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

MARGARET SEAMON,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

05-C-13-C

REPORT

On July 22, 2004, the Commissioner of Social Security denied plaintiff Margaret Seamon's claim for Disability Insurance Benefits under sections 216(I) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(I) and 423(d), after determining that plaintiff's various physical and mental impairments do not impose limitations so restrictive as to preclude her from all substantial gainful activity. Seamon seeks judicial review of that decision pursuant to 42 U.S.C. § 405(g). She contends that the decision of the administrative law judge who decided her claim is not supported by substantial evidence because: 1) the ALJ did not obtain a valid waiver from plaintiff of her right to representation and failed to remedy that error by fully developing the record; 2) the ALJ failed to account for her fibromyalgia and obesity in assessing her impairments; 3) the ALJ's hypothetical question to the vocational expert failed to account for the various "moderate" mental limitations found by the treating and reviewing mental health professionals; and 4) the ALJ made an improper credibility finding.

Because the ALJ's decision fails to make clear how he evaluated important evidence in the record indicating that plaintiff's mental impairments adversely affect her ability to relate to coworkers and supervisors, I am recommending that this case be reversed and remanded for further proceedings. I also am recommending that on remand the commissioner re-evaluate plaintiff's credibility without considering her testimony that her mental condition improved after June 2003.

Legal and Statutory Framework

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that she is under a disability. 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. § 404.1520. The inquiry at steps four and five requires an assessment of the claimant's "residual functional capacity," which the commissioner has defined as "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id*.

A claimant seeking benefits bears the initial burden to prove that a severe impairment prevents her from performing past relevant work. If she can show this, then the burden shifts to the commissioner to show that the claimant is able to adjust to any 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). At this final step, the ALJ must take into account the individual's residual functional capacity as well as the vocational factors of her age, education and work experience. 20 C.F.R. §§ 404.1520; 404.1560.

The following facts are drawn from the administrative record ("AR"):

FACTS

I. Procedural History

Plaintiff applied for disability insurance benefits on June 17, 2002, alleging that she had been disabled since January 1, 2002. Her applications were denied initially and on reconsideration. Pursuant to plaintiff's request, an administrative law judge (ALJ) held an administrative hearing on October 28, 2003, at which plaintiff, her husband, a medical expert and a vocational expert (VE) testified. On April 30, 2004, the ALJ issued a decision finding that plaintiff was not disabled because she remained capable of performing jobs existing in significant numbers in the economy. The Appeals Council denied plaintiff's request for review, leaving the ALJ's decision as the final decision of the commissioner. 20 C.F.R. § 404.981. Plaintiff filed the instant action seeking review of the commissioner's final decision pursuant to 42 U.S.C. § 405(g).

II. Medical Evidence

A. Background

Plaintiff was 52 years old when the ALJ decided her claim. Plaintiff earned her GED in 1989. Plaintiff's past work experience involved mainly clerical tasks such as phone reception and data entry in various office settings. She was terminated from her most recent job on January 29, 2002, after she was injured by a fall at work. The ALJ found that plaintiff had not engaged in substantial gainful activity after January 1, 2002, her alleged onset date.

B. Physical Impairments

Plaintiff has a history of neck, shoulder and low back pain stemming from whiplash injuries in 1999 and a fall at work in December 2001. An MRI in March 2002 showed a right lateral disk bulge at the neural foramen at C5-C6. From January 2002 to June 2003, plaintiff received treatment for her neck and shoulder pain in the form of medication, physical therapy, trigger point injections, facet injections and botox injections. In April 2002, a doctor determined that surgery would not be helpful. In August 2002, one of plaintiff's treating physicians, Dr. Bodeau, found that plaintiff had reached a permanent plateau of healing with respect to her discogenic neck pain related to her work injury. He assigned her a permanent partial disability of two percent of the person as a whole as a result of her moderate neck pain. He opined that plaintiff could perform work at the medium exertional level (lifting up to 50 pounds) and could frequently reach above shoulder level and below knee level, but should avoid repetitive neck movements and using the neck in awkward positions. Dr. Bodeau indicated no additional follow-up or treatment.

Plaintiff has physical concerns including irritable bowel syndrome, a right fracture of the tibia, asthma, right carpal tunnel syndrome and right elbow tendinitis. In addition, she is obese, standing about five feet tall and weighing 202 pounds. Because plaintiff focuses mainly on her mental impairments, I will not discuss the medical evidence relating to these additional physical impairments in detail.

C. Mental Impairments

Plaintiff has a history of depression, panic disorder, and post traumatic stress disorder (PTSD) stemming from two car accidents in close succession in 1999. On May 9, 2002, plaintiff began seeing Dr. John Bartholow for her mental problems. Plaintiff reported that although she was taking Xanax and Celexa, she was symptomatic and unhappy with her current response to the medications. Plaintiff reported that although she had managed her symptoms adequately in the past, recent stressors, including a work-related injury and having been fired from several jobs, had exacerbated her stress and anxiety. She scored a 41 on a Beck Depression Inventory, placing her in the severe depression range. Plaintiff acknowledged having suicidal thoughts but denied any active plan or intent. Dr. Bartholow diagnosed Seamon with major depressive disorder, recurrent; dysthymic disorder; anxiety disorder exacerbated by recent job-related stressors; and PTSD exacerbated by recent job-related stressors. AR 407-410.

Plaintiff began psychotherapy with Scott Phillips on July 1, 2002. On August 9, 2002, Phillips administered a mood disorder questionnaire to screen for bipolar disorder. He noted that plaintiff endorsed every symptom of mania or hypomania with many symptoms occurring at the same time. He suggested a need for a more thorough evaluation by a psychiatrist to check for bipolar disorder. AR 397.

At a visit with Dr. Bartholow on August 23, 2002, plaintiff reported having a great deal of anxiety and feeling overwhelmed by her symptoms, although she denied hopelessness

or suicidality. She said that her therapy with Phillips had been very helpful. Plaintiff presented disability papers. Dr. Bartholow told plaintiff that "a big part of her disability at this time is due to pain from that work related injury" and that he could not support disability on the basis of psychiatric problems alone. AR 391. Dr. Bartholow recommended a trial of Depakote and lowering the dosage of Celexa.

On September 9, 2002, Richard E. Fuhrer, Ph.D., a clinical psychologist, conducted a clinical evaluation of plaintiff at the request of the local disability agency. Dr. Fuhrer reported that plaintiff complained of chronic pain from a number of injuries including a right-sided back injury, foot and ankle injuries, arthritis in her knees, and of symptoms of anxiety, agoraphobia, PTSD and depression. During his mental status examination, Dr. Fuhrer observed that although plaintiff was mostly pleasant in her manner, "she quickly escalates into a rage at those she feels have treated her unjustly," including former employers. Plaintiff's mood appeared to be within normal limits, although plaintiff's husband reported that she could be happy one minute and very angry the next. Plaintiff reported low energy except for one "high energy" day a week during which she did excessive cleaning. She said she felt worthless, had daily crying spells, was irritable, had memory problems and avoided everyone except her children. Plaintiff's thought content was logical and goal-directed with no evidence of hallucinations or delusions, although plaintiff reported some suicidal thinking and episodes of rage during which she had homicidal urges. Dr. Fuhrer opined that plaintiff's short-term memory was below average and below expectation

for her education, although he described it as "not terribly impaired." Concentration was within acceptable limits. Plaintiff demonstrated fairly good insight and judgment.

Dr. Fuhrer diagnosed plaintiff with a non-specific mood disorder and gave her a score of 50 on the Global Assessment of Functioning Scale, indicating above-moderate to serious symptoms. He concluded that plaintiff was able to understand, remember, and carry out simple instructions. However, he found that

> It is more questionable whether she can respond appropriately to supervisors and co-workers at this point. She does quickly escalate with rage. Her ability to maintain concentration, attention, and work pace is likely somewhat impaired by depression and chronic pain. Her ability to adapt to changes is likely poor.

AR 268.

On September 19, 2002, Keith E. Bauer, Ph. D., a consulting psychiatrist for the state disability agency, completed a Psychiatric Review Technique Form and Mental Residual Functional Capacity Assessment of plaintiff on the basis of his review of the record, including Dr. Fuhrer's report. Dr. Bauer found that plaintiff had a mood disorder causing mild limitation in activities of daily living; moderate difficulties in maintaining social functioning; mild difficulties in maintaining concentration, persistence, or pace; and no repeated episodes of decompensation. AR 279. On the MRFC form, Dr. Bauer found plaintiff moderately limited in these work-related skills: understanding, remembering and carrying out detailed instructions; working in coordination with or proximity to others without being distracted by them; completing a normal workday and workweek without

interruptions from psychologically based symptoms; performing at a consistent pace without an unreasonable number and length of rest periods; interacting appropriately with the general public; accepting instructions and responding appropriately to criticism from supervisors; getting along with coworkers or peers without distracting them or exhibiting behavioral extremes; and maintaining socially appropriate behavior and adhering to basic standards of neatness and cleanliness. AR 284-285.

By September 27, 2002, Phillips suspected that plaintiff might have a personality disorder, noting that plaintiff's interpersonal manner was "a bit odd with issues of passive aggressiveness, antisocial behavior and over familiarity." AR 386. On October 7, 2002, Dr. Fuhrer discussed the results of Seamon's scores on the Minnesota Multiphasic Personality Inventory-II ("MMPI-II") and Millon Clinical Multiaxial Inventory-III ("MCMI-III"). He mentioned that on the MMPI-II "she shows elevation on all of the clinical scales, including an extremely high score on the "schizophrenia" scale. He noted that on the MCMI-III, she shows extreme elevations on several scales including bipolar, anxiety disorder, drug dependence, PTSD, major depression, and negativistic and antisocial personality traits. He further stated that "the test data is of questionable validity due to an apparent tendency to overly emphasize symptoms and problems making it impossible to sort out any specific clinical patterns." He nonetheless concluded that plaintiff "certainly is expressing in effect that she is highly distressed and disturbed." AR 464.

At an October 18, 2002 therapy session with Phillips, plaintiff was tearful and agitated. Plaintiff reported having pain in the back of her neck, sleeping poorly and being "stressed to the max." In the interim between therapy sessions, plaintiff had abruptly stopped taking her Celexa and Xanax, then restarted it within the previous two days or so. Phillips observed that plaintiff contradicted herself and dwelled on her somatic problems and her frustration with doctors whom she regarded as indifferent to her pain and "only in it for the money." AR 382. Phillips described plaintiff as irritable, hyperverbal and tangential. On the basis of plaintiff's presentation and the level of distress she described, Phillips urged plaintiff to check herself into the hospital; plaintiff refused. Phillips observed that plaintiff had multiple risk factors for worsening psychiatric symptoms including abrupt medication discontinuation, chronic and acute pain, severe financial concerns and personality traits that "encourage her to externalize her anger and frustration thereby reducing her possible responsibility for her current state as well as interfering with more proactive problem-solving." AR 381-82.

On October 21, 2002, Phillips described plaintiff as "depressed but stable," although she remained focused on her somatic problems and reported having "severe" mood changes. AR 380. On October 25, 2002, Dr. Bartholow noted that plaintiff was less irritable but was verbose and difficult to derail, moving from subject to subject with a limited interest in the doctor's responses. Plaintiff still had not started taking Depakote. Plaintiff reported financial stress, marital stress and difficulty finding a job. She said she felt comfortable continuing in therapy with Phillips. AR 378.

On November 8, 2002, plaintiff reported feeling much better after starting Depakote, although sleep still was difficult. Plaintiff felt optimistic about her situation and felt that Depakote had improved her mood. Plaintiff appeared more relaxed, more attentive and less anxious. She reported "major comfort" in her work with Phillips. AR 377.

A week later, however, plaintiff left a message for Phillips expressing "a good deal of anger" for what she perceived as him putting words in her mouth. Plaintiff announced that she felt betrayed and that she did not plan to return for further therapy. Phillips concluded that he had no grounds to commit plaintiff involuntarily because she was not an imminent suicide risk. *Id*. As Phillips was discussing plaintiff's case with a colleague, plaintiff telephoned Phillips again. She called him a traitor and stated "I'm sick of this world. Everybody's a turncoat." Plaintiff indicated that she had stopped taking her psychiatric medication and did not plan to return for psychotherapy, indicating that she could not trust anyone anymore. Phillips noted that plaintiff ended the conversation "essentially saying that she had called to 'ream my ass.'" AR 376.

On November 19, 2002, plaintiff saw Dr. Linda Kollross, a psychiatrist whom she had seen before she began treatment with Dr. Bartholow. Plaintiff reported that she was unhappy with her previous therapist because he was unable clearly to diagnose her and she felt as if he had "betrayed her" in some of the notes. Plaintiff reported being on Depakote, Celexa and Xanax and reported that overall, she felt as if the medications had been helpful. Dr. Kollross diagnosed a mood disorder, non-specific, and a probable personality disorder, and referred plaintiff to a therapist. AR 413.

On December 13, 2002, plaintiff was admitted to the hospital after calling police and reporting that she was suicidal. On admission, plaintiff reported that she was feeling more depressed than usual and had impulsively taken some Neurontin tablets that she had at home. Plaintiff related her symptoms to legal problems stemming from a work-related accident and her inability to find a job. Plaintiff was diagnosed as having an agitated depressive episode. Hospital staff administered Remeron to ameliorate plaintiff's complaints of significant sleep problems and anxiety. Plaintiff was discharged on December 15, 2002, in improved condition. AR 521-26.

On December 18, 2002, Dr. Bartholow responded to a mental health questionnaire concerning plaintiff. He reported her current diagnoses as major depressive disorder, recurrent dysthymia, anxiety disorder, PTSD, and chronic pain most likely a pain disorder with associated medical and psychological problems. He noted that plaintiff obsessed about chronic suicidality, and was very anxious, moody, labile and easily agitated. Dr. Bartholow noted that plaintiff described dramatic depressive symptoms, including social withdrawal, isolation, dysphoria and a strong sense of hopelessness. She described very frequent anxiety and panic attacks, thought about past events such as car accidents and "how she has been fired from several different jobs unfairly," and talked about her pain problems repeatedly. Dr. Bartholow noted that although plaintiff professed an inability to function, she did not exhibit significant problems with dress, grooming or hygiene. He reported regressive behaviors including plaintiff's inability to work, strong suspiciousness towards others,

emotional reactivity and difficulty in relationships. Dr. Bartholow reported that plaintiff's response to medication and psychotherapy "seems limited," and she was unlikely to improve given that she had been in similar treatment settings in the past. The doctor found that due to plaintiff's difficultly with social interactions, "she would have a difficult time working both with work stress and tolerating supervision." AR 428-29.

On February 4, 2003, another state agency psychiatrist, Arden Mahlberg, Ph.D., reviewed the record and completed a Psychiatric Review Technique Form. He noted several categories of mental impairment including affective disorder, anxiety-related disorder, and personality disorder. AR 443. He concluded that plaintiff's impairments resulted in moderate limitation in restriction of daily living; moderate difficulties in maintaining social functioning; moderate difficulties in maintaining concentration, persistence, or pace; and no episodes of decompensation. AR 453. Dr. Mahlberg completed a MRFC assessment on which he found that plaintiff has "moderate" limitations in several areas, including her ability to maintain regular attendance and be punctual within customary tolerances; work in coordination with or proximity to others without being distracted by them; complete a normal workday and workweek without interruptions from psychologically based symptoms; accept instructions and respond appropriately to criticism from supervisors; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness. AR 439-440.

From February 16 to February 21, 2003, plaintiff again was committed as a mental inpatient after attempting to kill herself by overdosing on Remeron. Plaintiff reported to Dr. M.M. Ahmed that over the last few weeks she had been extremely depressed and contemplated suicide. She reported that she had been unable to find a job and had problems trusting her psychiatrists, therapists and "the system." Plaintiff reported that her medications had not reduced her anxiety but had caused her to gain weight. Dr. Ahmed observed that plaintiff clearly was depressed with constricted affect. He reported that plaintiff talked about hallucinations in the form of hearing a voice of a woman talking to her. AR 581. Dr. Ahmed adjusted plaintiff's medications during the hospitalization. AR 576.

Thereafter, plaintiff was monitored by Dr. Kollross for medication management and received psychotherapy from Virginia Duerst. AR 556-68. (The records from these visits are sparse and do not document any subjective symptoms or clinical assessments.) The last record of any mental health treatment is from June 18, 2003.

III. Hearing Testimony

A. Plaintiff's Testimony

The ALJ began plaintiff's October 28, 2003 administrative hearing by noting that plaintiff could be represented by an attorney if she wished and that the hearing could be postponed for that purpose. At that point, plaintiff interrupted the ALJ and stated that she was no longer claiming that she was disabled except for the last year and a half. The ALJ

then returned to the issue of counsel, asking plaintiff whether she wanted to have an attorney present. Plaintiff said "No, sir," to which the ALJ replied: "Okay. You are aware that you could have one. All right. That's fine." AR 617-18.

Plaintiff testified that she was seeking disability benefits only for the time period January 1, 2002 to June 2003, noting that after that, she had gone off her psychiatric medications and stopped seeing a psychiatrist and was feeling a "whole lot better." AR 621. At the time of the hearing, however, plaintiff was taking Xanax and Celexa that her family doctor had prescribed, as well as Vioxx and Vicodin on occasion. Plaintiff attributed the severity of her condition during the relevant time period to the different medication regimes attempted by her psychiatrists and her inability to find a job. Plaintiff testified that she had been applying for clerical type jobs and was not getting hired, but denied that her inability to be hired was due to medical reasons. She stated that Botox injections had significantly reduced her neck pain. Plaintiff testified that mentally, she could conduct herself in a way that she had been unable to in the preceding year and was not the "crazy maniacal person" that her psychiatrists had led her to believe she was. She testified, however, that during the preceding year she had been very distressed, hopeless and enraged, had had problems with concentration and memory, had not wanted to leave her home and had been unable to work, due in part to her physical pain.

Among other things, plaintiff testified that she had filed complaints with the state and federal government against Dr. Ahmed, the doctor that treated her when she was

hospitalized in February 2003, for trying to "manipulate her thoughts" and making misstatements in her medical record that made her sound like a "lunatic."

B. Plaintiff's Husband

Plaintiff's husband testified that each fall for the past several years, plaintiff would sink into "deep fits of depression" that lasted through the winter. He reported that although plaintiff had been able to work in the past despite her depression, in recent years it had gotten worse to the point that plaintiff would end up hospitalized. When the ALJ asked whether he agreed that plaintiff's period of disability should end in June 2003, plaintiff's husband responded that he did not know, noting that plaintiff still had quite a bit of pain through the neck and shoulder area, right elbow and legs, and that she still had depression and panic attacks.

C. Medical Expert

Andrew Steiner, M.D., testified as a medical expert. Dr. Steiner identified plaintiff's impairments as a mood disorder; PTSD; neck and shoulder pain related to a December 2001 injury; some degenerative disc disease in the neck with mild loss of range of motion but no neurological deficit; history of fracture of the tibia plateau of the right knee in December 1998 and knee arthroscopy; left knee strain; history of left ulnar nerve transposition in 1990; and asthma. Dr. Steiner testified that none of plaintiff's impairments met or equaled

a listed impairment because there was no documentation of any ongoing neurological loss or severe joint structural changes. He opined that because of her physical impairments, plaintiff would be limited to work in the light exertional range with no repetitive or continuous rotation, extension or flexion of the neck, no more than occasional overhead activities, no more than occasional kneeling or crawling and no exposure to air pollutants.

D. Vocational Expert

Sidney Bauer testified as a VE. The ALJ asked Bauer whether jobs existed in the state of Wisconsin that could be performed by an individual of plaintiff's age, education and work history with the exertional restrictions identified by Dr. Steiner and who was limited to unskilled work requiring no more than superficial contacts with the public and no high production goals. The vocational expert testified that such an individual could perform the job of sales price marker, of which 3,200 jobs existed in the state. She testified that no jobs would be available for an individual who was absent from work more than five times a year.

IV. The ALJ's Decision

The ALJ followed the five-step sequential evaluation process in deciding plaintiff's claim. At step one, he found that plaintiff had not engaged in substantial gainful activity after her alleged onset date of January 1, 2002. At step two, he found from the medical evidence that plaintiff had the following impairments: history of irritable bowel syndrome

and a right fracture tibia; asthma; cervical spondylosis arthritis and degenerative neck disease; myofascial pain with muscle spasms; right carpal tunnel syndrome; right elbow tendinitis; noncardiac chest pain; panic attacks; post-traumatic stress symptoms; major depression; a mood disorder, not otherwise specified; and substance dependency problems with use of marijuana. After finding that this combination of physical and mental impairments significantly limited plaintiff's ability to perform the basic demands of work and were therefore "severe" as that term is defined in the commissioner's regulations, the ALJ found that the impairments singly or in combination did not meet or equal the requirements of any impairment in the Listing of Impairments at Appendix 1, Subpart P, Regulations No. 4.

In reaching this conclusion, the ALJ indicated that he was relying on the testimony of Dr. Steiner. With regard to plaintiff's mental impairments, the ALJ found that plaintiff did not satisfy the "B" criteria of impairment severity because her limitations imposed only moderate limitations in activities of daily living, moderate limitations in social functioning, moderate difficulties in maintaining concentration, persistence and pace, and one or two episodes of decompensation. *See* 20 C.F.R. § 404.1520a and Pt. 404, Subpt. P, App. 1, 12.00 (describing commissioner's procedure for evaluating severity of mental impairments).

The ALJ then assessed plaintiff's residual functional capacity. After conducting a thorough review of the entire record, including the medical evidence, plaintiff's course of treatment, the medical opinions in the record and the testimony of plaintiff and her

husband, the ALJ concluded that plaintiff retained the residual functional capacity for a range of unskilled work not requiring lifting or carrying weight of more than twenty pounds occasionally, ten pounds frequently; no more than six out of eight hours on the feet; no neck flexion, extension or rotation; no more than occasional overhead activities; no more than occasional kneeling or crawling; no exposure to concentrated air pollutants; no high production goals; and no more than brief, superficial contacts with the public.

With respect to the physical RFC assessment, the ALJ stated that he placed significant weight on the testimony of the medical expert, Dr. Steiner. The ALJ indicated that this RFC was consistent with various evidence in the record, including the absence of objective medical evidence showing neurological loss, nerve root compression or severe range of motion loss; Dr. Bodeau's conclusion that plaintiff could work at the medium exertional level with some restrictions; the failure of any other doctor to restrict plaintiff from work activities; and the fact that plaintiff had not required surgery or other invasive treatment for her neck and shoulder pain.

With regard to plaintiff's mental limitations, the ALJ indicated that he was giving significant weight to the opinions of the treating and examining physicians, including Dr. Fuhrer and Dr. Bartholow.

I will review additional aspects of the ALJ's decision in the analysis that follows.

ANALYSIS

I. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not re-evaluate 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. Thus, where conflicting evidence allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). 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).

II. Plaintiff's Waiver of Counsel

A claimant has a statutory right to counsel at a disability hearing. 42 U.S.C. § 406; 20 C.F.R. 404.1700. In *Thompson v. Sullivan*, 933 F.2d 581 (7th Cir. 1991), the Court of Appeals for the Seventh Circuit held that "[i]nformation that will ensure a valid waiver of counsel includes an explanation of the manner in which an attorney can aid in the proceedings, the possibility of free counsel or a contingency arrangement, and the limitation on attorneys' fees to twenty-five percent of past-due benefits plus required court approval of the fees." *Id*. at 584 (citation omitted). It is undisputed that the ALJ failed orally to advise plaintiff of this information at the hearing.

Plaintiff argues that the ALJ's failure to advise her at the hearing of the *Thompson* requirements invalidates her purported waiver. The commissioner responds that the ALJ's omissions were immaterial because prior to the hearing SSA had mailed to plaintiff written notices containing all of the *Thompson* information.

The Court of Appeals for the Seventh Circuit has not squarely decided whether the plaintiff's receipt of written materials that clearly set forth all of the information required by *Thompson* would be sufficient to establish the claimant's knowing waiver of counsel. In *Thompson*, the court noted that although a Notice of Hearing mailed to plaintiff indicated that there was a 25 percent limitation on fees, the notice's language was "not easily decipherable." 933 F.2d at 584. *See also Nelson v. Apfel*, 131 F.3d 1228, 1231 n.1 (7th Cir. 1997) (describing *Thompson* as holding that "[w]here the claimant did not receive

information about his right to counsel before the hearing and the ALJ failed to explain the benefits of counsel and the availability of contingency agreements" claimant's waiver of counsel was not knowing and voluntary).

I conclude that mailing written notices to plaintiff could satisfy the commissioner's burden, but only if the ALJ establishes at the hearing that the claimant received, read and understood the notices. One compound question, followed by a plaintiff's affirmative response, probably would suffice. That did not happen here. The ALJ ascertained only that plaintiff knew she could have an attorney present if she wanted one. Plaintiff did not acknowledge that she had received SSA's forms, and she did not confirm that she understood the ways in which an attorney could help her or the possibility of contingent fee arrangements. Plaintiff's interruption of the ALJ's waiver advisal obviously threw him off-stride, but this should not have prevented him from completing the advisal and or otherwise ensuring that plaintiff's decision to proceed pro se comported with *Thompson*. The ALJ's failure to make the necessary led to an insufficient, and therefore invalid waiver.

When the ALJ does not obtain a valid waiver, the commissioner bears the burden of showing that the ALJ nonetheless fully and fairly developed the record. *Binion*, 13 F.3d at 245. This duty requires that the ALJ "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Thompson*, 933 F.2d at 585. If the commissioner establishes that the record was developed fully and fairly, the plaintiff may rebut this showing by demonstrating prejudice or an evidentiary gap. *Binion*, 13 F.3d at 245.

Plaintiff complains that the ALJ did not fully develop the record with respect to her mental impairments, fibromyalgia and obesity. I disagree. A review of the record shows that the ALJ developed it fully and fairly. The hearing lasted an hour and 26 minutes. The ALJ had before him a voluminous medical record containing the results of a consultative mental examination, a disability questionnaire completed by one of plaintiff's treating psychiatrists, two mental residual functional capacity assessments by state agency physicians, two physical residual functional capacity assessments by state agency physicians and clinical notes from plaintiff's physical and mental health treatment. In addition, the ALJ called a medical expert to review the record and testify at the hearing regarding plaintiff's physical impairments.

The ALJ allowed plaintiff to testify at length about her impairments and he asked relevant follow-up questions pertaining to her assertion that she was no longer disabled, her efforts to obtain work, the reasons she was not getting hired, her limitations during the time period that she was contending she was disabled and the course of her medical treatment. The ALJ provided plaintiff the opportunity to question the medical and vocational experts. The ALJ asked questions of plaintiff's husband about plaintiff's condition and whether he agreed with plaintiff's assertion that she was no longer disabled. The ALJ accepted additional evidence submitted by plaintiff at the hearing and obtained additional medical records after the hearing that plaintiff wanted added to the record. All of this evidence was more than sufficient to allow the ALJ to make a disability determination supported by substantial evidence. *Luna v. Shalala*, 22 F.3d 687, 692 (7th Cir. 1994) (court "generally

respects the ALJ's reasoned judgment" regarding how much evidence needed to make finding about disability).

Because the commissioner has shown that the record was developed fairly and fully, plaintiff may attempt to rebut this showing by establishing that she was prejudiced in some way by the lack of representation, such as by the omission of critical evidence. Plaintiff argues that the ALJ should have attempted to discover more information about plaintiff's "inability to trust others especially her psychiatrists and her belief that taking medications and seeing psychiatrists made her worse." She contends that the ALJ should have "recontacted Mr. Phillips regarding his advice to Seamon regarding the potential dangers of abruptly discontinuing psychiatric medications and to check into the hospital given her level of distress." In other words, plaintiff argues that the ALJ should have attempted to discover more evidence to see if plaintiff really was "better," as she testified at the hearing.

But plaintiff (who now *is* represented by counsel) fails to explain what additional salient information Phillips could have provided or that the ALJ could have discovered. The ALJ found in his decision that plaintiff suffers from mental disorders and that those disorders imposed significant limitations on plaintiff's ability to work. Plaintiff has not provided any reports from Phillips or any other provider to support her suggestion that she "not only continues to suffer from severe mental disorders, but has deteriorated without

treatment." Plaintiff has failed to show that she was prejudiced by her lack of representation at the hearing with respect to her mental impairments.[1]

Plaintiff also contends that the ALJ failed to meet his heightened duty to develop the record by failing to ask her questions about her fibromyalgia or obesity. This argument is a nonstarter. Plaintiff points to two pieces of evidence in the record that she claims indicate that she has been diagnosed with fibromyalgia: 1) a single note by a Dr. Wright, who on October 9, 2003 questioned whether plaintiff's reported left arm and trapezius pain might be a "fibromyalgia-type" pain and; 2) the report of one of the state agency physicians, who listed "fibromyalgia" as one of plaintiff's impairments.

However, no doctor who treated plaintiff diagnosed her with fibromyalgia, treated her for it, referred her to a rheumatologist, or performed any clinical or laboratory tests to determine whether any of the common indicators of the disease (such as tenderness in the identified trigger points) were present. Indeed, Dr. Steiner, the medical expert called by the ALJ to opine regarding plaintiff's physical impairments, did not identify fibromyalgia as one of them. Plaintiff points to various symptoms peppered throughout the record that she contends support such a diagnosis, such as irritable bowel and muscular tenderness, but

[1] That said, plaintiff is on more solid ground when she contends that the ALJ should not have *accepted* her testimony that she was no longer disabled in light of evidence *already* in the record showing that plaintiff's cessation of her medications and mental health treatment in truth was a *symptom* of her mental illness, *not* a sign of improvement. I address this argument later.

absent the supporting opinion of a medical professional, her attempts to diagnose herself amount to"playing doctor," which is improper and unpersuasive.

It is well-settled that an ALJ need not evaluate in writing every single piece of evidence in the record. *Zalewski v. Heckler*, 760 F.2d 160, 166 (7th Cir. 1985). Here, in light of the extremely scant evidence that plaintiff has fibromyalgia, the ALJ did not err by failing to discuss it or identify it as one of plaintiff's impairments. Even if plaintiff did have fibromyalgia, she fails to explain what she would have told the ALJ if he had asked her about it at the hearing, or what additional limitations beyond those found by the ALJ were caused by her alleged fibromyalgia.

The same goes for plaintiff's obesity. Plaintiff points out that she testified that she is 5' to 5'½" tall and weighs 202 pounds, equal to a BMI of 38.2 to 39.4. The SSA recognizes this BMI as Level II obesity, the middle of three levels, and the commissioner is to consider the effects of obesity at several points in the five-step process. Soc. Sec. Ruling 02-p. Plaintiff argues that the ALJ did not adequately develop the record because he failed to ask any questions about her obesity and failed to make any findings as to how it affects her other impairments.

Even assuming that the ALJ should have been alerted by plaintiff's reported height and weight to consider her obesity in combination with her other impairments, remand would not be warranted. As with her alleged fibromyalgia, plaintiff has not explained how her obesity further impaired her ability to work and has not explained what she would have

told the ALJ about her obesity had he asked her about it at the hearing. Moreover, as plaintiff points out, one of the state agency physicians noted obesity as one of plaintiff's impairments; this physician nonetheless concluded that plaintiff retained the ability to perform light work. AR 288-95. It is worth noting that this is the same physician who indicated that plaintiff has fibromyalgia. The ALJ noted in his opinion that he considered the reports from the state agency physicians and found them "generally consistent with the overall evidence of record." Thus, although the ALJ did not explicitly consider plaintiff's obesity or alleged fibromyalgia, they were factored indirectly into his decision as part of the doctor's opinion. Because explicit consideration of plaintiff's obesity or fibromyalgia would not change the outcome of this case, remand is not warranted. *Accord Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir. 2004) (remand for explicit consideration of plaintiff's obesity not warranted where plaintiff merely pointed out that ALJ failed to mention obesity but did not explain how obesity would have affected step-five analysis).

In sum, even giving plaintiff the benefit of the doubt and finding her waiver of counsel to be invalid, remand is not warranted. The commissioner has met her burden of showing that the ALJ fully and fairly developed the record. Plaintiff has failed to rebut this showing with any evidence, much less evidence that shows a prejudicial gap in the record requiring further development.

III. Residual Functional Capacity Assessment and the Corresponding Hypothetical

As already noted, the ALJ concluded that plaintiff has the residual functional capacity to perform unskilled work not requiring lifting or carrying weight of more than twenty pounds occasionally and ten pounds frequently; no more than six out of eight hours on the feet; no neck flexion, extension or rotation; no more than occasional overhead activities; no more than occasional kneeling or crawling; no exposure to concentrated air pollutants; no high production goals; and no more than brief, superficial contacts with the public.

Plaintiff does not challenge the ALJ's assessment of her physical abilities in any way except to argue generally that the ALJ failed to account for limitations imposed by her fibromyalgia and obesity. However, as just explained, plaintiff has failed to articulate just what those limitations are. It is not enough for plaintiff merely to point to symptoms documented in the medical records that are consistent with fibromyalgia or obesity without explaining how those symptoms are inconsistent with the ALJ's conclusion that she can perform a limited range of light work. Plaintiff's unsupported contentions aside, the ALJ's assessment of plaintiff's physical residual functional capacity is supported by substantial evidence insofar as it is consistent with the objective medical evidence, plaintiff's reported symptoms and all the medical opinions in the record, including that of Dr. Steiner and plaintiff's treating physician, Dr. Bodeau.

Plaintiff focuses mostly on the ALJ's mental RFC assessment, namely that she is capable of performing unskilled work requiring only infrequent contact with the public and

no high production demands. Plaintiff's argument is not always clear, but it appears to have two threads: 1) The ALJ erred as a matter of law by failing to incorporate in his RFC assessment and corresponding hypothetical question to the VE each of the "moderate" limitations found by the state agency physicians on their MRFC forms; and 2) Even if the ALJ's mental RFC assessment is valid on its face, it is not supported by substantial evidence in the record.

I agree with plaintiff on the second point; therefore, it is unnecessary to decide her first point. However, because the question to what extent the ALJ's mental RFC assessment must "mirror" credited findings by state agency physicians is one that arises frequently and has been discussed in recent decisions by this court, it is worth addressing now in the hope of offering guidance to the commissioner and future SSI plaintiffs in this court.

Plaintiff's contention that the ALJ's hypothetical must include all of the "moderate" limitations identified by the state agency psychologists is founded on the Seventh Circuit's opinions in *Kasarsky v. Barnhart*, 335 F.3d 539 (7th Cir. 2003) and *Young v. Barnhart*, 362 F.3d 995 (7th Cir. 2003). In both cases, the court criticized the ALJ for failing to include in his hypothetical question mental limitations that the ALJ had credited in his decision. *Kasarsky*, 335 F.3d at 544; *Young*, 362 F.3d at 1002.

In *Kasarsky*, the ALJ's hypothetical to the vocational expert asked if there was work available to a claimant who "because of borderline intelligence . . . was serious[ly] limited, but not precluded from understanding, remembering, and carrying out detailed instructions."

Id. at 544. In remanding the case to the commissioner, the court found nothing in the ALJ's hypothetical description of plaintiff's limitations that took into account the ALJ's own earlier observation that the plaintiff suffered from frequent deficiencies of concentration, persistence, or pace. As the court explained:

> Perhaps the ALJ thought that even with frequent deficiencies of this type, Kasarsky could still carry out detailed instructions in a way that would satisfy a potential employer. But we have no way of knowing that, and it is equally possible that [the vocational expert] might have found that there were no jobs for someone with (a) limited exertional abilities, (b) borderline intelligence, *and* (c) frequent deficiencies of concentration, persistence or pace. Employers are entitled to demand that their employees stick with the job, once they have been trained to do it; the length of time it takes someone with [a mental impairment] to learn a job is not the same as the ability of that person to perform consistently once trained. The ALJ's failure to incorporate the latter kind of limitation, fully supported by this record, in the hypotheticals he posed to the vocational expert requires us to remand this case for further proceedings.

Id.

In *Young*, the ALJ concluded that Young "had the residual functional capacity to perform the nonexertional requirements of simple, routine, repetitive, low stress work with limited contact with coworkers and the public." 362 F.3d at 1002. The court found the RFC flawed because it "says nothing of limiting contact with supervisors" and failed to reconcile evidence indicating that Young "will have difficulty accepting instruction and criticism from others on the one hand and the fact that he has difficulty making plans independently and setting realistic goals on his own on the other hand." *Id*. In *Young*, as in

this case, some of that evidence came in the form of "moderate" limitations endorsed by state agency physicians.

Perhaps the ALJs in *Kasarsky* and *Young* would have been on solid ground had they included each and every moderate (or greater) mental limitation found by the state agency physicians, but in neither case did the court find that the ALJ's RFC assessment and corresponding hypothetical was flawed for having failed to do so. Rather, the court found that the ALJ had failed to formulate an RFC that made clear that the ALJ had in fact accounted for all of the mental limitations credited by the ALJ and supported by medical evidence in the record.

In *Young*, a case from this court, both this court and the court of appeals criticized the manner in which the ALJ phrased his RFC and hypothetical, noting that in limiting plaintiff to "simple, routine, repetitive, low stress work with limited contact with coworkers and the public," the ALJ was purporting to tell the vocational expert what types of work Young could perform rather than setting forth Young's limitations and letting the vocational expert draw his own conclusion. *Young*, 362 F.3d at n.4. However, neither court concluded that this misstep warranted reversal. This court found the error harmless and the court of appeals declined to decide the question in light of its conclusion that the hypothetical was "fatally flawed" for other reasons. *Id*.

In an opinion and order addressing Young's petition for EAJA fees, this court stated that it was "likely to be less charitable to the commissioner in future cases involving

hypotheticals phrased in terms of types of work rather than vocational limitations." *Young v. Barnhart*, 2004 WL 1946423, *6 (W.D. Wis. Aug. 30, 2004), *rev'd and remanded*, 2005 WL 1140287 (7th Cir. May 10, 2005). However, in a subsequent case, this court reviewed the case law and concluded that

> There does not appear to be a consensus among the circuits or within the Seventh Circuit regarding whether it is proper for an administrative law judge to phrase his mental residual functional capacity and corresponding hypothetical in terms of the work a plaintiff can perform, for example, 'simple, unskilled, low stress work,' as opposed to simply setting forth plaintiff's limitations and allowing the vocational expert to conclude on his own what types of work plaintiff can perform.

Kusilek v. Barnhart, 2005 WL 567816, *4 (W.D. Wis. March 2, 2005).

For example, in *Johansen v. Barnhart*, 314 F.3d 283, 288-89 (7th Cir. 2002), two consulting psychologists concluded that plaintiff had "moderate" mental limitations in three of the 20 work-related areas of mental functioning listed on the SSA's mental RFC form. One of those psychologists, Dr. Matkom, translated those findings into a specific RFC assessment, concluding that the plaintiff had the mental RFC to perform low-stress, repetitive work. When presented with a hypothetical that included the moderate limitations, the vocational expert testified that these limitations would preclude gainful employment; however, when asked whether there were jobs for an individual who could perform repetitive, low-stress work, the vocational expert identified a significant number of jobs in the regional economy. The ALJ relied on this latter testimony in finding that plaintiff was not disabled. The court of appeals affirmed, explaining:

> The ALJ did not err in relying on Dr. Matkom's assessment of Johansen's mental RFC. Both Dr. Matkom and Dr. Berney found that Johansen was essentially "moderately limited" in his ability to maintain a regular schedule and attendance, and in his ability to complete a normal workday and workweek without interruptions from psychologically-based symptoms. Dr. Matkom, however, went further and translated those findings into a specific RFC assessment, concluding that Johansen could still perform low-stress, repetitive work. Dr. Berney, on the other hand, did not make an RFC assessment (nor did state-agency physician Ingison). Thus, because Dr. Matkom was the only medical expert who made an RFC determination, the ALJ reasonably relied upon his opinion in formulating the hypothetical to present to Goldsmith.

Id. at 289.

In *Jens v. Barnhart*, 347 F.3d 209, 212-13 (7th Cir. 2003), the court deemed acceptable the ALJ's RFC finding that plaintiff could perform semiskilled work, notwithstanding the ALJ's finding in his decision that plaintiff "often" had deficiencies in concentration, persistence, or pace. And in *Sims v. Barnhart*, 309 F.3d 424, 431 (7th Cir. 2002), the court approved an ALJ's conclusion that the plaintiff retained the mental RFC to perform "simple and repetitive" work. *Accord Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001) (hypothetical concerning someone capable of simple, repetitive, routine tasks adequately captured plaintiff's deficiencies in concentration, persistence or pace described as "often" by the State agency psychological consultant); *Smith v. Halter*, 307 F.3d 377, 378-79 (6th Cir. 2001) (hypothetical limiting plaintiff to jobs that were routine and low stress, and did not involve intense interpersonal confrontations, high quotas, unprotected heights,

or operation of dangerous machinery adequately accounted for ALJ's finding that plaintiff "often" had problems concentrating).

As the court explained in *Kusilek*, the lesson of these cases is

> that an administrative law judge is free to formulate his mental residual functional capacity assessment in terms such as 'able to perform simple, routine, repetitive work' so long as the record adequately supports that conclusion.

Kusilek, 2005 WL 567816, *4.[2]

Accordingly, notwithstanding the red flag hoisted in *Young*, this court should reject plaintiff's challenge to the form of the ALJ's mental RFC finding and focus on its substance namely whether the ALJ's RFC and corresponding hypothetical incorporated all of plaintiff's limitations supported by medical evidence in the record. *Young*, 362 F.3d at 1003; *Kasarsky*, 335 F.3d at 543.

Evaluating the ALJ's mental RFC and corresponding hypothetical in this light, I conclude that they fail to account satisfactorily for all of plaintiff's mental limitations. In particular, the ALJ's decision is internally inconsistent with respect to plaintiff's difficulties

[2] The commissioner's ruling concerning residual functional capacity, SSR 96-8p, does not clearly set forth how an ALJ should explain mental RFC. By contrast, when the rule for assessing physical RFC, is straightforward: the ALJ first must determine the claimant's ability to sit, stand, walk, lift, carry, push and pull before assigning an exertional category, *e.g.*, sedentary, light, medium, heavy. 61 Fed. Reg. 34474, 34477 (July 2, 1996). SSR 96-8p contains no similar directive regarding the manner in which an ALJ may translate mental RFC into categories, or otherwise express it in shorthand fashion. *Id*. (noting that ALJ must consider claimant's nonexertional limitations and explaining that "work-related mental activities generally required by competitive, remunerative work include the abilities to: understand, carry out, and remember instructions; use judgment in making work-related decisions; respond appropriately to supervision, co-workers and work situations; and deal with changes in a routine work setting.").

relating to and trusting others. The ALJ indicated in his decision that he was giving significant weight to the opinions of Dr. Fuhrer and Dr. Bartholow. Dr. Fuhrer observed that plaintiff "quickly escalates with rage" and Dr. Bartholow described plaintiff as "easily agitated and very labile," with a limited ability to relate beyond talking about her chronic pain. Both Dr. Fuhrer and Dr. Bartholow opined that plaintiff would have a difficult time tolerating supervision; Dr. Fuhrer also questioned whether she could respond appropriately to coworkers. Plaintiff's prickly temperament and mistrust of others are further evidenced by her sudden dismissal of her therapist for allegedly "putting words in her mouth" and by plaintiff blaming her psychiatrists for her mental health problems.

The ALJ appears to have credited the evidence related to plaintiff's difficulties relating to others insofar as he found in his assessment of the "B" criteria of plaintiff's mental impairments that plaintiff's impairments imposed a moderate limitation in her social functioning. However, when assessing plaintiff's mental residual functional capacity, the ALJ included only a limitation that she have brief, superficial contact with the public without explaining why plaintiff's difficulty with social interactions would not also affect adversely her ability to relate to supervisors and coworkers. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1 12.00 C 2. ("Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority (e.g. supervisors), or cooperative behaviors involving coworkers.") Plaintiff's temperament would not be problem limited solely to public contact; to the contrary, plaintiff's volatility suggests that she would be even more

limited in her ability to relate to supervisors and other workers. Yet the ALJ included no such limitations in his RFC or corresponding hypothetical to the vocational expert.

Defendant attempts to salvage the ALJ's faulty RFC and hypothetical by proposing a number of reasons why the ALJ *might* have properly found that plaintiff was not severely limited in her ability to relate to coworkers or supervisors, but the bulk of her arguments simply are a *post-hoc* rationale found nowhere in the ALJ's decision. *See Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002) (court's review of ALJ's analysis of evidence is limited to reasons supplied by ALJ).

For example, defendant argues that Dr. Fuhrer's report did not warrant a limitation on contact with coworkers and supervisors because Dr. Fuhrer indicated only that it was "questionable" whether plaintiff could respond appropriately to coworkers and supervisors. She argues that the ALJ's implicit conclusion that plaintiff was not significantly limited in this area is supported by plaintiff's testimony that she was looking for clerical work and her statement on her resumé that she was a "team player." Not so: th ALJ did not articulate or imply such a thought process, nor may it reasonably be inferred from his opinion. Indeed, if the ALJ *had* relied on plaintiff's own assessment of her abilities as evidence that she was not significantly limited in her ability to relate to coworkers and supervisors, then presumably he would have found that plaintiff also had no limitation on her ability to relate to the public, because several of the jobs for which plaintiff applied were customer service and reception positions. AR 165, 166, 168.

Defendant also argues that the ALJ could discount Dr. Fuhrer's opinion in light of his subsequent report in which he indicated that plaintiff had exaggerated her symptoms during objective testing. Again, however, the ALJ never articulated this reasoning in his decision. Moreover, this argument ignores Dr. Fuhrer's statement that in spite of the unreliability of plaintiff's test results, they showed that plaintiff was "highly distressed and disturbed;" he also directly observed that plaintiff was quick to become enraged.

Defendant suggests that the ALJ reasonably accounted for plaintiff's limitations in her ability to relate to coworkers and supervisors by limiting her to "unskilled" work, which involves "working with things rather than with people." There is nothing in the definition of unskilled work to suggest that it requires so little interaction with coworkers or supervisors as to render limitations in these areas irrelevant. To the contrary, the commissioner's rulings make clear that an ability to respond appropriately to "supervision, co-workers and usual work situations" is one of the requirements of competitive, remunerative, unskilled work. Soc. Sec. Ruling 96-9p. *Accord Young*, 362 F.3d at 1004 (finding RFC that limited plaintiff to "simple, routine, repetitive, low stress work with limited contact with coworkers and limited contact with the public" deficient because it failed to account for substantial evidence in record indicated that plaintiff had problems responding appropriately to criticism from supervisors).

Finally, the commissioner points out that none of the mental health professionals who examined or treated plaintiff offered the opinion that plaintiff was permanently disabled or

unable to work because of her impairments. (In fact, when plaintiff presented him with disability papers, Dr. Bartholow told plaintiff that he could not support her claim for disability on the basis of mental impairments alone.) However, under the commissioner's regulations, the ALJ, not the claimant's doctors, is responsible for deciding whether the claimant is disabled. 20 C.F.R. § 404.1527(e)(1). At step five of the sequential evaluation process, that administrative determination depends on the interplay between plaintiff's mental and physical limitations and vocational considerations including age, education and work history. There is nothing in the record to suggest that Dr. Bartholow or plaintiff's other treating and examining physicians were qualified to make this determination or that they were asked to do so. The fact remains that both Dr. Bartholow and Dr. Fuhrer reported that plaintiff had mental limitations that would adversely affect her ability to work. Having found the reports of the doctors to be credible, the ALJ was obliged to account for those limitations in his RFC assessment.

After carefully reading the ALJ's decision, I can discern no reason why the ALJ accounted for plaintiff's social difficulties and temperament problems in his RFC only by finding that she was limited in her ability to deal with the public without also finding that plaintiff was limited in her ability to interact with supervisors or co-workers. Moreover, no reason for drawing such a distinction is discernable from the record. Even assuming, *arguendo* that the record supported the commissioner's contention that plaintiff is only "moderately" limited in her ability to relate to supervisors and other workers, I would be unable to find

that substantial evidence supports the ALJ's conclusion that plaintiff is not disabled because his decision fails to build an accurate and logical bridge between those limitations and his RFC. "Although the ALJ need not discuss every piece of evidence in the record, he must confront the evidence that does not support his conclusion and explain why it was rejected." *Indoranto v. Barnhart*, 374 F.3d 470, 474 (7th Cir. 2004) (citations omitted); *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986) ("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") (citation omitted). The ALJ's failure to do that in this case leaves this court without a basis for concluding that his decision is supported by substantial evidence.

The ALJ's concluded that plaintiff is not disabled based on the VE's responses to hypothetical questions that were based on the flawed RFC. Accordingly, the ALJ's decision cannot stand. "When the hypothetical question is fundamentally flawed because it is limited to the facts presented in the question and does not include all of the limitations supported by medical evidence in the record, the decision of the ALJ that a claimant can adjust to other work in the economy cannot stand." *Young*, 362 F.3d at 1005.

For this reason I am recommending remand to the commissioner for further proceedings consistent with this opinion.

IV. Credibility Assessment

A. Plaintiff's Alleged "Improvement" and Failure to Pursue Mental Health Treatment

Plaintiff argues that the ALJ erred insofar as he appears to have relied on her testimony that her condition had improved as a basis for denying her claim. I agree. Although there is nothing in the ALJ's decision to suggest that he limited his consideration of the evidence to the time period before June 2003 or considered only whether plaintiff was entitled to a "closed" period of benefits, the ALJ mentioned plaintiff's testimony that she had stopped taking psychotropic medications and seeing a psychiatrist and "has gotten better" at several places in his decision. First, the ALJ noted plaintiff's testimony in the context of his discussion of plaintiff's use of medications. The ALJ found that

> there is no indication that her medications have not been adequate in controlling her symptoms, especially when she is compliant. Unfortunately, because of the claimant's noncompliance with medications, in particular her refusal to start Depakote right away, her tendency to abruptly discontinue her psychiatric medications and her substance dependence issues with marijuana usage, the claimant's physicians have found it problematic to treat and manage her various symptoms . . . At the hearing, the claimant candidly admitted that following her hospitalization in February 2003, she stopped taking her psychiatric medications and she has been getting better. She testified that she could conduct herself in a way that she could not do a year ago . . .

AR 26.

The ALJ referred to plaintiff's testimony again in the context of his discussion of plaintiff's course of medical treatment, noting:

> It is significant to note that the claimant has not been consistent with her follow-up examinations, especially her psychiatric and psychological sessions, or with treatment recommendations . . . At the hearing, the claimant admitted that since June 2003, she has not seen a psychiatrist. She quit going to her psychiatrist. She asserted she could conduct herself in a way that she could not do a year ago. Thus, there is no indication that the claimant required anything more than the treatment she has received thus far. Thus, the undersigned finds that there is nothing associated with the course of the medical treatment which would preclude the performance of work within the residual functional capacity arrived at above.

Id.

Clearly, the ALJ was not merely "reciting" plaintiff's testimony in these passages, as the commissioner suggests. Rather, the ALJ was relying on her testimony to establish one of two points: 1) Plaintiff had not complied with recommended treatment, and therefore her subjective complaints were not credible; or 2) Plaintiff's condition had improved in June 2003 and therefore she was not disabled at least for a portion of the time period covered by the ALJ's decision.[3] Under either scenario, the ALJ's decision is flawed.

[3] The ALJ twice mentioned plaintiff's testimony that "she could conduct herself in a way that she could not do a year ago." If the ALJ was relying on plaintiff's testimony about cutting off her mental health treatment merely as evidence of noncompliance, then this statement was superfluous. The ALJ's reference to plaintiff's testimony regarding her ability to conduct herself suggests that the ALJ did find in fact that plaintiff's condition had improved. In any case, it is not necessary to resolve this issue conclusively in light of my conclusion that the ALJ erred in relying on plaintiff's testimony for any reason.

If the former, then the ALJ failed to consider that plaintiff suffers from a mental impairment (characterized in part by an inability to trust others, including her doctors) that would keep her from obtaining needed psychiatric treatment. *See* Soc. Sec. Ruling 96-7p (ALJ must consider "information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment"); *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir. 1989) ("it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation").

If the latter, then the ALJ erred for largely the same reason. The record shows that plaintiff's mental condition is characterized in part by passive-aggressive behavior, a high degree of suspiciousness towards others and a tendency to blame her doctors, former employers and "the system" for her current state. Plaintiff has accused at least two of her doctors of "putting words in her mouth" and misreporting things in their clinical notes, going so far as to have filed a formal complaint against one of them. Plaintiff's doctors advised her not to stop her medications or her psychotherapy. In light of this evidence, it would have been improper for the ALJ to accept at face value plaintiff's un-counseled assertion that ceasing mental health treatment (against medical advice) actually had improved her mental condition.

It is not clear how much weight the ALJ gave to plaintiff's testimony or for which purpose he relied on it when concluding that plaintiff was not disabled. However, it is clear that the ALJ did rely on that testimony. Accordingly, I recommend that on remand, the

commissioner be directed to reconsider plaintiff's claim without deeming plaintiff's cessation of mental health treatment to be direct evidence of her improvement, or to be impeachment of her subjective complaints.

B. Plaintiff's Work History

Finally, as part of her challenge to the ALJ's credibility assessment, plaintiff complains that the ALJ erred when considering her work history. This is the relevant passage from the ALJ's decision:

> The undersigned must also consider the claimant's work history. The record indicates that the claimant has a long work history beginning in 1968 and ending in 2002. During this period, she had eleven years of insignificant reported earnings and seven years of zero reported earnings. Since being let go from her employment in 2002, the claimant has applied and sought other employment positions without any results. However, she has not sought the expertise or help of Division of Rehabilitation Services in her job searches so that she could be retrained or find employments that are compatible with her level of functioning. Instead, she filed a workers' compensation claim against her former employer and reportedly received $5,000 in settlement money. In June 2002, she filed for social security disability insurance benefits. At the hearing, the claimant acknowledged that she thought her disability had ended and she wanted to find work. She stated she would like to take refresher computer courses. Since she has gotten better, she has not sought out Division of Rehabilitation Services. Thus, the undersigned finds that there may be an element of economic disincentive which prevents the claimant from searching and obtaining full-time employment. Therefore, the claimant's work history may not be used to bolster her credibility in regard to her claim for public disability benefits.

AR 27.

Citing *Sarchet v. Chater*, 78 F.3d 305, 308 (7th Cir. 1996), plaintiff contends that "the Seventh Circuit has found that earnings are not an appropriate basis for a credibility finding." However, a review of *Sarchet* shows that the court made no such global finding. Although the court criticized the ALJ for finding Sarchet not credible in part because she had an extremely poor work history, this was only one of several findings made by the ALJ in that case which indicated to the court that the ALJ had "an unshakable commitment to the denial of [Sarchet's] claim." *Id*. at 308-09. In particular, the court found that in addition to having a "pervasive misunderstanding of [fibromyalgia]", the ALJ had made a number of "unfounded sociological speculations which bespeak a lack of imagination concerning the lives of many of the people who apply for social security disability benefits." *Id*. at 308. With respect to plaintiff's limited earnings, the court noted that the ALJ's reasoning failed to account for plaintiff's "long list of medical ailments," numerous medications and limited education, which made her unemployable if not disabled. Id.

Read in the context of the egregious facts in play in *Sarchet*, the court's criticism of the ALJ's consideration of Sarchet's earnings history cannot be read as announcing a ban on ALJs considering a claimant's work history as a factor relevant to credibility. To the contrary, the commissioner's rulings specify that an ALJ may consider a claimant's work history in evaluating the claimant's credibility. Soc. Sec. Ruling 96-7p. The lesson of *Sarchet* is that an ALJ should not assume that a claimant's poor work history is evidence of goldbricking without first exploring other salient factors.

There is no evidence in this case that the ALJ in this case had an "unshakable commitment" to denying plaintiff's claim or was engaging in unfounded sociological conjectures. In fact, from the tenor of the ALJ's discussion, it appears that he was not relying on plaintiff's work history as a basis for rejecting plaintiff's credibility but rather was noting that her work history did not necessarily *bolster* her credibility, as plaintiff had alleged at the hearing. Overall, it appears that plaintiff's work history played only a minor role in the ALJ's ultimate disability determination. Accordingly, I see no basis to overturn this aspect of the ALJ's decision.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the decision of the Commissioner of Social Security denying plaintiff Margaret Seamon's application for Disability Insurance Benefits be REVERSED AND REMANDED for further proceedings consistent with this opinion pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 29th day of July, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 29, 2005

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Re: Seamon v. Barnhart
Case No. 05-C-013-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 19, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 19, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge