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

GLEN A. CRITES,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

05-C-648-C

REPORT

Plaintiff Glen Crites brings this action for judicial review of the commissioner's determination that he is not disabled and therefore ineligible for benefits under the Social Security Act. Plaintiff, who has an 11th grade education and was 24 years old at the time of the administrative hearing, claims to suffer from severe, unremitting back pain, even though the underlying injury resolved long ago. The administrative law judge decided that even though plaintiff's pain complaints lacked an objective medical basis and were overstated, the ALJ nonetheless would find that plaintiff could perform only the least strenuous types of work. However, the ALJ then concluded that plaintiff is not disabled because, according to data deemed accurate by the commissioner (compiled in tables known as "the grids"), numerous sedentary jobs exist for young, educated people like plaintiff.

Plaintiff contends that the ALJ's decision is not supported by substantial evidence because he has non-exertional limitations that preclude him from performing the "full range"

of sedentary work, rendering the ALJ's reliance on the grids inadequate to support his conclusion. As explained below, I disagree. Accordingly, I am recommending that this court affirm the commissioner's decision.

I have drawn the following facts from the administrative record ("AR"):

FACTS

Plaintiff, who was 24 years old at the time of the commissioner's decision, has an 11th grade education and little past work experience, having worked primarily at various seasonal jobs, including parking attendant, security guard, go-cart mechanic and ride operator at a water park. He applied for social security disability benefits on March 31, 2003, alleging that he had been disabled since August 24, 2002 as a result of a lower back sprain and associated pain that affected his ability to lift, walk and stand.

Plaintiff traces his alleged disability to a July 23, 2002, injury to his lower back sustained while throwing heavy garbage bags into a dumpster as part of his job duties at the water park. Medical records obtained by the local social security office in connection with plaintiff's application show that plaintiff was seen July 23, 2002, in the emergency room, where he was diagnosed with an acute back strain. He was prescribed ibuprofen and released to return to light duty work. Plaintiff then began seeing Dr. Holmen, who restricted him to gatekeeping duties at the water park and referred him to physical therapy.

On August 26, 2002, plaintiff saw Dr. Kenneth Oh, a rehabilitation specialist. Plaintiff reported that after the initial sprain, the pain had begun to spread throughout his back into the cervical and thoracic areas. Plaintiff attributed this to his employer's failure initially to honor Dr. Holmen's light duty restrictions. Plaintiff reported that he had attended physical therapy only three or four times because he had trouble scheduling appointments around his work hours and getting rides to appointments. Plaintiff said his back hurt constantly except when he was lying down. However, on physical examination, Dr. Oh detected no objective abnormalities and noticed that plaintiff had no significant difficulty moving around on the examination table. Dr. Oh concluded that at most, plaintiff had suffered a mild strain of his paraspinal muscles and facet joints. He indicated that plaintiff should perform sedentary work for one week and then increase to light work the following week with only occasional bending, twisting or squatting. Dr. Oh ordered x-rays, indicating that if they were negative, he would upgrade plaintiff's work abilities. He encouraged plaintiff to perform his home exercises and return to physical therapy. AR 125-26. He prescribed Naprosyn and Skelaxin.

On August 29, 2002, plaintiff saw Kevin Coleman, D.O., reporting continued back and neck pain as well as headaches. He was taking no medications. Dr. Coleman diagnosed a trapezius strain and restricted plaintiff temporarily to lifting no more than 10 pounds and no bending or twisting. He referred plaintiff to physical therapy and prescribed a muscle relaxer and a pain reliever. AR 134-35.

Plaintiff saw Dr. Oh on September 9, 2002, reporting no improvement in his pain. He had not been to physical therapy, reportedly because his mother had not been available to drive him. Dr. Oh reviewed the x-rays of plaintiff's back and saw no abnormalities. Plaintiff had not worked for one week, reporting that the water park had closed for the season on September 3. Plaintiff said he had spent the entire past week lying in bed, getting up only occasionally to walk around the house or play with his cat. However, Dr. Oh noticed that plaintiff's hands were dirty, one palm was scraped and there was dirt under plaintiff's nails. When Dr. Oh asked plaintiff why he was so dirty if he had done nothing all week, plaintiff's mother interjected that plaintiff had checked the oil on her car that morning. Again, Dr. Oh detected nothing on physical examination that might explain plaintiff's pain. He indicated that from the way plaintiff described how he hurt his back, plaintiff at most would have suffered some muscular facet strain which should have improved with rest and medication. Dr. Oh recommended a bone scan and indicated that if it was normal, then "there was no real objective reason to not advance [plaintiff's] work restrictions." AR 120-21. Apparently, plaintiff followed through with a bone scan.

Plaintiff saw Dr. Coleman on September 17, 2002, reporting that his pain had moved down into his lower back. He had not been attending physical therapy regularly and was not working, although he indicated that he was planning on changing the motor in his car over the weekend, "lifting one small part out at a time." AR 133. After finding nothing significant on examination, Dr. Coleman encouraged plaintiff to increase his activity and

return to work, indicating that plaintiff was "taking it way too easy" and avoiding any activity that might aggravate his pain. Dr. Coleman increased plaintiff's work restriction to light, with occasional bending. He began to suspect plaintiff of malingering. *Id*.

On October 1, 2002, plaintiff reported some improvement in his back pain but complained of stress-related headaches. He complained of insomnia, fatigue and low concentration. Dr. Coleman concluded that plaintiff's latest symptoms were not related to his work injury and that work restrictions were no longer necessary. Dr. Coleman suspected that plaintiff's headaches and muscle pains were related to depression. He gave plaintiff samples of Paxil to try for 30 days. AR 131.

A little more than two weeks later, plaintiff's mother called Dr. Coleman and asked him to write a letter stating that plaintiff could not work; she said plaintiff needed a letter so he could collect his weekly worker's compensation check. Dr. Coleman declined to write a letter. Plaintiff later told Dr. Coleman that plaintiff had not looked for work because he was afraid of re-injuring his back and neck. AR 129-30.

On November 4, 2002, plaintiff saw Dr. James Leonard, an orthopedist. Plaintiff told Dr. Leonard that he continued to have cervical and low back pain, with associated headaches, that he attributed to his July 23, 2002 work injury. Plaintiff was not taking any medications. Dr. Leonard detected no abnormalities on physical exam or x-ray. Although plaintiff's mother asked Dr. Leonard to assign work restrictions for plaintiff, Dr. Leonard

declined to do so, noting "the lack of specific findings on exam today." Dr. Leonard recommended that plaintiff take ibuprofen and begin a walking program. AR 149-50.

At a follow-up appointment with Dr. Leonard a month later, plaintiff said he still had back pain and occasional headaches, which had not been helped much by ibuprofen. Plaintiff had pain on range of motion in the cervical and lumbar areas. Dr. Leonard issued a 20-pound lifting restriction and ordered an MRI. AR 148. The MRI revealed no abnormalities except a "tiny" left paracentral disk protrusion. Dr. Leonard ordered a functional capacity test to determine "if there are any permanent restrictions." AR 147.

On December 30, 2002, plaintiff had a functional capacity evaluation at St. Clare Hospital in Baraboo. AR 185-90. The test was administered by an occupational therapist. The results of the test indicated that plaintiff could perform work in the sedentary range, meaning work requiring primarily sitting, some walking and standing, and minimal lifting. *See* 20 C.F.R. §§ 404.1567(a), 416.967(a). The therapist noted that plaintiff demonstrated "active pain behavior during the evaluation with increasing frequency of verbal reports of pain increases as the evaluation progressed." AR 186. He also noted that plaintiff had limited range of motion in his neck and back, some of which was "functional, secondary to his pain involvement." AR 188. Plaintiff showed pain behavior when performing tasks during the evaluation and often discontinued activities because of pain. AR 189. Among other limitations, the report recommended that plaintiff change positions frequently and

bend no more than 10 percent of the workday. The therapist noted that plaintiff's perception of his abilities was severely limited by his pain. AR 189.

According to a May 18, 2004 loss of earning capacity evaluation prepared by vocational consultant Michele Albers, Dr. Leonard had completed a form on February 7, 2003, in connection with plaintiff's worker's compensation claim. On the form, Dr. Leonard had indicated that plaintiff could stand and walk four hours in a work day and sit four hours in a work day, and that he could lift 10 pounds frequently. Apparently, on July 11, 2003, Dr. Leonard completed a different form on which he indicated that plaintiff had a three percent disability of the body as a whole. According to Albers's report, for limitations, Dr. Leonard had noted "see results of functional capacity test, 10 pounds lift." AR 175-176. When asked by Albers to describe his abilities, plaintiff said he could sit comfortably for four to six hours, stand for two to three hours, walk up to 45 minutes and bend and twist once in a while. AR 176-177.

Plaintiff saw Dr. Leonard on January 8, 2004. In the note from that visit, Dr. Leonard wrote that he had seen plaintiff in the clinic several months previously and had assigned plaintiff permanent restrictions and a disability rating. Dr. Leonard observed that plaintiff had a "long-standing pain disorder" for which Dr. Leonard had no new treatment options. AR 195.

On May 12, 2004, plaintiff was examined by Dr. Stephen Barron in connection with plaintiff's worker's compensation claim. Dr. Barron detected features of malingering, noting

that plaintiff appeared to exaggerate his pain and demonstrated inconsistent abilities on physical examination. Dr. Barron determined that plaintiff had suffered a lumbar sprain that had healed fully by September 21, 2002. Based on the lack of objective findings during the examination, Dr. Barron concluded that plaintiff was able to work full time with no limitations. AR 164-73.

At a hearing before an administrative law judge ("ALJ"), plaintiff testified that he cannot work because any walking, bending or lifting causes sharp pain in his lower back. Plaintiff testified that he had not been treated by any doctor since he saw Dr. Leonard. He testified that he was working with the Division of Vocational Rehabilitation to find out if there was a job within his limitations for which he could be trained. According to plaintiff, he could sit continuously from one to five hours, depending on the firmness of the chair. He said he could stand two to three hours, but afterwards he would be unable to move "without having pain." AR 263. He said he could lift a gallon of milk but could not carry it very far. According to plaintiff, he spent most of his day lying on the couch.

On March 24, 2005, the ALJ issued a decision denying plaintiff's applications. The ALJ applied the commissioner's five-step process for evaluating disability claims, *see* 20 C.F.R. §§ 404.1520 and 416.920, and determined that although plaintiff's back sprain was a "severe" impairment that prevented plaintiff from returning to jobs as strenuous as those he had performed in the past, plaintiff was not disabled under the Social Security Act because he remained capable of performing a full range of sedentary work. In reaching this

conclusion, the ALJ found incredible plaintiff's claim that he was unable to perform any work. The ALJ noted that there was no objective medical evidence of an abnormality that could be expected to cause the symptoms plaintiff alleged, an examining physician had indicated that plaintiff could work full time with no limitations and no doctor had opined that plaintiff was unable to do any kind of work. The ALJ also noted that plaintiff's only medication was ibuprofen and that plaintiff was working with DVR to be retrained. Overall, the ALJ determined that although plaintiff had some pain at times of overexertion, his complaint of constant, disabling pain was not supported by the record.

In reaching his conclusion at step five, the ALJ relied on the Medical-Vocational Guidelines, otherwise known as the "grids," which provide a formulaic method for determining whether a claimant who has been found unable to do his or her past relevant work is capable of making an adjustment to other jobs in the national economy. *See Haynes v. Barnhart*, 416 F.3d 621, 627 (7th Cir. 2005); 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(a) ("Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled."). The ALJ applied the guideline for sedentary work, rule 201.24, Table No. 1, finding implicitly that plaintiff could (1) sit up for approximately six hours of an eight-hour workday, (2) do occasional lifting of objects up to ten pounds, and (3) occasionally walk or stand for no more than about two hours of an eight-hour workday. 20 C.F.R. §§

404.1567(a); 416.967(a); SSR 96-9p. The rule directed a conclusion that plaintiff was not disabled. Accordingly, the ALJ determined that plaintiff was not eligible for disability benefits.

ANALYSIS

Plaintiff argues that the ALJ erred in relying on the grids because plaintiff has two nonexertional limitations that substantially limit his ability to perform the full range of sedentary work: 1) a need to change positions frequently, sometimes referred to as a sit/stand option; and 2) a near-inability to bend forward at the waist, also known as stooping. *See Lee v. Sullivan*, 988 F.2d 789, 793 (7th Cir. 1993) (grids to be applied only when they accurately describe claimant's abilities and limitations); SSR 85-15, 1985 WL 56857, at *1 (grids may be used only as "framework" for decision-making when claimant has combination of exertional and nonexertional impairments); SSR 96-9p, 1996 WL 374185, at *6 and *8 (indicating that sit/stand requirement and inability to stoop occasionally would limit plaintiff from performing full range of sedentary work).

As support for his claim that the ALJ erred in failing to include these limitations in his residual functional capacity assessment, plaintiff points to the December 30, 2002 Functional Capacities Evaluation, which indicated that plaintiff should only bend up to 10 percent of the day and should change positions regularly throughout the day. Plaintiff argues that because the ALJ never mentioned the FCE in his decision, much less explained

why he rejected its findings, this court must remand the case so the ALJ can address the FCE and consult a vocational expert to determine the impact of these nonexertional limitations on the relevant job base. *Haynes*, 416 F.3d at 629 (where plaintiff suffers from combination of exertional and nonexertional limitations, ALJ must consult with vocational expert). Plaintiff points out that the limitations on the FCE were endorsed by one of his treating physicians, Dr. Leonard.[1]

This court's review of the ALJ's decision is limited to deciding whether it is supported by substantial evidence, which 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 a decision under this standard, "[b]oth the evidence favoring the claimant as well as the evidence favoring the claim's rejection must be examined, since the review of the substantiality of the evidence takes into account whatever in the record fairly detracts from its weight." *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986). An ALJ need not provide an in-depth analysis of every piece of evidence the claimant provides so long as he builds a logical and adequate bridge between the evidence and the result. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). To determine whether the ALJ has met this burden, the

[1] Defendant makes a number of unfounded arguments in her responsive brief. Contrary to defendant's position, forward bending *is* the same as stooping, SSR 85-15, 1985 WL 56857, at *7 (defining stooping as "bending the body downward and forward by bending the spine at the waist"); there is nothing to suggest that the ALJ meant to discuss the FCE "by reference" when he discussed Dr. Barron's report; and Albers's report supports plaintiff's contention that Dr. Leonard endorsed the restrictions recommended on the FCE, *see* AR 175.

court must engage in a "commonsensical reading [of the decision], rather than nitpicking at it." *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2000).

Against these standards, plaintiff stands no chance of success on his claim that the ALJ committed reversible error by failing to mention the FCE. First, I am confident that the ALJ considered this piece of evidence: plaintiff's lawyer submitted it, questioned plaintiff about it and made a legal argument about it at the hearing. AR 261, 264. Indeed, it seems plain that in finding that plaintiff was limited to sedentary work, the ALJ had to have relied on the FCE, because *all* the other reports in the record indicated that plaintiff had far fewer exertional limitations, if any at all.

Second, although it would have been helpful for the ALJ to have explained why he rejected any relevant non-exertional limitations on the FCE, the gist of his reasoning is apparent from his decision. A review of the FCE leaves little doubt that the sit/stand option and infrequent bending limitations recommended by the occupational therapist were based primarily on plaintiff's description of how much pain he experienced when performing these activities, as opposed to any objective measurement of plaintiff's work capacity. *Cf. Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) (ALJ's rejection of functional capacities report on ground that claimant had exaggerated condition to therapist was arbitrary "since the therapist based her evaluation on physical tests and observation, not just on what Barrett told her.").

But the ALJ found that plaintiff's pain complaints were overstated. Notwithstanding plaintiff's arguments to the contrary, there is ample evidence to support that conclusion. As the ALJ noted, no doctor found any objective evidence of any impairment that could be expected to cause pain as severe as that reported by plaintiff; two doctors who examined plaintiff (Dr. Coleman and Dr. Barron) thought plaintiff had no permanent injury and no work-related restrictions; and a third doctor (Dr. Oh) thought plaintiff could return to at least light work that required only occasional bending, twisting or squatting. The ALJ also noted that plaintiff was taking only over-the-counter pain medication and that he was working with the Department of Vocational Rehabilitation to be retrained for less strenuous work.

These discrepancies, as well as others that the ALJ charitably did *not* cite, (including strong evidence of malingering), provided ample reason for the ALJ to reject non-exertional limitations based upon plaintiff's subjective complaints of pain, including those on the FCE. *See Johnson v. Barnhart*, 2006 WL 1520067, at *3 (7th Cir. June 5, 2006) (failure of claimant to use medication or receive therapy is reason for ALJ to disbelieve claimant's report of continuous, agonizing pain); *Sienkiewicz v. Barnhart*, 409 F.3d 798, 804 (7th Cir. 2005) (per curiam) (discrepancy between applicant's complaints and medical record is probative of exaggeration); *Schmidt v. Barnhart*, 395 F.3d 737, 746 (7th Cir. 2005) (ALJ may consider representations claimant has made to state authorities and prospective employers that she can work). This is true even if Dr. Leonard endorsed the limitations on the FCE. *Diaz v.*

Chater, 55 F.3d 300, 308 (7th Cir. 1995) (ALJ need not give substantial weight to physician's opinion based on patient's "own statements about his functional restrictions" if ALJ finds claimant's statements not credible).

It bears noting that plaintiff's own statements indicate that he is not as limited as the FCE suggested: at the hearing, plaintiff estimated that he could sit continuously from one to four or five hours; stand continuously for two to three hours; and lift a gallon of milk.[2] Also, plaintiff admitted that he could bend (in fact, at one point after his alleged onset date of disability, he was capable of checking the oil in his mother's car and changing a motor in his car); he just said he could not bend "comfortably." Plaintiff's testimony is consistent with what he told Albers, the vocational expert, and his described abilities generally are consistent with an ability to perform the full range of sedentary work. Accordingly, even if the ALJ erred in failing to discuss the FCE, the error was harmless. *Keys v. Barnhart*, 347 F.3d 990, 994 (7th Cir. 2003) (harmless error doctrine applies to judicial review of administrative decisions).

Finally, as for stooping, a person need only be able to stoop "occasionally" in most unskilled sedentary jobs. SSR 96-9p, 1996 WL 374185, at *8. "Occasionally" is defined as 11-33 percent of the day. The FCE recommended that plaintiff limit stooping to 1-10 percent of the day. Sometimes a miss is as good as a mile (*e.g.* a statute of limitations),

[2] In his decision, the ALJ indicated that plaintiff testified that he could "sit less than two hours, stand about 40 minutes, and lift less than five pounds." AR 16. I am unable to reconcile this finding with plaintiff's testimony.

sometimes it's not. This situation is a "not." For the commissioner's bureaucratic machinery to function, objective criteria often are assigned to flexible terms such as "occasionally." Obviously, 11% is one point higher than 10%, but when considering how best to employ the term "occasionally" on the facts of this case–taking into account the totality of the circumstances and the equities of the situation–this 1% lack of overlap does not strike the court as a sufficiently large gap as to merit remand for reconsideration. To overturn the commissioner's decision on this basis would violate the admonition against sacrificing on the altar of perfectionism the claims of other people stuck in the queue. *See Stephens v. Heckler*, 766 F.2d 284, 288 (7th Cir. 1985). This court should decline plaintiff's invitation and affirm the commissioner's decision.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner of Social Security denying plaintiff's applications for disability insurance benefits and supplemental security income under the Social Security Act be AFFIRMED.

Entered this 22nd day of June, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

June 22, 2006

Dana W. Duncan
Schmidt, Grace & Duncan
P.O. Box 994
Wisconsin Rapids, WI 54495-0994

Richard D. Humphrey
Assistant Attorney General
P.O. box 1585
Madison, WI 53701-1585

Re: Crites v. Barnhart
Case No. 05-C-648-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 July 14, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 14, 2006, 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