of plaintiff's alleged need to walk away from the workplace after a period of sitting.

Unfortunately, no one asked Dr. Hammersten to clarify his statement. Plaintiff contends that any ambiguity should be resolved in his favor because it was the ALJ's duty to perform a "function by function" assessment of the claimant's residual functional capacity and to determine at step five whether there were jobs in the economy that plaintiff could perform. However, residual functional capacity is determined at step four, where the burden of proof rests with the claimant. *See Bowen v. Yuckert*, 482 U.S. 137, 146 n. 5 (1987); Soc. Sec. Ruling 96-8p (1996).

Nonetheless, if this court remands this case to develop additional psychological evidence, then it also should allow Dr. Hammersten to explain to the ALJ what he meant by the phrase "move around." If, however, this court concludes that the ALJ properly rejected

Dr. Fuhrer's opinion, then it is not worth a remand simply to clarify this point, because plaintiff bore the burden of proof on it.

Finally, plaintiff contends that the ALJ erred by failing to include a complete inability to stoop in his residual functional capacity assessment. "Stooping" is defined as bending the body downward and forward by bending the spine at the waist. Soc. Sec. Ruling 85-15. As support for his contention that he cannot stoop, plaintiff points to Dr. Zondag's residual functional capacity assessment of August 20, 1998 and a disability report from state agency physician M.J. Baumblatt, who both concluded that plaintiff should be precluded from stooping. Plaintiff argues that the ALJ adopted this limitation implicitly when he adopted Dr. Hammersten's conclusion that plaintiff should be precluded from lifting from floor level, which involves the same motion involved in stooping. Thus, argues plaintiff, the ALJ erred in not including a complete inability to stoop in his hypothetical question to the vocational expert. Citing to one of the social security rulings, plaintiff contends that a complete inability to stoop would lead to a conclusion that plaintiff is disabled. *See* Soc. Sec. Ruling 96-9p ("a complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply").

Plaintiff's argument is uncompelling. The ALJ specifically rejected the findings of Dr. Zondag and Dr. Baumblatt who found that plaintiff could not stoop. However, he adopted the findings of Dr. Hammersten, who did not preclude plaintiff from all stooping but who limited plaintiff from lifting from the floor. Plaintiff is correct to the extent this activity

involves the same motion involved in stooping, but precluding plaintiff from lifting from the floor is not the same as precluding plaintiff from all stooping, whether it involves lifting or not. Finally, plaintiff presents no evidence to suggest that an inability to stoop would preclude him from performing the limited range of assembly jobs identified by the vocational expert.

V. Conclusion

Although the ALJ provided accurate and logical reasons for rejecting Dr. Zondag's disability opinion, he stepped out of bounds when he rejected Dr. Fuhrer's opinion. There is no basis in the record for the ALJ's conclusion that Dr. Fuhrer's assessment of plaintiff's limitations–aside from the reading test scores–was unreliable because of plaintiff's "emotional state" during the evaluation. Because the other reasons he cited for discounting this assessment are not supported by substantial evidence in the record, remand is appropriate so that the ALJ can amplify the record on this point. If the court remands on this point, then it should also require the ALJ to obtain clarification from Dr. Hammersten regarding whether plaintiff's need to "move around" after periods of sitting could be accommodated by moving about within the work station.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(B)(1)(b), I recommend that this court reverse the decision of the Commissioner denying plaintiff Terry Bohrman's applications for Social Security benefits and remand this case to the Commissioner for proceedings consistent with this report.

Entered this 22nd day of August, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge