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

JEANNE M. STEBBINS,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

03-C-0117-C

REPORT

This is an appeal of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Jeanne Stebbins, who suffers from severe headaches and depression, seeks judicial review of a final decision of the Commissioner denying her application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 416(i) & 423. Plaintiff applied for benefits on September 13, 2000. After two denials by the local disability agency, plaintiff requested a hearing before an administrative law judge. A hearing was held on August 7, 2002. On September 26, 2002, the ALJ issued a decision finding that plaintiff was not disabled under the Social Security Act because there was a significant number of jobs in the regional economy that she could perform despite her limitations. That decision became the final decision of the Commissioner when the Appeals Council declined plaintiff's request for review. This appeal followed.

Plaintiff contends that the ALJ failed to examine and properly weigh evidence in the record that favored her claim, including the opinions of her treating neurologist and counselor who both opined that plaintiff could not sustain a 40-hour work week because of her headaches. In addition, plaintiff contends that the ALJ did not adequately consider evidence in the record that supported her testimony regarding the severity of her pain. She asks this court to reverse the decision and award her benefits, or in the alternative, to remand her case to the Commissioner for a new residual functional capacity assessment.

Because the ALJ's decision fails to address significant evidence in the record that supports plaintiff's claim, I am recommending that this court reverse the decision of the Commissioner. Further, because no reasonable finder of fact could conclude from this record that plaintiff is not disabled, I am recommending that this court direct the Commissioner to award benefits on remand.

The following facts are drawn from the administrative record:

FACTS

I. Evidence Before the ALJ

Plaintiff has been plagued with chronic headaches since she was a child. Until the late 1990s, plaintiff was able to maintain full time employment despite her headaches. However, in the fall of 1998, the headaches became more frequent and more intense, causing plaintiff to begin taking time off from her job as a legal secretary. On June 12, 2000, plaintiff took

a leave of absence from work because she suffered almost daily migraine headaches that were interfering with her ability to perform her job. She has not returned to work since.

The administrative record includes more than 300 pages of medical reports that document plaintiff's medical treatment for her headaches. These include several reports from neurologist Dr. Ronald Zerofsky, who treated plaintiff for her headaches from January 1998 to December 2001. Dr. Zerofsky diagnosed plaintiff's headaches as migraine headaches; another physician, Anne Weiss, described them as mixed vascular/tension headaches. Dr. Zerofsky attempted to treat plaintiff's headaches with a cocktail of medications, including propranolol, neurontin and a liquid hydrocodone elixir.[1] In addition to these medications, plaintiff received injections of dilaudid and vistaril up to three times a month as needed for the most severe headaches.[2] Plaintiff also tried acupuncture and massage therapy, but neither afforded her any lasting relief from her headaches.

In November 2001, Dr. Zerofsky became concerned that plaintiff might be abusing narcotics when he learned that plaintiff had obtained unauthorized refills of her hydrocodone. He stopped prescribing any narcotics for plaintiff and referred her to Dr. Mike Miller, an addiction specialist. Dr. Miller evaluated plaintiff on November 29, 2001.

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[1] Propranolol, a beta-blocker, and neurontin, an anti-seizure medication, are prescribed for the prevention of migraines. *Physicians' Desk Reference* at 2655, 3516 (2002). Hydrocodone is an opioid analgesic. *Id*. at 1994.

[2] Dilaudid is a Schedule II narcotic pain-reliever similar to morphine. *Physicians' Desk Reference* at 441-442 (2002). Vistaril is a drug administered conjunctively with narcotics to reduce the amount of narcotic needed, prevent nausea and reduce anxiety. *PDR* at 1738.

Plaintiff denied having obtained the refills fraudulently and attributed the mix-up to a communication error between Dr. Zerofsky's office and the pharmacy. After conducting a thorough interview and mental status evaluation of plaintiff, Dr. Miller concluded there was no evidence to support a finding that plaintiff had a drug addiction or that she was suffering from opiate withdrawal. Following this evaluation, Dr. Zerofsky resumed prescribing narcotics for plaintiff.

On December 19, 2001, Dr. Zerofsky completed a questionnaire concerning plaintiff's headaches. He indicated that plaintiff had headaches 95 percent of the time that varied from mild to severe and that had worsened gradually over the years. He opined that plaintiff would not be able to work competitively on a sustained basis because of her headaches.

On February 7, 2002, plaintiff began seeing neurologist Dr. Charles Miley for treatment of her headaches because she had a falling out with Dr. Zerofsky over the medication issue. Dr. Miley concluded that plaintiff had "what appears to be migrainous headaches which are now chronic, daily, with elements of analgesic induced and analgesic rebound headaches."[3] Dr. Miley told plaintiff that he shared Dr. Zerofsky's concern about analgesic overuse, and noted that plaintiff was psychologically dependent on having her opiates available. However, he renewed plaintiff's hydrocodone prescription. On July 19,

[3] Rebound headaches are chronic headaches that can result from overuse of pain medication for treatment of migraines or other headaches. *See* www.mayoclinic.com.

2002, plaintiff told her primary care physician, Dr. Ringdahl, that although Dr. Miley sought to reduce her use of pain killers, she had actually used more of the hydrocodone the previous month. Dr. Ringdahl stated that he was becoming more concerned that plaintiff was becoming addicted to her medications. He urged her to get into the University of Wisconsin's Headache Clinic for treatment; plaintiff indicated that she had been on the waiting list for the clinic since January 2002 but had not yet been scheduled for an appointment.

In addition to her chronic headaches, plaintiff suffers from episodic major depression, for which she takes anti-depressant and anti-anxiety medications. Various physicians and mental health providers who have examined or treated plaintiff agree that plaintiff's headaches and depression are intertwined, and that stress is the primary trigger of plaintiff's headaches. From December 2000 through the date of the administrative hearing, plaintiff participated regularly in counseling with Velma Haag, a clinical social worker, to work on stress management strategies to attempt to control her headaches. In addition, plaintiff sees a psychiatrist regularly for medication management. In a letter dated August 5, 2002, Haag stated that although plaintiff had made improvements, she continued to report frequent, painful headaches. Haag opined that plaintiff would not be able to maintain full-time employment "given the frequency of days she is waylaid by pain."

At the administrative hearing, plaintiff testified that she had a headache almost every day. Plaintiff testified that her headaches varied in intensity, but were typically about a 7-8

on a 10-point scale. She testified that she attempted to relieve her headaches by lying down, putting ice on her head and taking over-the-counter pain relievers. If that failed to relieve her pain, she took hydrodocone and a phenergan suppository to help with nausea. If that failed, she went to the emergency room or urgent care for a dilaudid injection. Plaintiff testified that she lied down every day, and about once a week she was in bed all day with a severe headache. A vocational expert testified that an individual who had to lie down for two hours a day and was likely to miss work at least four times per month would not be able to be employed competitively at any job.

II. Legal Framework and the ALJ's Decision

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's regulations establish a 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 her from performing past relevant work. If she can show this, the burden shifts to the Commissioner to show that plaintiff was 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). Although the Commissioner must carefully consider opinions from medical sources when conducting the five-step sequential inquiry, final responsibility for deciding whether a claimant is disabled is reserved for the Commissioner. 20 C.F.R. § 404.1527(e).

In his written decision, the ALJ reviewed the medical evidence and found that it showed that plaintiff complained of headaches that were caused by tension and stress related to problems in plaintiff's family. However, he found that there was "no medical evidence of any diagnosed complaint which might be expected to cause pain," noting that an MRI was negative, there was no EEG evidence of abnormality, and physical examinations showed no neurologic, motor or sensory abnormalities. In addition, he noted that plaintiff's physicians

were trying to wean her off her medications. In light of his conclusion that there was no objective evidence to support plaintiff's complaints, the ALJ questioned whether it was even necessary to evaluate plaintiff's statements regarding her pain and limitations under Social Security Ruling 96-7p, which requires that evaluation only where there is "an underlying medically determinable physical or mental impairment . . . that could reasonably be expected to produce the individual's pain or other symptoms." Nonetheless, the ALJ proceeded to consider plaintiff's testimony.

The ALJ concluded that plaintiff's subjective complaints were not credible. He noted that plaintiff's complaints of disabling pain stood "in some contrast" to a medical report from August 16, 2000 noting that plaintiff was doing better after she left her job, she had gotten a puppy, was doing craft work and had just had her first grandson. The ALJ also noted that plaintiff reported to one of her doctors that she spent a lot of time caring for her grandchild and that plaintiff brought her grandchild to counseling sessions, and that plaintiff had frequently cancelled appointments, including follow up visits with a psychiatrist, Dr. Connie Phillips. Additionally, the ALJ noted that plaintiff had managed to work in the past in spite of headaches.

The ALJ concluded that plaintiff suffered from severe psychological impairments, namely a somatoform disorder and an affective disorder, with complaints of tension headaches, but that she did not have an impairment or impairments that met or equaled the criteria of an impairment listed in Appendix 1, Subpart P, Regulations No. 4. As for

limitations, the ALJ noted that it was "questionable" whether plaintiff had any limitations, noting that the agency consulting physicians had opined that she had no exertional limitations and "at least one treating doctor advised [plaintiff] to return to work." The ALJ noted that Haag had opined that plaintiff was disabled by pain, but he rejected Haag's opinion on the ground that she was "neither a physician nor the possessor of a doctorate in psychology."

The ALJ concluded that plaintiff had the physical ability to perform the exertional demands of light work requiring the lifting of no more than 20 pounds occasionally or 10 pounds frequently. Noting that plaintiff's "tension headaches are exacerbated by stress," the ALJ found that she was limited to simple, routine, repetitive, low stress work. On the basis of the vocational expert's testimony, the ALJ concluded that plaintiff's limitations prevented her from performing her past relevant work. However, he concluded that there were at least 69,000 jobs in Wisconsin that plaintiff could perform given her limitations, including machine tending, inspection, packaging and assembly jobs. Accordingly, he found that plaintiff was not disabled under the Social Security Act. His decision became the final decision of the Commissioner when the Appeals Council declined plaintiff's request for review.

ANALYSIS

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not conduct a new evaluation of the case but instead reviews the final decision of the Commissioner. This review is deferential: under § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the Commissioner's findings under § 405(g), this court cannot 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. *Clifford*, 227 F.3d at 869. Nevertheless, the court must conduct a "critical review of the evidence" before affirming the Commissioner's decision, *id.*, and the decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." *Steele v. Barnhart*, 290 F.3d 936, 940 (7th Cir. 2002). When the ALJ denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

This case must be remanded to the Commissioner. The ALJ's based his decision on a number of analytical errors, foremost of which was a fundamental misunderstanding of the diagnosis and treatment of migraine headaches. The ALJ believed that plaintiff's complaints of disabling headache pain were undermined by the absence of objective medical evidence

showing some abnormality of neurological, motor or sensory function. However, migraine headaches do not stem from a physical or chemical abnormality that can be detected by imaging techniques, laboratory tests, or physical examination, but are linked to disturbances in cranial blood flow. According to one medical source:

> The cause is unknown, and the pathophysiology is not fully understood. Changes in brain and scalp arterial blood flow occur, but whether vasodilation and vasoconstriction are a cause or an effect of the migraine is unclear . . . Intracranial vascular malformations are a rare cause of migraine-like headaches.

See The Merck Manual of Diagnosis and Therapy,

www.merck.com/pubs/mmanual/section14/chapter1688/168b.htm.

Contrary to the ALJ's suggestion, "[t]here is no simple, specific diagnostic test for migraine headaches." *Ausman & Snyder's Medical Library*, Lawyer's Edition, § 6:27 at 97-98 (1990). Rather, a diagnosis of migraine headache is made when certain clinical criteria are present. These criteria include a recurrent headache that: lasts from 4 to 72 hours; is throbbing; is moderate to severe in intensity; is localized to one side of the head; and is associated with nausea, vomiting or sensitivity to light, sound or smell. *See* www.merck.com /pubs/mmanual/section14/chapter1688/168b.htm. Diagnosis is more likely when the patient has a family history of migraines. "Diagnosis is based on the symptom patterns when there is no evidence of intracranial pathologic changes." *Id*.

Because there is no medical test available to confirm the presence or severity of migraine headaches, it was improper for the ALJ to rely on the absence of such evidence as

a reason to discount plaintiff's testimony. The medical records are replete with references, including records of numerous emergency room visits, indicating that plaintiff complained consistently of classic migraine symptoms, including nausea; throbbing, sharp pain; headaches lasting for days at a time; and sensitivity to light, sound or smell. While it is true that a claimant's self-reported symptoms alone are insufficient to establish disability, *see* 20 C.F.R. § 404.1528(a), these symptoms, when documented by a physician in a clinical setting, "are, in fact, medical signs which are associated with severe migraine headaches," and are often the only means available to prove their existence.[4] *Ortega v. Chater*, 933 F. Supp. 1071, 1075 (S. D. Fla. 1996). *See also* SSR 96-4p at n.2 (when manifestations such as pain, fatigue, weakness or nervousness is "an anatomical, physiological, or psychological abnormality that can be shown by medically acceptable clinical diagnostic techniques, it represents a medical 'sign' rather than a 'symptom'").

No doctor who examined plaintiff or reviewed the medical record ever questioned whether plaintiff genuinely had an underlying medical impairment that might reasonably cause her pain. Dr. Zerofsky, plaintiff's treating neurologist for four years, concluded that plaintiff's symptom pattern was sufficient not only to support a diagnosis of migraines, but also to warrant a medication regime that included thrice-monthly injections of potent

[4] Furthermore, the presence of some these symptoms was confirmed by observation. For instance, emergency room reports noted that plaintiff was photophobic and in some degree of distress. AR 245, 247, 406. One psychiatrist observed that plaintiff was "having a bad headache and [her] affect reflected this." AR 350.

narcotics. Dr. Anne Weiss diagnosed mixed vascular/tension headaches and suggested possible medication changes. Dr. Miley, another neurologist, diagnosed "migrainous" headaches with elements of analgesic rebound headaches. By concluding that"there is simply no medical evidence of any diagnosed complaint which might be expected to cause pain," the ALJ misapplied the Commissioner's regulations and improperly substituted his judgment for that of the medical professionals. *See, e.g., Clifford*, 227 F.3d at 870 (ALJ may not "substitute his own judgment for a physician's opinion without relying on other medical evidence or authority in the record").

The ALJ also impermissibly played doctor when he concluded that plaintiff suffers from "complaints of tension headaches" caused by family issues. The ALJ appears to have drawn his conclusion that plaintiff's headaches were of the tension variety from Dr. Weiss's one-time evaluation of plaintiff, after which she diagnosed plaintiff with "mixed vascular/tension headaches" and from evidence suggesting that plaintiff's headaches were stress-related. The ALJ did not explain why he ignored Dr. Weiss's finding that plaintiff's headaches were also "vascular," which is another name for migraine headaches, or the numerous reports from Dr. Zerofsky indicating that plaintiff suffered from migraine headaches. It appears that the ALJ thought that because plaintiff's headaches were stress-related, they had to be "tension" headaches. However, there is no medical evidence in the

record to support that conclusion.[5] The ALJ's failure to credit the substantial evidence in the record indicating that plaintiff suffered from migraine headaches is without reason. This tactic suggests that he was going out of his way to pass off plaintiff's headaches as garden-variety.

Apart from his misunderstanding of the medical facts, the ALJ conducted a faulty credibility evaluation. The ALJ noted that plaintiff's complaints of severe and disabling headaches stood "in some contrast" to a medical report from August 2000 indicating that plaintiff had gotten a puppy, did craft work and was doing better after taking medical leave from her job. The ALJ also noted that plaintiff had told her psychiatrist that she spent a lot of time caring for her grandchild, and that plaintiff's grandchild sometimes accompanied her to counseling sessions. Neither of these findings provide an adequate basis on which to uphold the ALJ's credibility finding. Plaintiff's reported activities were not necessarily inconsistent with her testimony that she has to lie down every day and is totally incapacitated by pain on some days. *See Zurawski,* 245 F.3d at 887 (plaintiff's activities of washing dishes, doing laundry, helping children prepare for school and preparing dinner did not necessarily contradict claim of disabling pain); *Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir. 2000) (claimant's ability to care for home and her children was not basis to find her

[5] Nor is there extra-record support for the ALJ's suggestion that a headache brought on by stress is a "tension" headache. First, although stress may be a "trigger" for tension-type headaches, such headaches are no longer thought to be caused by the stress but by chemical changes in the brain. *See* www.mayoclinic.com. Second, it is a well-accepted medical fact that stress is also a common trigger for migraine headaches. *Id*. In any case, even if plaintiff's headaches were tension-type headaches instead of migraines, that does not mean they were not disabling.

testimony incredible because "[s]uch work by its nature provides the type of flexibility to alternate standing, sitting and walking, and to rest and elevate the legs when necessary").

The ALJ also found plaintiff's claim undermined by the fact that she cancelled appointments and only saw Dr. Phillips on one occasion. However, the record shows that plaintiff cancelled appointments *because of her migraines*, *see, e.g.,* AR 152 & 157, and that she transferred her psychiatric care from Dr. Phillips to Dr. Cunning so she would not have to commute to Madison, where Dr. Phillips's practice was located. AR 201, 221. Contrary to the inference drawn by the ALJ based upon his selective discussion of the record, this evidence is consistent with plaintiff's reports of disabling pain. The ALJ also noted more than once that the consulting physicians from the disability agency had found no exertional limitations, but this is a non-sequitur: plaintiff's disability claim is not based on alleged exertional limitations, it is based on her alleged inability to work on a consistent and sustained basis. *See* SSR 96-8p (claimant's residual functional capacity represents her ability to perform sustained work activities in an ordinary work setting on a "regular and continuing basis," meaning 8 hours a day, 5 days a week).

The ALJ's credibility finding is notable also for the evidence that he did *not* review. Because the medical evidence clearly showed the existence of a medically determinable impairment that could reasonably be expected to cause plaintiff's pain, the ALJ was required to proceed to evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to

do basic work activities." SSR 96-7p; *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003) (ALJ's must comply with SSR 96-7p in evaluating credibility of statements supporting a Social Security application). When conducting this evaluation, "the ALJ may not disregard subjective complaints merely because they are not fully supported by objective medical evidence." *Knight v. Chater*, 55 F.3d 309, 314 (7th Cir. 1995). To the contrary,

> once the presence of a medically determinable physical or mental impairment is established that could reasonably be expected to produce the pain alleged, but the intensity or persistence of the pain is unsubstantiated by the medical record, the ALJ is obliged to *examine and weigh* all the evidence including observations by treating and examining physicians, third-party testimony, the claimant's testimony and daily activities, functional restrictions, pain medication taken, and aggravating or precipitating factors to evaluate how much the claimant's impairment affects his ability to work.

Herron, 19 F.3d at 334 (emphasis added). *See also* SSR 96-7p; 20 C.F.R. § 404.1529(c).

The ALJ failed to conduct the evaluation demanded by the Commissioner's rulings and regulations. Most significantly, he failed to consider Dr. Zerofsky's medical reports or plaintiff's medication regime at all, except to note that Dr. Zerofsky had cut plaintiff off from her medications and recommended that she get counseling. The ALJ did not examine plaintiff's various medications, their potential side effects or the degree to which they were effective in reducing plaintiff's pain. The ALJ's decision suggests that he dismissed plaintiff's need for medication as evidence of an addiction and not pain. Here again, however, the ALJ discussed only select excerpts from the medical record to support his conclusion and failed to discuss other contrary evidence in the record. For example, the ALJ noted that Dr.

Zerofsky "cut off" plaintiff's medications, but he did not indicate that that medication regime was resumed after plaintiff's evaluation with Dr. Miller. In fact, the ALJ did not mention Dr. Miller's evaluation at all, even though his conclusion that plaintiff was not addicted to her medications directly refutes the opposite inference drawn by the ALJ.

Furthermore, the fact that plaintiff's doctors sought to wean plaintiff from her medications does not indicate that she did not have an impairment requiring medical treatment, as the ALJ suggested. The record shows that besides their concerns about addiction, plaintiff's treating physicians were concerned that her chronic use of pain medications was actually causing her headaches to worsen or become more frequent, a phenomenon known as "rebound headaches." There is no evidence to suggest that they were seeking to reduce plaintiff's dependence on pain medications because they did not think she had headaches.

The ALJ also failed to consider Dr. Zerofsky's opinion that plaintiff would not be able to work competitively on a sustained basis because of her headaches. The opinion of a treating physician who is familiar with the claimant's impairments, treatments, and responses should be given great weight in disability determinations. *See Clifford*, 227 F.3d at 870; SSR 96-8p ("Medical opinions from treating sources about the nature and severity of an individual's impairment(s) are entitled to special significance and may be entitled to controlling weight"). If the ALJ finds that the treating physician's opinion is "well-supported by medically acceptable [evidence] and is not inconsistent with the other substantial

evidence in [the] record," he must give it controlling weight. 20 C.F.R. § 404.1527(d)(2). More weight is to be given to an opinion if the doctor had a lengthy treatment relationship, had reasonable knowledge about the impairment, presents relevant evidence to support his opinion, and his opinion is consistent with the record as a whole. *Id*.; *see also* SSR 96-2p ("Treating source medical opinions are entitled to deference and must be weighed using all of the factors provided in 20 C.F.R. § 404.1527"). Under the applicable regulations, the Social Security Administration is required to explain the weight it gives to the opinions of treating physicians. *See* 20 C.F.R. § 404.1527(d)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion."). Failure to provide good reasons for discrediting a treating physician's opinion is grounds for remand. *See Clifford*, 227 F.3d at 870.

Although Dr. Zerofsky is both plaintiff's treating physician *and* a specialist (migraines are regarded as neurologic disorders), the ALJ did not mention his opinion regarding plaintiff's limitations anywhere in his decision. While the ALJ need not articulate his reasons for rejecting every piece of evidence, he must at least "minimally discuss" a claimant's evidence that contradicts the Commissioner's position. *See Green v. Shalala*, 51 F.3d 96, 101 (7th Cir. 1995). By failing to mention Dr. Zerofsky's report at all, much less "evaluate" it as he was required to do under the Commissioner's rulings and regulations, this court is unable to track his reasons for discounting it. *Id*.

Finally, the ALJ failed to articulate a rational basis for rejecting Haag's opinion that plaintiff could not work competitively because of her pain. The ALJ reasoned that Haag was not a physician and did not have a doctorate degree in psychology. However, the Commissioner's regulations provide that when evaluating symptoms, the ALJ is to consider "all of the available evidence," which includes statements from non-medical sources such as counselors. 20 C.F.R. §§ 404.1513(d), 404.1529(c). Haag is a clinical social worker who saw plaintiff regularly for two years and was well-acquainted with her ongoing efforts to combat her headaches. The ALJ should not have rejected out-of-hand her opinion regarding plaintiff's employability merely because she was not a doctor.

"Both the evidence favoring the claimant as well as the evidence favoring the claim's rejection must be *examined*, since review of the substantiality of evidence takes into account whatever in the record fairly detracts from its weight." *Zurawski*, 245 F.3d at 888 (citation omitted) (emphasis supplied). In this case, the ALJ either ignored or rejected improperly the various pieces of evidence in the record that support plaintiff's contention that she cannot work because of severe migraine headaches. Indeed, the errors and omissions in the ALJ's decision are so glaring that it raises the question why the Commissioner has persisted in defending it. The Commissioner surely had to know this case was a loser when the best arguments she could muster to support the ALJ's decision consist of post-hoc rationalizations that are nowhere to be found in the ALJ's decision. As this court recently observed in another case, instead of throwing such confabulations against the wall during appeal hoping

that something sticks, the Commissioner would be better served by more diligently applying her own rules and then more candidly reviewing her challenged decisions. Her blithe defense of a palpably deficient decision in the instant case is reckless, cynical, or both.

CONCLUSION

Because the ALJ's decision that plaintiff is not disabled is based on various errors and omissions and fails to address important evidence in the record that favors plaintiff, this case should be remanded. Furthermore, because the record yields "but one supportable conclusion" that plaintiff is disabled, *see Campbell v. Shalala*, 988 F.2d 741, 744 (7th Cir. 1993), this court should direct the Commissioner to award benefits to plaintiff. The only issue in this case is whether plaintiff's migraine headaches are so incapacitating as to prevent her from working on a regular and consistent basis. Given the longitudinal medical records documenting plaintiff's complaints of recurrent, often incapacitating headaches, plaintiff's regular use of potent narcotics, and Dr. Zerofsky's opinion that plaintiff is unable to work competitively because of the severity, frequency and duration of her headaches, the only conclusion that reasonably can be reached on this record is that plaintiff cannot perform any job on a consistent, 40-hour a week basis. However, if the district court disagrees, then it should remand this case to the Commissioner for further proceedings consistent with this opinion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court reverse and remand the Commissioner's decision pursuant to sentence four of 42 U.S.C. § 405(g), with directions to the Commissioner to award benefits to plaintiff on her application for Disability Insurance Benefits filed on September 13, 2000.

Date: August 20, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge