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

DONALD HELLER,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART,
Commissioner of Social Security,

03-C-0587-C

Defendant.

REPORT

Plaintiff Donald Heller appeals a decision of the Commissioner of Social Security denying his application for Supplemental Security Income benefits under the Social Security Act. He contends that the administrative law judge who decided his claim at the administrative level committed the following errors: ignored pertinent evidence of plaintiff's mental impairments and his deteriorating physical condition in constructing plaintiff's residual functional capacity; improperly relied on plaintiff's daily activities as evidence of an ability to engage in substantial gainful activities; and made a faulty credibility assessment. Plaintiff asks this court to reverse and remand the decision of the Commissioner pursuant to 42 U.S.C. § 405(g).

Having carefully reviewed the administrative law judge's written decision in light of the administrative record and the arguments of the parties, I conclude that this court should affirm the decision of the commissioner. Except for one flaw that I conclude is immaterial, the administrative law judge conducted a careful evaluation of the evidence and drew an accurate and logical bridge from the evidence to her conclusion that plaintiff is able to perform a substantial number of jobs existing in the regional economy notwithstanding his severe impairments.

I have drawn the following facts from the administrative record:

FACTS

I. Procedural History

Plaintiff filed an application for Supplemental Security Income benefits under the Social Security Act on July 16, 2001, alleging disability as a result of a lower back injury on September 12, 2000. After plaintiff's application was denied initially and on reconsideration, plaintiff filed a request for a hearing before an administrative law judge. A hearing was held on March 12, 2003 before Administrative Law Judge Mary M. Kunz. Plaintiff was represented by counsel. The hearing consisted of testimony from plaintiff and vocational expert, Edward Utities. On April 23, 2003, the ALJ issued a decision in which she found plaintiff not disabled under the Social Security Act. On July 18, 2003, the

Appeals Council denied plaintiff's request for review of the ALJ's decision, making the ALJ's decision the final determination of the commissioner.

II. 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 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).

III. Plaintiff's Age, Education, Work History and Subjective Complaints

Plaintiff was 37 years old on his alleged onset date and 39 at the time of the hearing. Plaintiff earned his high school diploma, but most of his classes were in special education. Plaintiff has a borderline IQ of 73, has no significant mathematical computation skills and is essentially illiterate. His past relevant work consists of semi-skilled, medium to heavy exertional-level work as a groundskeeper and municipal maintenance worker.

IV. Medical Evidence

In 1992, Thomas V. Rieser, M.D., performed a cervical fusion of C5-C6 on plaintiff. A vocational evaluation that same year indicated that in spite of his borderline intellect and illiteracy, plaintiff was able to make normal work and family adjustments. The evaluator noted that plaintiff "is able to understand and recall simple job instructions, knows how to work, and has been able to get along with coworkers and supervisors." AR 193.

On September 12, 2000, plaintiff suffered a work-related injury, injuring his L4-L5 disc. On September 14, 2000, plaintiff sought medical treatment for complaints of low back

pain, radiating down the right lower extremity. Plaintiff had difficulty standing on his right leg. He refused range of motion testing. He had slight hypesthesia over the SI distribution. His deep tendon reflexes and strength were intact. Straight leg raising caused increased pain, but no increased radicular signs. Plaintiff was prescribed Vioxx and Vicodin for a diagnosis of low back strain with probable right L5 radiculopathy.

An examination performed on October 2, 2000 showed pain in the midline throughout the lumbar spine, but no muscle spasm and full range of motion and strength, and no paresthesias. However, there was significant pain with left straight leg raise at 60 degrees and on the right at 45 degrees.

An MRI of the lumbar spine performed on October 4, 2000 demonstrated modest disc degenerative changes at L4-L5 and L5-S1. On October 24, 2000, Dr. Busse-Quenan diagnosed a posterior annulus tear at L-4-5 with right paracentral protrusion, small annular tear with disc protrusion centrally at L5-S1, right sciatica, and PSIS dysfunction.

On December 22, 2000, plaintiff was referred to Dr. Rieser for evaluation of low back pain, intermittent right buttock pain and bilateral leg weakness. Dr. Rieser noted plaintiff's history of fusion secondary to a cervical spine injury. Upon examination, Dr. Rieser noted that plaintiff's stance was normal and there was no evidence of spine deformity. Plaintiff was able to heel, toe, and heel-to-toe walk but with slight pain to palpation. Straight leg raise was negative, deep tendon reflexes were equal and symmetric, and motor and sensory were normal but range of motion testing did cause plaintiff discomfort. Dr. Rieser diagnosed

degenerative disc disease at L4-5 and L5-S1, as demonstrated by MRI, and recommended epidural steroid injections. Dr. Rieser opined that plaintiff should be able to return to work in one month with a 20-pound lifting restriction, with an increase to 30-40 pounds thereafter.

Plaintiff participated in physical therapy from October 31, 2000 through February 20, 2001. On February 27, 2001, Dr. Rieser prescribed a TENS unit and a lumbar back brace to plaintiff.

On December 7, 2001, Thomas Findlay conducted a vocational evaluation of plaintiff. At the time of the evaluation, plaintiff was living with his girlfriend and his two children, aged 16 and 13. Plaintiff indicated that on a typical day, he got up between 6 and 6:30 a.m., saw his children off to school and then did household chores like cooking and cleaning, pacing himself according to his level of discomfort. Plaintiff typically watched television, took a nap and occasionally went hunting. He also had various appointments related to his medical care or at his children's school. Findlay noted that Dr. Rieser had opined on May 25, 2001, that plaintiff was restricted to 30 to 40 pounds lifting with no repetitive lifting, bending or twisting.

On December 12, 2001, plaintiff participated in a consultative medical evaluation at the request of the Social Security Administration. Plaintiff reported back problems since September 12, 2000, as a result of a lifting accident. Upon physical examination, Eric N. Carlsen, M.D. noted that plaintiff had a normal gait, was able to heel and toe walk and could

get on and off the examination table independently. Motor and sensory examinations were intact but caused slight pain to palpation over the lumbrosacral spine. Dr. Carlsen diagnosed plaintiff with chronic low back pain with mild degenerative disc disease. He opined that plaintiff had the physical capacity to perform work in the light to medium range, with no limitations on sitting, standing or walking.

On December 28, 2001, Dr. Robert Nallearom, a non-treating, non-examining State agency physician, completed a Physical Residual Functional Capacity Assessment. He found that plaintiff could lift 50 pounds occasionally and 25 pounds frequently. Also, Dr. Nallearom determined that plaintiff could stand or walk (with normal breaks) for a total of about six hours in an eight-hour workday.

On February 6, 2002, plaintiff visited Sharon K. Shepich, M.D. with complaints of left side low and mid back pain, radiating down through the buttocks, and occasional neck pain leading to headaches. Upon examination, plaintiff could move swiftly from sitting to standing position but with tenderness along the left cervical spine over C3-4. Plaintiff had normal deep tendon reflexes and his gait demonstrated no foot drop but plaintiff also had palpable spasm of the paralumbar musculature, tenderness over the mid back at L4-L5, and left foot weakness. Dr. Shepich diagnosed probable C6-C7 radiculopathy, disc pathology at L4-L5 with significant chronic pain issues and hypertension. Dr. Shepich prescribed Neurontin, Vioxx, and Flexeril, and gave plaintiff samples of Toprol. By February 20, 2002,

plaintiff reported that using Vioxx was helping relax his muscles and his blood pressure was excellent. Plaintiff was additionally prescribed Hydrocodone for pain.

An MRI of the cervical spine performed on March 13, 2002 demonstrated straightening of the cervical lordosis, mild degenerative disc disease at C5-C6, posterior central disc bulge at C4-C5, and signal abnormality at the vertebral body and plates and within the disc space at C5-C6, suggestive of an interbody fusion. An MRI of the lumbar spine showed disc desiccation and bulge with dorsal annular tear/granulation tissue at L4-L5, broad-based posterior disc protrusion with annular tear/granulation tissue at L5-S1, mild left L5-S1 foraminal stenosis and straightening of the lumbar lordosis.

On March 19, 2002, plaintiff returned to Dr. Rieser with complaints of neckache greater than lower backache. Upon physical examination, range of motion of the cervical spine was 75 percent in all directions and range of motion of the lumbar spine was 50 percent in all directions with some general discomfort. Upper and lower extremity strength was normal, reflexes were intact and straight leg raising was negative. Dr. Rieser diagnosed degenerative disc disease at C5-C6 with a bulge, degenerative disc disease at L4-L5 and L5-S1 with annular tear and bulges, low back pain and cervicalgia. Dr. Rieser recommended epidural steroid injections but plaintiff declined. Dr. Rieser told plaintiff that he would always have some neck and back pain and he encouraged him to "find another line of work . . . more conducive to neck and back health." AR 310.

At a follow-up visit with Dr. Shepich on July 10, 2002, plaintiff told her that he was somewhat afraid to have epidural steroid injections and that he knew several people who had had them with no improvement. Plaintiff stated that with the medications he was taking at the time, he was able to maintain a satisfactory functional level that allowed him to perform household activities such as light housekeeping and cooking. On examination, Dr. Shepich noted palpable spasm in plaintiff's paracervical muscles.

On September 10, 2002, Anthony J. Matkom, Ph.D., a non-examining State agency reviewer, completed a Psychiatric Review Technique Form and Mental Residual Functional Capacity Assessment regarding plaintiff. AR. 279-295. On the PRTF, Dr. Matkom identified plaintiff's impairment as "borderline IQ." Dr. Matkom did not complete the section of the PRTF that asked him to rate plaintiff's degree of limitation in the four functional categories that constitute the "B" criteria for evaluating mental impairments, namely, activities of daily living; social functioning; difficulties in maintaining concentration, persistence or pace; and episodes of decompensation. However, he did complete a more detailed assessment of plaintiff's work-related limitations on the mental RFC form.

On the section of the RFC form titled "Summary Conclusions," Dr. Matkom checked boxes indicating that plaintiff was moderately limited in the ability to understand and remember detailed instructions. In addition, he indicated that plaintiff was moderately limited in several tasks falling under the category of "Sustained Concentration and Persistence," namely, the ability to carry out detailed instructions; sustain an ordinary

routine without special supervision; make simple work-related decisions; complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. In the section of the form asking for a narrative discussion of plaintiff's residual functional capacity, Dr. Matkom noted that plaintiff had not alleged any mental impairment but was of borderline intelligence and functionally illiterate. He also noted that plaintiff lived independently, cared for his three children and home and had "no significant restrictions in day to day functioning related to mental impairments." Overall, Dr. Matkom's impression was that plaintiff was capable of unskilled work. AR 295.

On September 23, 2002, Dr. Shepich conducted an assessment of plaintiff's ability to perform work activities. According to Dr. Shepich's report, plaintiff was able to perform daily activities, but they were limited by pain. For example, plaintiff could cook for short periods of time, but he developed significant low back and neck pain if he had to stand for longer than an hour to cook a large meal. Plaintiff reported that his low back pain was particularly exacerbated by any lifting or twisting, and even vacuuming was difficult for him. Dr. Shepich noted that plaintiff's current medications "allowed him to go through his day with a minimum of pain but he does experience pain every day." AR 301. On the basis of this information, her review of the MRI findings and a physical examination, Dr. Shepich concluded that plaintiff could lift or carry less than 25 pounds occasionally and less than 10 pounds frequently. She opined that he could stand or walk for a total of two hours in an

eight-hour day without interruption for 30 minutes and sit for up to six hours in an eight-hour day without interruption for 30 minutes. Dr. Shepich also reported that plaintiff can never climb, stoop, crouch, kneel, crawl, and can only occasionally balance; that his ability to reach, push and pull were affected by his impairment; but that he had not impairment of handling, sensation, seeing, hearing or speaking. Finally, Dr. Shepich indicated that plaintiff should not be relied upon to work at heights or around moving machinery or vibration. At the conclusion of her report, Dr. Shepich stated that "a job position that did not require much physical labor and allowed him freedom of movement with frequent position changes would be a positive change for him." *Id*.

Plaintiff saw Dr. Shepich again on February 5, 2003. On examination, plaintiff had palpable paracervical muscular spasm, prominence over the right SI joint and a swollen left parotid gland. Dr. Shepich diagnosed polyarthritis with history of back injury, rule-out infammation component, hypertension, and financial and social stresses. Dr. Shepich refilled plaintiff's prescription for Vicodin and restarted the use of Celexa.

On March 5, 2003, Dr. Shepich completed another RFC form on which she assessed plaintiff's physical ability to do work related activities. Dr. Shepich opined that plaintiff could lift less than 10 pounds only occasionally. She also found that plaintiff could only stand or walk for a total of less than two hours in an eight hour day, with interruptions every 15-20 minutes. Dr. Shepich determined the same limitation for plaintiff's ability to sit. On March 10, 2003, plaintiff's chiropractor, Travis Stanford, completed an RFC form for plaintiff on which he indicated similar restrictions.

V. Plaintiff's Testimony

Plaintiff stated that he lives alone in a house. He testified that he has cannot work because of pain in the lower back and neck, irritation in his lower back and right leg after sitting for a while, and numbness in the right leg. He testified that he can sit for 10 to 15 minutes before he has to change positions; walk about an hour before feeling pain down his right leg; and stand for half an hour. Plaintiff testified that he could lift about ten pounds, although he occasionally lifted his grandchildren. He also testified that he has difficulty bending and twisting.

Plaintiff testified that what he does each day depends upon how he feels. Plaintiff said he is able to vacuum, do dishes, prepare meals and do other household activities, but that his activities were sometimes limited by pain. He lies down about three times a day. Plaintiff also testified that he experiences dizziness from his medication and high blood pressure. Plaintiff's former teacher, sister, or one of his children comes over almost every day to help him around the house and sometimes cook for him.

Plaintiff testified that he feels his condition is worsening. He experiences more and more numbness, spasms and pain when doing housework, which is the extent of his activities.

VI. Vocational Expert Testimony

After hearing plaintiff's testimony, the ALJ proposed the following hypothetical to Utities, the vocational expert:

> First of all, we have an individual who is presently 39 . . .. And this individual has a high school education, but [it] is in special education. And he, we're going to determine that he is essentially illiterate and has no significant math computational skills. This individual has a work history as described in your report and he is impaired by borderline intelligence with a full-scale IQ score of 73, history of degenerative disk disease at the cervical spine with a history of cervical fusion at C6-7. There has been a diagnosis of adjustment reaction to disability and pain, and possible polyarthritis of the spine as well. He takes medications and the medications may cause drowsiness, as a result. As a result of these impairments, in the first hypothetical question, I want you to assume that this individual can lift up to 20 pounds occasionally, and 10 pounds frequently. This individual would be able to walk or stand up to two hours, sit up to six hours in an eight hour day, but should be able to change positions every 30 minutes. Should not be required to perform climbing, stooping, crouching, kneeling, or crawling, and no more than occasional balancing. Should not be required to push or pull arm or leg controls. Should not be required to do overhead reaching. Should not perform work at heights near dangerous moving machinery, and should not be required to use hand tools that are vibrating, or that would involve like powerful twisting or turning with the hand tools, power gripping.

In addition, the ALJ stated that the job should not include any reading and no math computation.

Utities responded that an individual with these limitations could not perform any of plaintiff's past relevant work. When asked about other jobs that this hypothetical person

could perform, Utities opined that the individual could perform various jobs, including bench work assembly type occupations, of which there were about 5,100 such jobs in the Wisconsin economy; inspecting and grading and sorting occupations, of which there were about 800 jobs; and light bench work, of which there were about 1000 jobs. Utities said all the jobs he identified were "unskilled, basically rote repetitive types of occupations." AR 80. In response to a question from plaintiff's lawyer, Utities stated that all the jobs would have baseline production standards. AR 88.

Plaintiff's counsel asked Utities whether his response to the hypothetical would be different if the hypothetical person would be absent from the workplace more than twice a month or was unable to carry out simple instructions. Utities responded that such a person would be precluded from employment.

VII. The ALJ's decision

The ALJ applied the five-step sequential evaluation procedure and determined that plaintiff was not disabled. At step one, the ALJ concluded that plaintiff had not engaged in substantial gainful activity during his alleged period of disability. At steps two and three, the ALJ found that although plaintiff suffered from severe impairments, namely, neck pain and degenerative disc disease of the lumbar spine with disc protrusion at L5-S1, degenerative disc disease of the cervical spine with a history of cervical fusion at C6-7, borderline intelligence with a full-scale IQ of 73 and functional illiteracy and adjustment reaction to disability and

pain, these impairments were not enough to meet or equal an impairment in the Listing of Impairments.

When considering whether plaintiff had a severe mental impairment, the ALJ followed the commissioner's analytical procedure set forth in 20 C.F.R. § 416.920a. Under that procedure, the ALJ was required to assess the extent to which plaintiff was limited in four functional categories known as the "paragraph B" criteria: activities of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. The ALJ found that plaintiff's mental impairments did not result in limitations in any of these areas except the ability to maintain concentration, which she found to be moderately limited. The ALJ based her conclusion regarding plaintiff's concentration deficiencies on the evidence indicating that plaintiff had borderline intelligence and was functionally illiterate. The ALJ found that plaintiff had no difficulties in maintaining persistence or pace.

At step four, the ALJ found that plaintiff possessed the residual functional capacity to perform unskilled tasks involving lifting twenty pounds occasionally and ten pounds frequently, walking or standing up to two hours in an eight-hour day and sitting up to six hours in an eight-hour day, but required the opportunity to change positions every thirty minutes. The ALJ also found that plaintiff should not be required to perform overhead reaching, climbing, stooping, kneeling, crouching, crawling, repetitive turning of the head, more than occasional balancing or pushing or pulling arm or leg controls. Additionally, the ALJ found that plaintiff could not perform work at heights or around dangerous machinery

or that which required the use of vibrating hand tools, power gripping, or reading or math computations.

In determining plaintiff's residual functional capacity, the ALJ placed significant weight on the 2002 assessment completed by Dr. Shepich, finding that it was consistent with the other evidence in the record. The ALJ acknowledged that Dr. Shepich had opined later that had more severe functional restrictions. However, she concluded that

> the [2003] limitations with regard to lifting, standing, walking and sitting are inconsistent with the claimant's assertions and the objective findings. Moreover, Dr. Shepich's treatment notes do not reflect any significant change in the claimant's conditions that would reflect a reduced residual functional capacity. As a result, the undersigned has given no weight to this part of the opinion.
>
> AR 21.

The ALJ determined that although many of plaintiff's statements concerning his limitations were credible, his claim that he was unable to perform any work activity was not. The ALJ noted that plaintiff's daily activities were not wholly consistent with an inability to work. She also found that his use of medications and conservative course of treatment was not consistent with total disability, noting that plaintiff had rejected the use of epidural steroids, rarely used Hydrocodone and only for severe pain, had not been hospitalized or undergone surgery since the onset date, had not been referred to any pain management clinic and had not been referred to counseling or psychotherapy for his adjustment reaction. The ALJ noted that plaintiff had alleged that his medication made him drowsy, but she found that this limitation was not significant because it did not prevent plaintiff from maintaining

his household and caring for his children. Finally, the ALJ found that plaintiff's allegation of total disability was suspect in light of his poor work record and his failure to seek employment since his alleged onset date.

The ALJ found that plaintiff could not perform his past relevant work because the demands of those jobs exceeded his current residual functional capacity. However, after considering plaintiff's residual functional capacity, age, education and past relevant work, the ALJ found that plaintiff could perform other work existing in significant numbers in the national economy, including bench work assembly and inspecting, grading and sorting occupations. The ALJ rejected plaintiff's suggestion that, because of pain and physical restrictions, he lacked the persistence and pace to meet the baseline production requirements of such jobs. The ALJ noted that plaintiff had the persistence and pace to maintain his household and that there was no evidence in the record to support plaintiff's contention that he could not satisfy the production requirements of the jobs identified by the vocational expert.

The ALJ made the following specific findings:

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

2. The medical evidence establishes the claimant is severly impaired by degenerative disc disease of the lumbar spine with disc protrusion at L5-S1, degenerative disc disease of the cervical spine with a history of cervical fusion at C6-7, borderline intelligence with a full-scale IQ of 73 and functional illiteracy, and an adjustment reaction to disability and pain.

3. The claimant does not have an impairment or combination of impairments that meets or is medically equal to an impairment found in the Listing of Impairments at 20 C.F.R. Subpart P Appendix 1.

4. The claimant retains the residual functional capacity to perform unskilled tasks involving lifting twenty pounds occasionally and ten pounds frequently, walking or standing up to two hours in an eight-hour day, sitting up to six hours in an eight-hour day, but requiring the opportunity to change positions every thirty minutes, should not be required to push or pull arm or leg controls, or perform overhead reaching, climbing, stooping, kneeling, crouching, crawling, repetitive turning of the head, or more than occasional balancing, and is precluded from performing work at heights or around dangerous machinery, involving the use vibrating hand tools, power gripping, or reading or math computations.

5. The claimant's allegations of functional limitations are credible to the extent that the impairments could reasonably cause some limitation in function. However, the allegation of total disability is not credible due to inconsistencies in the record as a whole.

6. The claimant has past relevant semi-skilled medium exertional-level work as a groundskeeper and custodial worker.

7. The claimant cannot perform his past relevant work, as he performed it or as it is customarily performed in the national economy, because the demands of these jobs exceed his current residual functional capacity.

8. The claimant is a younger individual.

9. The claimant has a high school education in special education, but has no significant math computational skills and [is] essentially illiterate.

10. As the residual functional capacity is limited to unskilled tasks, the issue of whether the claimant has any previously acquired skills that would transfer to other jobs within his residual functional capacity is not material to this decision.

11. Considering the claimant's residual functional capacity, age, education and past relevant work, he is able to perform other work existing in

significant numbers in the national economy, examples of which include bench work assembly type occupations, such as final assembler, bench hand, band attacher, and lens inserter; inspecting, grading and sorting occupations, including dowel inspector, check weigher, and table worker; and assemblers of cards and announcements, mechanical pencils, marking devices, and desk pen sets.

12. The claimant has not been under a disability, as defined in the Social Security Act, at any time relevant to this adjudication.

ANALYSIS

I. Standard of Review

Under 42 U.S.C. § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." *See Stevenson v. Chater*, 105 F.3d 1151, 1153 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). "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). In addition, the court reviews the ALJ's decision to ensure that no errors of law occurred. *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001).

II. The ALJ's Assessment of Plaintiff's Mental Impairment

Plaintiff contends that the ALJ's assessment of his mental limitations was flawed because it did not adequately account for the limitations identified by the state agency psychologist on the mental RFC form. Plaintiff contends that Dr. Matkom's opinion that plaintiff has moderate limitations in his ability to sustain an ordinary routine without special supervision, make simple work-related decisions, complete a normal workday and workweek

without interruptions from psychologically based symptoms and perform at a consistent pace without unreasonable number and length of rest periods is inconsistent with the ALJ's conclusion that plaintiff has no limitations in persistence and pace. Plaintiff argues that if credited, Dr. Matkom's findings suggest that plaintiff would be unable to meet the production demands of the jobs identified by the vocational expert, and therefore the ALJ erred in failing to discuss Dr. Matkom's report in her decision.

I agree that it is difficult to reconcile the ALJ's conclusion that plaintiff has no problems with persistence or pace with Dr. Matkom's report. In particular, the ALJ's finding appears to conflict with Dr. Matkom's conclusion that plaintiff is moderately limited in his ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without unreasonable number and length of rest periods. Although the ALJ's assessment of plaintiff's persistence and pace was part of her evaluation of the "paragraph B" criteria used to determine mental impairment severity, Dr. Matkom's findings on the mental RFC form were certainly relevant to this issue. *See Ramirez v. Barnhart*, 268 F. Supp. 2d 484, 488-491 (E.D. Pa. 2003) (explaining relationship between findings regarding functional loss for purpose of evaluating severity of mental impairment at step three and mental residual functional capacity assessment at step five); SSR 96-8p (mental RFC assessment provides "a more detailed assessment by itemizing various functions contained in the broad categories found in paragraphs B and C of the adult mental disorders listings"). Unfortunately, the ALJ did not

explain in her opinion how she resolved this apparent conflict. The ALJ mentioned Dr. Matkom's report only by exhibit number, noting that she had considered that opinion along with the other opinions in the record made by state agency consultants. The ALJ went on to explain that she was giving these reports only "some" weight, noting that the consultants had rendered their opinions without the benefit of plaintiff's testimony or medical records that surfaced after the date of their decision. However, the ALJ's reasoning does not appear to be directed at Dr. Matkom's report, insofar as none of the additional medical records bore on plaintiff's mental condition and Dr. Matkom's RFC assessment was the only current evidence in the record concerning plaintiff's ability to perform the mental demands of work.

The only other possible glimpse into the ALJ's reasoning was her discussion of plaintiff's contention that, because of his pain and physical restrictions, he could not meet baseline production requirements of competitive employment. The ALJ rejected plaintiff's argument, noting that "the evidence shows the claimant has the persistence and pace to maintain his household." Although the ALJ was addressing plaintiff's contention that his ability to persist and stay on task was limited by his *physical* impairments, it is reasonable to infer that the ALJ also considered plaintiff's ability to maintain his household as a basis for her conclusion that he had no limitations in persistence or pace as a result of his mental condition. However, this does not adequately explain why the ALJ did not address Dr. Matkom's findings regarding plaintiff's limitations in this area, for Dr. Matkom also noted in his report that plaintiff lived independently and cared for his children and home.

Thus, this court is left to wonder whether the ALJ considered Dr. Matkom's findings that suggested that plaintiff had moderate limitations in persistence or pace. However, I am not convinced that this gap in the ALJ's decision is significant enough to warrant a remand. This is because Dr. Matkom qualified his findings, explaining in the narrative section of his report that it was his overall impression that plaintiff was capable of performing unskilled work.[1] (Although Dr. Matkom is not a vocational expert, he is an expert in the Social Security disability programs and is part of the team that makes disability determinations at the initial and reconsideration levels, *see* SSR 96-6p, so it is reasonable to infer that he is familiar with the mental requirements of unskilled work.) Although the ALJ did not include a limitation to unskilled work in her hypothetical question to the vocational expert, she did ask him to assume an individual who was "essentially illiterate and has no significant math computational skills . . . and is impaired by borderline intelligence with a full-scale IQ score of 73 . . ." and to restrict the available jobs to those requiring no reading or math computations. The vocational expert responded by identifying jobs that were unskilled, rote and repetitive in nature. Thus, the jobs that the vocational expert identified were consistent with Dr. Matkom's assessment of plaintiff's abilities.

Dr. Matkom's opinion is the only medical evidence in the record concerning plaintiff's current mental limitations. In fact, the mental limitations on which Dr. Matkom's

[1] The commissioner defines unskilled work as work that requires little or no judgment and involves only simple tasks, which can be learned in a short period of time. 20 C.F.R. § 404.1568(a).

report were based, plaintiff's low IQ and functional illiteracy, are limitations that plaintiff had long before his alleged onset date.[2] In spite of this, he was able to perform a variety of unskilled jobs before he was injured in September 2000. As the vocational evaluator noted in 1992, plaintiff was able to make normal work adjustments in spite of his borderline intellect and illiteracy. Indeed, when plaintiff filed his application for supplemental security income benefits, he did not allege that he was unable to work as a result of any mental impairment.

This evidence provides substantial support for the ALJ's conclusion that there were a number of unskilled jobs that plaintiff could perform notwithstanding his mental impairments and distinguishes this case from *Kasarsky v. Barnhart*, 335 F.3d 539 (7th Cir. 2003) (per curiam), a case cited by plaintiff. In *Kasarsky*, the ALJ completed a Psychiatric Review Technique Form on which he indicated that Kasarsky had "frequent" deficiencies of concentration, persistence or pace. *Id*. at 543. However, in his residual functional capacity assessment and hypothetical to the vocational expert, the ALJ found that "[b]ecause of borderline intelligence, the claimant is serious[ly] limited, but not precluded from understanding, remembering, and carrying out detailed instructions." *Id*. at 544. The court of appeals found that, absent some explanation from the ALJ, this description of Kasarsky's mental abilities could not be reconciled with the record or the ALJ's earlier observation that

[2] Although the ALJ also found that plaintiff suffers from the additional mental impairment of an adjustment reaction to disability and pain, there is no evidence that plaintiff has any functional limitations as a result of that impairment.

Kasarsky would have frequent deficiencies in concentration, persistence or pace. *Id*. Because the ALJ had failed to include a limitation on concentration, persistence or pace in his hypothetical to the vocational expert, remand was necessary. *Id*.

Notably, the record in *Kasarsky* contained a report from a psychologist who recommended that Kasarsky's mental tasks be limited to a single repetitive action that would not require much instruction. *Id*. at 542. In this case, however, the only psychologist who evaluated plaintiff's mental impairment concluded that plaintiff had the mental ability to perform unskilled work, an opinion that was consistent with other evidence in the record. Unlike *Kasarsky*, the ALJ's residual functional capacity assessment and the vocational expert's testimony adequately accounted for all of plaintiff's mental limitations that are supported by the record, notwithstanding the ALJ's failure to quote verbatim from her own paragraph B assessment or Dr. Matkom's mental RFC form.

In sum, substantial evidence supports the ALJ's conclusion that plaintiff has the residual functional capacity to perform unskilled work notwithstanding his mental limitations. Because the jobs identified by the vocational expert were within this residual functional capacity, remand is not required. *See Donahue v. Barnhart*, 279 F.3d 441, 444 (7th Cir. 2002) (remand not required for ALJ's failure to include plaintiff's shortcomings in concentration in hypothetical where vocational expert did not name jobs requiring steady concentration).

III. Plaintiff's Other Objections to the ALJ's Decision

Plaintiff's remaining arguments can be dispensed with rather quickly. Plaintiff challenges the ALJ's decision to afford more weight to Dr. Shepich's September 2002 RFC assessment than to her more restrictive May 2003 assessment. "A treating physician's opinion regarding the nature and severity of a medical condition is entitled to controlling weight if it is well supported by medical findings and not inconsistent with other substantial evidence in the record." *Gudgel v. Barnhart*, 345 F.3d 467, 470 (citing 20 C.F.R. § 404.1527(d)(2)). The treating physician is generally more familiar with the claimant's medical conditions and circumstances. *See id*. However, "a claimant is not entitled to disability benefits simply because her physician states that she is 'disabled' or unable to work" because a treating physician may bring biases to an assessment. *Dixon*, 270 F.3d at1177. Thus, the treating physician's opinion may be given less weight when it is not well-supported and is inconsistent with other evidence. If the ALJ decides not to give controlling weight to a treating physician's opinion, the ALJ must support that decision with "good reasons." 20 C.F.R. § 416.927(d)(2).

The ALJ gave "good reasons" for her conclusion that Dr. Shepich's 2003 RFC assessment should not be entitled to controlling weight. As the ALJ explained, there was nothing in Dr. Shepich's treatment notes to explain why plaintiff's RFC had declined so drastically over such a brief time period from September 2002 to May 2003. Contrary to plaintiff's suggestion, the ALJ did not conclude that the severe limitations identified by Dr.

Shepich on the 2003 RFC *could not* be produced by plaintiff's medical conditions; rather, she found a lack of objective evidence to show why plaintiff's limitations had increased over the relevant time period. Faced with two conflicting opinions, it was proper for the ALJ to choose the opinion that was better supported by Dr. Shepich's contemporaneous treatment notes. *See Henderson ex rel. Henderson v. Apfel*, 179 F.3d 507, 514 (7th Cir. 1999) ("An ALJ need not give controlling weight to a treating physician's opinion if it is not supported by objective clinical findings.").

Furthermore, the ALJ noted that Dr. Shepich's 2003 assessment was more restrictive than plaintiff claimed to be at the hearing. As the ALJ noted, plaintiff testified that he had a greater ability to lift, walk, stand and sit than indicated by Dr. Shepich in her 2003 report. Plaintiff argues that this finding was improper because the ALJ did not accurately characterize plaintiff's testimony. He points to a portion of the hearing transcript that he contends indicates that he was confused by one of the ALJ's questions. However, even if one accepts that plaintiff may have been confused by one of the ALJ's questions, that confusion does not support plaintiff's suggestion that *none* of his answers concerning time and distance was accurate. To the contrary, plaintiff's provided forthright responses to the ALJ's other questions concerning his ability to stand, walk and stand. Also, plaintiff was represented by an attorney at the hearing. Presumably, if she thought plaintiff was confused by the ALJ's questions or that he was overstating his abilities, she would have cleared that up through her own questions. *See Glenn v. Secretary of Health and Human Services*, 814 F.2d 387, 391 (7th

Cir. 1987) (ALJ "entitled to assume" that applicant represented by attorney is making his "strongest case for benefits").

Furthermore, if Dr. Shepich's 2003 assessment was based upon plaintiff's subjective assessment of his own abilities, as plaintiff appears to suggest, then the ALJ could discount it insofar as she did not find plaintiff's allegation of total disability to be credible. Plaintiff challenges the ALJ's credibility assessment, arguing that the ALJ did not properly evaluate his daily activities and drew other improper inferences from the record, but I find no flaws in the ALJ's credibility determination. The ALJ credited much of plaintiff's testimony concerning his limitations, but found that the record as a whole did not support his contention that he was incapable of all work activity. In reaching her conclusion, the ALJ considered and discussed numerous factors that the commissioner has determined to be relevant to assessing the credibility of a claimant's subjective complaints, including the objective medical evidence; plaintiff's daily activities; medications taken; plaintiff's course of treatment; and other relevant factors. *See* 20 C.F.R. § 416. 929; SSR 96-7p.

Plaintiff argues that the ALJ found that plaintiff's ability to perform daily activities was "conclusive" evidence that he was not disabled. However, the ALJ did not equate plaintiff's daily activities with a finding of non-disability. She simply noted plaintiff's daily activities as one of several factors that undermined his complaint of total disability. As the ALJ noted, the record contained various descriptions of plaintiff's daily routine, which included maintaining his household and yard, preparing meals, seeing his children off to

school and attending various appointments at school, that tended to indicate that plaintiff's complaints of disabling limitations were not entirely credible. It is worth noting that some of the activities that exacerbated plaintiff's symptoms, including vacuuming and climbing up and down stairs to do laundry, were beyond the limitations that the ALJ included in her residual functional capacity assessment.

Plaintiff also argues that the ALJ's reliance on his failure to participate in a pain clinic or psychotherapy was improper because no physician had ever referred plaintiff for such treatment and there was no evidence that such treatment would restore plaintiff's ability to work. However, contrary to plaintiff's suggestion, the ALJ did not deny plaintiff's application on the ground that plaintiff failed to follow prescribed medical treatment that could restore his ability to work. Rather, she found that the failure of plaintiff's doctors to recommend more intensive measures to treat plaintiff's physical and mental condition tended to suggest that the conditions were not disabling. It was not improper for the ALJ to draw a negative inference from the relatively conservative course of treatment that plaintiff's doctors had prescribed. Likewise, it was not improper for the ALJ to conclude from plaintiff's refusal to undergo steroid injections that he was not as limited by pain as he claimed to be. Although plaintiff points to evidence in the record indicating that he refused the injections because of fear and doubt that they would improve his pain, it was not unreasonable for the ALJ to conclude that an individual in severe pain would put his fear and doubts aside and follow his doctor's treatment suggestion.

Although the ALJ could have drawn different inference concerning the credibility of plaintiff's claim of disability, when the evidence reasonably supports competing inferences, the task for weighing and interpreting that evidence is reserved in the first instance to the ALJ. *See Donahue*, 279 F.3d at 444 "[T]he resolution of competing arguments based on the record is for the ALJ, not the court.". The ALJ's decision demonstrates that she considered all of the factors relevant to credibility, explained the evidence she considered under each factor and how she was weighing that evidence, and provided reasons for her decision that are logically supported by the evidence.

Overall, the ALJ built an accurate and logical bridge from the evidence to her conclusion. Although she did not mention every piece of evidence in her decision, the ALJ carefully reviewed plaintiff's case and supported her decision with substantial evidence.

RECOMMENDATION

For the reasons set forth above and pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court affirm the decision of the Commissioner of Social Security denying plaintiff Donald Heller's application for Supplemental Security Income benefits.

Entered this 17th day of May, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge