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

CHARLES SMITH,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

05-C-0026-C

This is an appeal of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Charles Smith, who suffers from hip dysplasia, arthritis and obesity, challenges the commissioner's determination that he is not disabled and therefore not entitled to disability insurance benefits or supplemental security income under the Social Security Act, 42 U.S.C. §§ 416, 423, 1381a and 1382c. Plaintiff contends that the commissioner's decision is not supported by substantial evidence because the administrative law judge who decided his claim at the administrative level: 1) failed properly to evaluate evidence indicating that plaintiff has a medical condition satisfying the criteria of a musculoskeletal impairment listed in Appendix 1, 20 C.F.R., Pt. 404, Subpt. P; 2) made an improper credibility determination; and 3) failed properly to account for all of plaintiff's limitations when assessing his residual functional capacity and when concluding that plaintiff was capable of performing a significant number of clerk/receptionist jobs. For the reasons set forth below, I am recommending that this court reject plaintiff's arguments and affirm the decision of the commissioner.

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 he is under a disability. The Act defines "disability" as 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*.

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 the claimant 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).

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

FACTS

I. Procedural History

On August 16, 2001, plaintiff filed applications for disability insurance benefits and supplemental security income under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 416, 423, 1381a and 1382c, claiming that he became disabled on July 19, 2001, due to hip dysplasia and severe rheumatoid arthritis of the hips. His applications were denied initially and on reconsideration. At plaintiff's request, an administrative law judge (ALJ) held a hearing on October 8, 2002, at which plaintiff and a vocational expert testified. On February 5, 2003, the ALJ issued a decision finding that plaintiff was not disabled because he 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. Background and Medical Evidence

Plaintiff was born on January 6, 1970, making him 33 years old at the time of the hearing. He is 6'1" and approximately 350 pounds. He attended school until the 11th grade, meaning that he has a "limited education" per the commissioner's regulations. 20 C.F.R. § 404.1564. His past work experience includes employment as a telemarketer, a bus driver, a medical transporter, an assembler, a press operator, and a dish washer. At the time of the hearing, plaintiff worked only part-time doing office work where his earnings did not qualify as substantial gainful work activity.

Plaintiff suffers from bilateral hip dysplasia, a congenital abnormal formation of the hip joint in which the femoral head is not stable in the hip socket. When detected and treated early, the condition can be corrected. Left untreated, however, as in plaintiff's case, the condition leads to pain, decreased agility and osteoarthritis. *See* http://www.mayoclinic.com.

On November 15, 1989, when plaintiff was 19 years old, plaintiff saw Dr. Arnold Rosenthal and physician assistant Kim Johnson. Plaintiff reported worsening pain in his hips and lower back. He was employed as a food preparer. Physical exam and x-rays were consistent with bilateral congenital hip dysplasia. Plaintiff weighed 210 pounds. Dr.

Rosenthal and Johnson recommended that plaintiff refrain from any kind of heavy labor and lose weight to increase the longevity of his hips, indicating that there was no treatment available at the time for plaintiff's hip problems. They predicted that plaintiff would have to undergo bilateral hip replacements at a young age. AR 125.

About three years later, on August 31, 1992, plaintiff returned, reporting increasing hip pain over the past six to eight months. Plaintiff was performing odd jobs through the Department of Vocational Rehabilitation under a 25-pound lifting restriction. Dr. Rosenthal and Johnson recommended that plaintiff find a sedentary job, lose weight, and begin swimming for exercise. They also prescribed Relafen, an anti-inflammatory. They concluded that plaintiff was not yet a candidate for hip replacement surgery because he was too young. AR 122.

On April 19, 2001, plaintiff saw Dr. Rosenthal again, reporting pain in his hips radiating down the front of his legs past his knees into his feet. He weighed 304 pounds. Plaintiff reported that sometimes the pain became excruciating for days at a time. Plaintiff stated that the pain interfered with his job as the driver of a medical transport vehicle, causing him sometimes to stop and get out of the vehicle because of the pain. Plaintiff said that neither 800 milligrams of ibuprofen nor Relafen provided pain relief. X-rays showed bilateral congenital hip dysplasia with moderate degenerative arthritis of both hip joints that was somewhat more advanced as compared to x-rays from 1994. Plaintiff walked with a stiff abducted gait and had limited range of motion in the hips, although reflexes and sensation

were normal. Dr. Rosenthal recommended continued conservative treatment but indicated that hip replacement surgery could be an option as early as 10 more years. AR 112-13.

On August 3, 2001, Dr. Rosenthal wrote a letter indicating that plaintiff's hip dysplasia caused "significant limitations due to pain, poor mobility, and the inability to stand or walk for long periods." AR 111.

On November 9, 2001, plaintiff saw Dr. Robert Penn for a consultative examination. Plaintiff weighed over 350 pounds. He reported that he had been obese all his life but had continued to gain weight as his mobility had decreased. He told Dr. Penn that he had been compelled to quit his medical transport job because of daily back and hip pain. Plaintiff was taking Naprosyn for the pain. Dr. Penn noted that plaintiff walked with a limp and did not move his right leg very well. Dr. Penn reported that plaintiff "can't ambulate or stand for extended distances. He can't even sit for long periods because of hip and back pain." He noted that plaintiff's weight contributed to his problems. AR 135.

On November 26, 2001 and again on March 18, 2002, state agency consulting physicians reviewed plaintiff's record. They concluded that plaintiff retained the residual functional capacity to perform the exertional demands of sedentary work.

In April 2002 and in again September 2002, Dr. Penn examined plaintiff. In a letter to plaintiff's attorney dated September 24, 2002, Dr. Penn opined that because of his hip dysplasia, plaintiff had "marked difficulty ambulating," indicating that "[w]alking around an average size grocery store or around the block would be difficult." Dr. Penn opined that

plaintiff would have difficulty squatting. He noted that plaintiff was taking Naprosyn and Tylenol for pain, which provided some relief "as long as he does not walk an extended distance or do stair climbing." Dr. Penn noted that plaintiff was not using a walking assistance device at the time. AR 148-49.

III. Plaintiff's Testimony at the Administrative Hearing

At his administrative hearing on October 8, 2002 hearing, plaintiff explained that he was born with hip dysplasia and that he first started to notice real pain about 13 years prior (that is, around 1989). AR 182. Plaintiff said that his main problem was that he could not "ambulate the way I should, or move around the way I should. And it's really - - it really gets to me after a while, especially standing, or walking, or picking up - - I can't pick up - - I can't pick anything up and walk with it." *Id*. Plaintiff testified that his hip problems had worsened since 1995, causing more pain and less mobility. AR 184. However, plaintiff's doctors had told him that he is not eligible for hip replacement surgery for roughly another 12 years primarily because of his relatively young age. AR 185.

Plaintiff testified that he lived at home with his wife, two children and his mother-in-law. AR 175. At the time of the hearing, plaintiff was working four hours a day with a medical transport company, answering telephones, taking messages and doing light office work. AR 177. Plaintiff began the job 8 days before the hearing. Before that, he had worked one month as a part-time telemarketer. *Id*. Plaintiff testified that when he was not

at work, he was home with his children, aged 11 and 12, while his wife worked a second shift job. Plaintiff reported that his activities during this half of his day depended on how he felt. AR 194. Most of the time when he returned home from work, he needed to stretch out: "I just get to that point where I can't even sit, and I need to lie flat." AR 194. Plaintiff cooked a bit with his children acting as his "feet," retrieving items from the refrigerator and cupboard so that he could work at the table. AR 191.

Plaintiff estimated that he could stand for no more than 15 minutes, walk about half a block and could sit for about 30 minutes so long as he could move around in his seat. Plaintiff testified that his leg buckled occasionally, causing him to fall down at least once or twice a month. Plaintiff testified that if he overexerted himself, such as by trying to mow the lawn with the tractor, then he would have two or three days where he had to rest in the recliner with his feet up. AR 189.

Plaintiff testified that he purchased a wheelchair, a walker, and an elevated toilet seat that had been prescribed by his family physician. Plaintiff used the wheelchair during outings with his children, such as to the fair, plays and football games, "depending on the length and distance I'm going to have to walk to get from - - where I needed to be." AR 188. He used the walker around his home if he was having a "really bad day." AR 189.

Plaintiff testified that he had not followed through on his doctor's suggestion to swim for exercise, indicating that he could not afford the cost of a swimming membership. He stated that he could walk "maybe half a block," and that attempting to improve his endurance actually would cause greater harm to his hips. AR 193.

IV. Vocational Expert Testimony

The ALJ asked the vocational expert to describe plaintiff's prior work history. She explained that his prior jobs as a truck driver and factory assembler were unskilled jobs in the light to medium exertional category. AR 196. The VE labeled plaintiff's most recent job as "a clerk/receptionist type job," which, "per the DOT, is listed as being sedentary work, and the skill level is semi-skilled." AR 197. The VE stated that plaintiff's job as a telemarketer was listed in the DOT as sedentary work with a skill level of 3 (semi-skilled). *Id*. The VE explained that plaintiff's positions as a bus driver and as a transporter were listed in the DOT as medium level work, with a skill level of 4 (semi-skilled). *Id*.

The ALJ asked the VE if the "clerk/receptionist" jobs to which she referred "allowed something of a sit/stand option." AR 198. The VE responded that those jobs offered "more flexibility than other types of jobs" in that "you can get up, move around if you need to." AR 198. The ALJ asked for an estimate of the number of "clerk/receptionist" jobs in Wisconsin, the State of Wisconsin, the four county area, and also how many of these "would allow that sit/stand kind of option." *Id*. The VE responded that there were approximately 5,000 receptionist jobs in the entire state of Wisconsin "where a person would be coming in entry level." AR 199. She testified that all of the jobs could accommodate a sit/stand option "in a varying degree."

V. The ALJ's Decision

The ALJ conducted the five-step sequential analysis set forth at 20 C.F.R. § 404.1520. At the first two steps of the sequential analysis, the ALJ found that plaintiff had not engaged in any substantial gainful activity since his alleged onset date of disability, July 19, 2001, and that he had "severe impairments," namely bilateral hip dysplasia, osteoarthritis and obesity. At step three, giving special attention to the musculoskeletal listings, the ALJ found that plaintiff's impairments did not meet or medically equal an impairment listed at 20 C.F.R., Part 404, Subpart P, Appendix 1.

Next, the ALJ determined that plaintiff retained the residual functional capacity to perform sedentary work that involved lifting or carrying no more than ten pounds, standing or walking no more than two hours and that allowed a sit/stand option. In reaching this conclusion, the ALJ found that plaintiff's subjective allegations about his limitations were consistent with his condition and his doctor's statements and were generally credible. However, the ALJ rejected plaintiff's complaints to the extent that he contended that he was incapable of performing all work-related activities.

Relying on the vocational expert's testimony, the ALJ found that although plaintiff could not return to his past relevant work, he remained capable of performing jobs that existed in significant numbers in the economy. Specifically, the ALJ found that plaintiff could perform the job of entry level clerk/receptionist, of which there were 5,000 jobs in the state of Wisconsin. Thus, at the fifth step of the sequential analysis, the ALJ found that plaintiff was not disabled within the meaning of the Social Security Act.

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 *ne novo* 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. Step Three: Listing of Impairments

Plaintiff argues that the ALJ erred at step three of the sequential evaluation process when he concluded that plaintiff's impairments did not meet or equal any listing in the Listing of Impairments. Plaintiff contends that the ALJ should have found that he meets the criteria for Listing 1.02(A). A claimant's impairment must match or medically equal all of the specified medical criteria in order to show the impairment meets a listing. *Maggard v. Apfel*, 167 F.3d 376, 380 (7th Cir. 1999); 20 C.F.R. § 404.1525(c). Moreover, the claimant bears the burden of showing that his condition meets or equals each element of a listed impairment. *Maggard*, 167 F.3d at 380.

Listing 1.02A requires an individual to establish the following:

> Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:
>
> > A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b.

20 C.F.R., Pt. 404, Subpt. P, App. 1.

According to section 1.00B2b,

> Ineffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent

> ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.
>
> * * *
>
> To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.

20 C.F.R., Pt. 404, Subpt. P, App. 1 § 1.00B2b.

This is the ALJ's discussion of step three in his decision:

> The undersigned has specifically reviewed Section 1.00 et seq (musculoskeletal system), with special attention given to, but not limited to, Sections 1.00B2b, 1.00B2d, 1.00I, and 1.00Q. The claimant testified that he "occasionally" uses assistive devices; however, there is no documentation that any assistive devices have been prescribed by a physician. Furthermore, Dr. Penn indicated in Exhibit 6F that, while the claimant could not stand or ambulate for extended distances or times, he could probably stand for 15 to 30 minutes, and would have difficulty walking around the block. Dr. Penn noted that the claimant "does not use a walk-assist device at this time." Dr. Penn further noted that the claimant uses anti-inflammatory drugs for pain (he takes Naprosyn and Tylenol), which "does help with pain symptomatology as long as he does not walk an extended distance or do stair climbing." No side effects from medication are alleged. While x-rays suggested moderate arthritic disease of both hips, no fracture or destructive processes were evident. After giving careful consideration to all the evidence, the Administrative Law Judge has concluded that the claimant's impairments, considered singly or in combination, are not

> attended by the requisite medical findings to meet or equal the requirements of any impairment listed in Appendix 1, Subpart P, Regulations No. 4.

AR 23.[1]

The parties dispute whether the ALJ found that all the criteria of 1.02(A) had been met except for the requirement that plaintiff be unable to ambulate effectively. Plaintiff argues that the ALJ found that all the other criteria were met; defendant argues that the ALJ found that plaintiff also failed to show "medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s)." Defendant points out that the ALJ noted that the x-rays revealed no evidence of fracture or destructive processes.

The ALJ's decision suggests that he found that the third criterion of Listing 1.02(A) was not satisfied. However, that finding is not supported by substantial evidence. As plaintiff points out, x-rays of plaintiff's hips in 1989 and 1992 showed "narrowing of the superior joint space." AR 122, 125. This appears to satisfy 1.02(A)'s requirement that there be "medically acceptable imaging of joint space narrowing, bony destruction, *or* ankylosis of the affected joint(s)." (Emphasis added).

Thus, the only question is whether substantial evidence supports the ALJ's finding that the medical evidence failed to show that plaintiff was unable to ambulate effectively. Plaintiff points to Dr. Penn's statements that plaintiff could not "ambulate or stand for

[1] Plaintiff contends that the ALJ committed an error of law because his analysis of the listings refers only to sections from the introductory statements to the musculoskeletal system and fails to clarify the specific listing he considered. This contention is a nonstarter: the ALJ's analysis can be tracked to Listing 1.02(A) (Major dysfunction of a joint(s)), which is the only listing that plaintiff contends he meets.

extended distances," "doesn't move the right leg very well when ambulating" and would have difficulty "walking around an average size grocery store" and "getting up and down stairs."

While this evidence shows that plaintiff has difficulty ambulating independently , it fails to establish that plaintiff was *unable* to do so, as required to satisfy the listing. As the ALJ noted, Dr. Penn's findings suggested that plaintiff could not walk extended distances, but they failed to establish that plaintiff could not walk a sufficient distance to carry out activities of daily living, or to travel without assistance to and from the workplace. Although plaintiff points to his use of a wheelchair and walker as conclusive evidence of his inability to ambulate, plaintiff did not establish that he was unable to travel independently to and from his part time job or that such travel required a walker or assistive device. As the ALJ noted, plaintiff testified that he used such devices only occasionally, such as when he had to cover a long distance or when he was having a "bad" day.

Even assuming the ALJ erred in discounting plaintiff's alleged use of an assistive device on the ground that plaintiff had failed to provide documentation that it had been prescribed by a physician, under Listing 1.02(A), such occasional use of an assistive device is not conclusive proof of an inability to ambulate. Overall, substantial evidence supports the ALJ's conclusion that insufficient medical documentation existed from which to find that plaintiff had an impairment that met or equaled Listing 1.02(A).

III. Residual Functional Capacity Assessment

The ALJ concluded that plaintiff retained the residual functional capacity to perform work at the sedentary exertional level (requiring lifting no more than 10 pounds and standing or walking no more than two hours a day) that allowed him the option to sit or stand while working. In adopting this very restrictive residual functional capacity assessment, the ALJ generally accepted plaintiff's subjective allegations as credible. However, he rejected plaintiff's allegations "to the extent the claimant alleges being totally precluded from all work-related activities." AR 25.

Plaintiff suggests that the ALJ did not articulate the basis for his credibility finding clearly enough to allow the court to trace the path of his reasoning, as required by cases such as *Brindisi v. Barnhart*, 315 F.3d 783 (7th Cir. 2003), and by Social Security Ruling 96-7p. However, the ALJ's decision reveals several grounds for his decision to discount plaintiff's allegations of totally debilitating symptoms.

First, the ALJ observed that there were no medical opinions in the file suggesting that plaintiff had a more restrictive residual functional capacity than found by the ALJ, noting that the state agency physicians who reviewed the file had concluded that plaintiff retained the residual functional capacity for sedentary work. In addition, the ALJ noted that plaintiff had told Dr. Penn that his pain medications were helpful so long as he did not walk far or climb stairs, activities not normally required by sedentary work.

The ALJ also noted that plaintiff was able to perform day-to-day activities such as driving two to three times per week, cooking one or two times a week, watching his children,

grocery shopping and playing cards, and that plaintiff had told the vocational evaluator that he tried to stay busy cooking, providing childcare and doing household chores, garden projects and lawn care.

In addition, the ALJ pointed to plaintiff's infrequent medical visits and failure to lose weight despite of his doctor's recommendations as evidence that plaintiff was exaggerating when he claimed that his symptoms prevented him from performing all work. Finally, the ALJ noted that plaintiff had been able to work full time in the past despite of his condition, which was present at relatively the same level of severity before plaintiff's alleged onset date.

Plaintiff raises some valid challenges to the ALJ's credibility assessment. For example, plaintiff's infrequent medical treatment does not necessarily undercut his claim regarding the severity of his condition, given that his doctors made plain that they couldn't do much except prescribe medication until plaintiff was old enough for hip replacement. Nonetheless the ALJ's credibility assessment taken as a whole accurately reflects the evidence in the record and draws appropriate inferences therefrom. Although plaintiff's daily activities are somewhat limited, in the main they suggest that plaintiff is able to perform a full day's worth of activities so long as he does not overexert himself and is able to change positions at will. The ALJ accounted for these limitations by limiting plaintiff to sedentary work with a sit/stand option, which is less strenuous than plaintiff's home garden projects and lawn care. Although plaintiff suggests that he required the option to lie down during the day, the ALJ reasonably could find this allegation incredible, given plaintiff's reported daily routine, his

statement regarding the effectiveness of his pain medication, his ability to work in the past, and the failure of any doctor to recommend such a restriction.

Where, as here, the ALJ's credibility determination is sufficiently clear, logically reasoned and not patently wrong, this court must defer to it. *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2000). This leads me to conclude that the ALJ properly determined plaintiff's residual functional capacity at step four. Apart from plaintiff's subjective complaints of totally debilitating symptoms which the ALJ reasonably found were not credible, substantial evidence in the record supports the ALJ's determination that plaintiff could perform a limited range of sedentary work.

IV. Step Five Determination–Vocational Considerations

To be found disabled, a claimant must have a medically determinable physical or mental impairment of such severity that he not only is unable to do previous work, but also cannot engage in any other kind of substantial gainful work that exists in the national economy. Under the commissioner's sequential evaluation process, when an individual is found at step four to lack the residual functional capacity to be able to perform his or her past relevant work, then the ALJ must consider the individual's ability to adjust to any other work, taking into account the individual's residual functional capacity, age, education and work experience. 20 C.F.R. §§ 404.1520; 404.1560. The term "work experience" means "skills and abilities acquired through work you have done which show the type of work you

may be expected to do." 20 C.F.R. § 404.1565. Under the regulations, work experience is relevant "when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity." Soc. Sec. Ruling 82-62.

In this case the ALJ concluded at step four that plaintiff's residual functional capacity precluded him from performing any of his past relevant work, which the ALJ identified as factory assembler, dump truck driver and delivery truck driver. Accordingly, the ALJ proceeded to step five. The ALJ found that plaintiff was a younger individual of limited education with no transferable skills from any past relevant work. AR 26. In reaching his conclusion that significant jobs existed in the national economy that plaintiff could perform given his residual functional capacity and vocational factors, the ALJ reasoned:

> The Administrative Law Judge asked the vocational expert whether a significant number of jobs exists in the national economy for an individual of the claimant's age, education, past relevant work experience and residual functional capacity as determined. The vocational expert testified that assuming the hypothetical individual's specific work restrictions, said individual would be capable of making a vocational adjustment to other work. Given all of these factors, the vocational expert testified that 5,000 entry-level clerk/receptionist jobs exist in the State of Wisconsin. She further testified that all of these 5,000 jobs allow some extent of a sit/stand option.
>
> The undersigned points out that the claimant has, in fact, demonstrated that he is capable of making said vocational adjustment as he has been working twenty hours per week answering telephones and performing receptionist-type duties since September 20, 2002.

AR 26-27.

Plaintiff contends that the record does not contain substantial evidence supporting the ALJ's conclusion that plaintiff meets the skill requirements of the semi-skilled clerk/ receptionist jobs identified by the VE. First, he argues that the vocational expert's testimony fails to support the ALJ's conclusion because, contrary to what the ALJ stated in his decision, he never posed to the VE a hypothetical question positing an individual with plaintiff's residual functional capacity and vocational factors.

Plaintiff is correct. The ALJ did not pose *any* hypothetical to the VE. Rather, after asking the vocational expert to classify plaintiff's past work, the ALJ asked the vocational expert some follow-up questions about plaintiff's current work attempt as a clerk/receptionist. The exchange between the ALJ and the VE is as follows:

> ALJ: Now the clerk/receptionist job that you referred to, that's the job that he's just started.
>
> VE: Correct. The one that was just started the end of September.
>
> ALJ: Okay. And do those jobs typically allow something of a sit/stand option, in terms of how they are performed?
>
> VE: Much more flexibility than the other types of jobs. For example, assembly jobs, you don't – you get to pick and choose when you can sit, stand, move around, and do what you need to do. These are more flexible types of jobs that you can get up, move around if you need to. And they're, by nature, more sedentary to begin with. So you'd be sitting, and then maybe getting up every now and then for a quick break.
>
> ALJ: Can you give me an idea of roughly how many clerk/receptionist jobs there are in the State of Wisconsin, the four county area, and also how many of these would allow that sit/stand kind of option?

> VE: Okay. I would look at all of these in a varying degree of one or another, being able to accommodate that. It would be more a matter of duration in how frequent a person would need to move about and actually leave their work station, because that's when it becomes an interruption for individuals. If you move away from the work station, if you're walking, if you're going to the bathroom, those types of things, and you need to be at the work station, that's going to be a different situation rather than if you just kind of shift around in your chair, move your legs, maybe stand up for a quick second or two. So all of them have the capabilities for that, it's just how far the individual needs to go in order to be able to accommodate themselves in the situation. If we're looking at – what I'll do is look at basically tying it to more or less a receptionist type job. And if we're looking at the receptionist jobs, to begin with, an individual would probably start at about a skill level of three, because it takes about a month, at least, to learn how to do those jobs. And if we're looking at those type of jobs where a person would be coming in entry level, we'd probably be looking at about 5,000 jobs in the entire state.

AR 198-99.

The VE never testified that an individual of plaintiff's residual functional capacity, age, education and work experience would be able to perform the demands of the entry-level clerk/receptionist jobs that she identified. Accordingly, her testimony fails to provide substantial evidence for the ALJ's conclusion at step five.

Plaintiff contends that the only other basis for the ALJ's step five finding is his reliance on the fact that plaintiff was performing such work at the time of the administrative hearing. As plaintiff points out, however, under the commissioner's regulations, an individual does not acquire skills from past work unless the work lasted long enough for the individual to have learned how to do it. Plaintiff argues that he did not met this duration

requirement because he had been on the job only eight days before the hearing. (Although the ALJ found that plaintiff had been performing his job since September 20, 2002, the record shows that plaintiff began the clerk/receptionist job on September 30, 2002). Plaintiff points out that the VE testified that it would take at least 30 days to learn how to perform the clerk/receptionist jobs that she identified.

Given the restrictions that the commissioner has placed upon the relevance of past work, I agree that plaintiff's recent, short-term work attempt prior to his hearing does not constitute substantial evidence to support the ALJ's conclusion that plaintiff had acquired the skills to allow him to make a vocational adjustment to the clerk/receptionist jobs identified by the VE.

Even so, it would be pointless to remand this case because there is other, substantial evidence in the record that supports the ALJ's step five determination. *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir. 2004) (declining to remand case for harmless error). First, before working as a clerk/receptionist, plaintiff had worked as a telemarketer for approximately 30 days. The VE testified that such jobs were listed in the *Dictionary of Occupational Titles* as having a Specific Vocational Preparation of 3, meaning that they could be learned in as little as a month. *See DOT* 299.357-014. Plaintiff did not identify any problems performing that job apart from having difficulty sitting on some days. AR 177. Comparing the duties of a telemarketer to a clerical receptionist, *DOT* 237.367-038, indicates that there is at least some overlap in the skills required of both jobs. Thus,

although the ALJ treated plaintiff's work as a telemarketer as an unsuccessful work attempt, plaintiff's ability to perform it for approximately one month suggests that he also could perform semi-skilled work as a clerk/receptionist.

Second, although the ALJ found that plaintiff had a "limited education" because he completed only the 11th grade, *see* 20 C.F.R. § 404.1564(b)(3), a vocational evaluation showed that plaintiff has high-school level or stronger skills in vocabulary and reading comprehension. AR 104. High-school level skills support the conclusion that plaintiff could perform the entry level receptionist jobs identified by the vocational expert. *See* 20 C.F.R. § 404.1564(b)(4) (high school education generally consistent with ability to perform semi-skilled work).

Finally, the vocational evaluator encouraged plaintiff to pursue service-oriented jobs such as "group home worker, telemarketer, customer service worker, service establishment attendant, answering service operator, order clerk, etc." AR 106. The failure of a vocational specialist to identify limitations that would preclude plaintiff from performing jobs strikingly similar to the clerk/receptionist jobs identified by the VE strongly supports the ALJ's conclusion that plaintiff is capable of making a vocational adjustment to such jobs.

Plaintiff has not asserted that he has vocational considerations that would preclude him from performing such jobs. Although I recognize that the commissioner bears the burden of proof at step five, plaintiff's failure to adduce any evidence to show that the commissioner's error is not harmless bolsters the conclusion that a remand for a new step

five determination would not affect the outcome of this case. Accordingly, because substantial evidence in the record as a whole supports the ALJ's conclusion at step five that plaintiff can make a vocational adjustment to the clerk/receptionist jobs identified by the vocational expert, I am recommending that this court affirm the commissioner in spite of the ALJ's erroneous reliance on plaintiff's short-term work attempt in reaching that decision.

V. Step Five Determination–Sit/Stand Option and Inability to Stoop

Plaintiff contends that substantial evidence does not support the ALJ's conclusion regarding the number of clerk/receptionist jobs that would allow for a sit/stand option. He argues that because the vocational expert testified that the jobs would allow for that option to "a varying degree," it was imperative that the ALJ make specific findings regarding how frequently plaintiff would need to alternate positions in order to determine the subset of the 5,000 jobs identified by the vocational expert that plaintiff could perform. Plaintiff points to the following language from Social Security Ruling 96-9p:

> Alternate sitting and standing: An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. The RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a

> vocational resource in order to determine whether the individual is able to make an adjustment to other work.

Although it would have been better for the ALJ to have been more specific regarding the frequency of plaintiff's need to alternate positions, I am not persuaded that his lack of specificity affected the outcome in this case. Notably, with respect to the clerk/receptionist jobs she identified, the vocational expert testified that "you get to pick and choose when you can sit, stand, move around, and do what you need to do. These are more flexible types of jobs that you can get up, move around if you need to." AR 198. Although she stated that all of the 5,000 jobs she identified would accommodate "that sit/stand kind of option," to a "varying degree" depending on what it would take to accommodate the individual's need to move around, her testimony makes clear that the variables to which she was referring were accommodations that required the individual to leave the work station as opposed to merely change positions at will at the work station. Thus, the ALJ failure to define the nature of plaintiff's sit/stand option more specifically was immaterial because the jobs identified by the vocational expert were those in which the individual could change positions at will.

The only evidence in the record to which plaintiff points to support a conclusion that he could not perform a job that allowed him to change position from sitting to standing at will is his testimony that when he came home after working four hours, he had to lie down. As noted previously, however, the ALJ reasonably found that plaintiff's allegation that he required the ability to lie down during the day was inconsistent with the record and not credible. The record provides adequate support for the ALJ's conclusion that plaintiff's need

to change positions would not preclude him from performing the jobs identified by the vocational expert.

Finally, plaintiff contends that the ALJ erred by not posing a hypothetical to the vocational expert that included a limitation on the ability to stoop. Again, plaintiff points to Social Security Ruling 96-9p, which notes that "[a] complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply."

Plaintiff's argument merits little discussion. The commissioner defines "stooping" as bending at the waist. Soc. Sec. Ruling 83-14; *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (7th Cir. 2003). The only evidence to which plaintiff points as supporting his claim that he is unable to stoop is his testimony that he has trouble putting socks on or bending down to retrieve items from lower shelves in the kitchen. Plaintiff also points to Dr. Penn's finding that plaintiff would have "difficulty squatting," but squatting is not stooping. Even assuming that the ALJ should have concluded from plaintiff's testimony that he was limited in the amount of stooping he could perform, plaintiff has presented no evidence to suggest that stooping is a typical requirement of the semi-skilled clerk/receptionist jobs identified by the vocational expert. According to the *DOT*, even a complete inability to stoop or crouch would not preclude plaintiff from performing those jobs. *See DOT* 237.367-038.

CONCLUSION

A critical review of the evidence reveals that although the ALJ's decision was not perfect, substantial evidence supports his conclusions and any errors were harmless. There is no basis for this court to overturn the commissioner's decision.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that this court affirm the decision of the commissioner denying plaintiff Charles Smith's application for Disability Insurance Benefits.

Entered this 27th day of July, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 27, 2005

Frederick J. Daley
Daley, Debofsky & Bryant
One North LaSalle Street, Ste. 3800
Chicago, IL 60602

Richard D. Humphrey
Assistant United States Attorney
P.O. Box 1585
Madison, WI 53701-1585

Re: Smith v. Barnhart
Case No. 05-C-026-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 15, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 15, 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