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

DOROTHY BRUEGGEN,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

06-C-0154-C

REPORT

This is a social security appeal brought pursuant to 42 U.S.C. § 405(g). Plaintiff Dorothy Brueggen is a 58-year old former medical claims examiner who suffers from irritable bowel syndrome. According to plaintiff, her condition causes her to have frequent, explosive and unpredictable bouts of diarrhea that preclude her from maintaining competitive employment. The administrative law judge who considered plaintiff's application for disability insurance benefits determined that plaintiff's symptoms would not prevent her from working so long as she has ready access to a bathroom and the freedom to use the bathroom when needed. The issue in this case is whether substantial evidence supports the ALJ's conclusion that plaintiff's bathroom needs could be accommodated by her former employment.

As discussed below, although the ALJ wrote a careful and cogent decision, there is one apparent gap that would seem to require remand. Accordingly, in spite of what is an

otherwise through and well-reasoned decision by the ALJ, I am recommending that this court reverse the decision of the commissioner and remand it for further proceedings.

The following facts are drawn from the administrative record:

FACTS

In July 2003, plaintiff Dorothy Brueggen filed an application for disability insurance benefits, alleging that she had unable to work since March 2003 because of abdominal pain, chronic diarrhea and nausea. Plaintiff attributed her symptoms to non-alcoholic cirrhosis of the liver, with which she had been diagnosed in January 2003 following surgery to remove her gallbladder.

In March 2004, plaintiff began seeing Dr. Kevin McClelland, a gastroenterologist, for complaints of diarrhea. Plaintiff reported that her symptoms, which consisted of sudden onsets of bowel movements associated with some midepigastric discomfort and nausea, began around the time she had her gallbladder removed in January 2003. A thorough workup, including an upper endoscopy, colonoscopy, biopsies and laboratory testing, revealed no significant abnormalities, leading Dr. McClelland to diagnose plaintiff with irritable bowel syndrome.[1] Although plaintiff's nausea and abdominal pain improved on proton pump inhibitor therapy, various medications prescribed by Dr. McClelland failed to

[1] Unlike inflammatory bowel disease, irritable bowel syndrome does not cause inflammation or changes in bowel tissue, and its symptoms usually are mild. (This information can be found by searching for the term "irritable bowel syndrome" at www.mayoclinic.com.)

alleviate the diarrhea. In August 2004, Dr. McClelland determined that it would be worthwhile to refer plaintiff for a second opinion, noting plaintiff's "ongoing symptoms and significant debility that they provide by her description." AR 352.

In September 2004, plaintiff saw Dr. Waldo Avello, who ordered more testing to determine the cause of plaintiff's diarrhea. Dr. Avello noted that plaintiff's diarrhea was probably not secretory in nature, noting that the number of plaintiff's bowel movements appeared to decline when plaintiff abstained from food. AR 380. Apparently, Dr. Avello ultimately agreed with the diagnosis of irritable bowel syndrome.

At an administrative hearing held on November 4, 2004, Dr. Andrew Steiner, a consulting physician, testified that plaintiff's impairments consisted of undiagnosed diarrhea and cirrhosis with associated fatty changes in the liver. Reviewing the listings for gastrointestinal disorders and liver disease, Dr. Steiner concluded that neither condition was severe enough to be presumptively disabling. With respect to the cirrhosis, Dr. Steiner indicated that there was no evidence of jaundice or abnormal liver functions to suggest liver failure. He testified that the only work-related limitation imposed by plaintiff's condition would be the need to have access to a bathroom.

Plaintiff testified at the hearing that she could not work because of constant diarrhea that beset her without warning, constant stomach pain that fluctuated in intensity, and constant nausea. Plaintiff testified that she experienced between 7 and 25 episodes of diarrhea in a 24-hour period and that she wore a protective pad. As for the nausea, plaintiff

said she sometimes could not stay on the phone because she felt like she was going to vomit and that she typically had to lie down twice a day for 15-20 minutes. Plaintiff said she ate small meals for the nausea and had lost 35 pounds. According to plaintiff, she was unable to do her job as a medical claims examiner because of the diarrhea. Plaintiff testified that she was running to the bathroom so often that her employer had to hire another individual to help her do her job.

The ALJ called vocational expert Edward Utities to testify. The ALJ asked Utities the following question:

> [I]n competitive work what is the frequency of access to the restrooms that is generally tolerated?

The VE testified that employer tolerance for bathroom breaks depended upon the type of work that was being performed: for unskilled work, bathroom breaks would typically be confined to the "normal" morning and afternoon break periods and the lunch break; professional or office work would be more flexible and would probably allow for an additional break or two of 5-10 minutes in duration. However, said the VE, most employers would not tolerate unscheduled breaks exceeding 10 minutes beyond those allowed by three typical break periods. The VE testified that if plaintiff required up to seven bathroom breaks a day, as she had testified, then she "probably" would not be able to perform even skilled office work. The VE elaborated:

> There are ways of dealing with that using pads for that matter and things of that nature but, again, if a person absolutely had to use bathroom facilities a lot would be depending in terms of what they are doing. For example, if they are on a phone call

> and they absolutely had to leave. That would be something that would be a real negative factor, or if they were dealing with a customer in person. That would not be so good on a consistent basis.

AR 406.

After the hearing, the ALJ wrote to Dr. McClelland and posed a series of questions concerning plaintiff's condition. One of the ALJ's questions was whether there was an objective medical basis for plaintiff's complaints of ongoing, uncontrolled diarrhea 7 to 25 times a day and unremitting abdominal pain. Dr. McClelland responded that after other impairments had been ruled out, plaintiff had been diagnosed with irritable bowel syndrome unresponsive to therapy. In response to a different question, Dr. McClelland indicated that plaintiff's diarrhea had not resulted in any complications, such as weight loss, dehydration or abnormal laboratory findings; however, he indicated that diarrhea of the duration and frequency described would not ordinarily result in such complications. AR 381.

At a supplemental hearing on April 15, 2005, plaintiff presented testimony from witnesses who worked with her before she left her job as a claims examiner. Lori Neidenmire testified that she saw plaintiff go to the bathroom at least hourly, and sometimes more often, and that she was aware of times that plaintiff had to leave work either because she had soiled herself or because she was in the bathroom more than she was working. However, Neidenmire testified that plaintiff was a very good employee and a "good producer." Neidenmire was not aware of any concerns by management that plaintiff was not satisfactorily performing her work as a claims examiner. Another co-employee, Christine

Adkinson, testified that plaintiff took unscheduled bathroom breaks for up to 30 minutes at least a couple times an hour.

The ALJ recalled Dr. Steiner to testify.[2] Dr. Steiner testified that he disagreed with Dr. McClelland's statement that diarrhea of the nature and frequency described by plaintiff would not lead to some weight loss or electrolyte imbalances, indicating that persistent, chronic diarrhea generally leads to such secondary problems. Dr. Steiner indicated that in addition to wearing protective pads, a person could control diarrhea by avoiding caffeinated beverages and raw fruits and vegetables. Dr. Steiner also testified that timing of eating could be used to control diarrhea, explaining that after eating there was a reflex that caused stimulation of the rectal muscle. Dr. Steiner testified, however, that irritable bowel syndrome was a condition that could cause a person to use the bathroom at unscheduled times and for variable lengths of time.

On July 7, 2005, the ALJ issued a written decision finding plaintiff not disabled. Applying the familiar sequential evaluation process for evaluating disability claims, *see* 20 C.F.R. § 404.1520, the ALJ found that plaintiff had not engaged in substantial gainful employment since her alleged onset date (step 1); plaintiff had a severe impairment, irritable bowel syndrome (step 2); plaintiff's impairment was not severe enough to meet or equal the criteria of an impairment deemed presumptively disabling (a.k.a a "listed impairment") (step

[2] A vocational expert also testified at the second hearing, offering the unremarkable conclusion that no competitive employment was available to a person who had to take unscheduled breaks up to two times per hour for as long as 30 minutes each.

3); and plaintiff was able to perform her past relevant work as a claims clerk/medical claims examiner (step 4). At step two, the ALJ acknowledged that plaintiff had cirrhosis with mild abnormalities in liver functioning, obesity and mild sensory neuropathy. However, the ALJ found that because plaintiff was not significantly limited by any of these conditions, plaintiff's cirrhosis was not a severe impairment.

In reaching her determination that plaintiff could return to her past relevant work, the ALJ found that plaintiff's only work-related limitations were the need to have ready access to a bathroom and to have bathroom breaks, as needed, and that insofar as plaintiff alleged total disability, her complaints were not credible. As support for her credibility determination, the ALJ relied on the lack of objective medical evidence as well as several other pieces of evidence, including evidence indicating that plaintiff's stomach pain and nausea had improved with medication; the lack of evidence that plaintiff had made significant attempts to manage her diet or time of meals or use prescribed pads; plaintiff's activities of daily living; and plaintiff's work history. With respect to plaintiff's work history, the ALJ pointed out that plaintiff had indicated on a questionnaire that one of the reasons her last job had ended was because she had moved; the ALJ found that "[t]he fact that the claimant ceased working for reasons unrelated to the impairment does not add credibility to an allegation that it is the disability that prevents work." AR 23.

With respect to the testimony of plaintiff's former co-workers, the ALJ found that:

> Collateral testimony presented during the hearing indicated that the claimant was observed to take unscheduled breaks at work

> and to go home occasionally because of an accident in which she would soil herself. The testimony about the frequency and length of time the claimant was gone from work was somewhat inconsistent and it was noted that the claimant was adequately performing her job. These allegations are not consistent with the medical record, the conclusions drawn would have been based on the claimant's allegations, and they are also not consistent with the claimant's course of treatment consisting primarily of the use of medication without significant diet modifications or other treatment recommendations.

AR 22.

In determining plaintiff's residual functional capacity, the ALJ gave significant weight to the opinion of Dr. Steiner, who, according to the ALJ, had expressed the opinion "that the claimant could perform work within the previously-described limitations." AR 23. Finding that the record "indicates that the claimant performed her past job with ready access to a bathroom and bathroom breaks, as needed," the ALJ found no evidence from which to conclude that plaintiff could not continue to perform such work. AR 24.

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

ANALYSIS

I. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner is well-settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). 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 v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). 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). With respect to credibility determinations, this court will reverse only if the finding is "patently wrong." *Prochaska v. Barnhart*, 454 F.3d 731, 738 (7th Cir. 2006) (citation omitted); *Sims v. Barnhart*, 442 F.3d 536, 538 (7th Cir. 2006) ("Credibility determinations can rarely be disturbed by a reviewing court, lacking as it does the opportunity to observe the claimant testifying.").

2. Evaluation of Subjective Complaints

There is no dispute in this case that plaintiff suffers from bowel incontinence. The only issue in contention is whether substantial evidence supports the ALJ's determination that plaintiff still could perform her past work if she was allowed bathroom breaks "as needed." Plaintiff insists that she cannot. She argues that the phrase "as needed" does not account for the unpredictable and urgent nature of her bathroom visits. I disagree. In spite of plaintiff's repeated arguments to the contrary, the term "as needed" implies just that: that

plaintiff must have the ability to use the bathroom whenever she needs without being limited to the regularly-scheduled break periods. I am satisfied that in finding that plaintiff required bathroom breaks "as needed," the ALJ properly understood that plaintiff's needs did not occur like clockwork.

Even so, argues plaintiff, the record establishes that she cannot work competitively even with bathroom breaks as needed. Plaintiff points to her testimony that she needs to visit the restroom between 7 and 25 times daily and to the vocational expert's testimony at the first hearing that seven restroom breaks per day would preclude plaintiff from performing even the types of professional office work that she had performed in the past. However, plaintiff's argument assumes that the ALJ found plaintiff's testimony concerning the frequency of her bathroom visits to be credible, which is not the case. To the contrary, the ALJ stated that she did *not* "find [plaintiff's] statements suggesting an inability to perform all gainful activity to be fully credible."

Although it is true that the ALJ described plaintiff's subjective complaints in broad terms like "incapacitating limitations" and "an inability to perform all gainful activity," it is apparent from the ALJ's decision and the record that the ALJ was including plaintiff's allegation of having to use the bathroom at least seven times each workday among those complaints. The ALJ clearly was aware of plaintiff's testimony concerning frequency: she noted it in her questions to Dr. McClelland and at the outset of the supplemental hearing. Moreover, nothing in the ALJ's decision suggests that she ignored or misunderstood the VE's

testimony that seven or more bathroom breaks each day would preclude competitive employment. Although the ALJ could have been more explicit, it is apparent that in finding plaintiff's allegations of "incapacitating limitations" not credible, the ALJ was including plaintiff's assertion that she would require at least 7 bathroom breaks per workday.

The ALJ found plaintiff's complaints of debilitating limitations not credible for these reasons: the lack of supporting objective medical evidence; the improvement of plaintiff's nausea and abdominal pain with the use of a proton pump inhibitor; the lack of medical treatment from June 2003 to March 2004; the lack of evidence to suggest that plaintiff attempted to manage her symptoms through diet, time of meals or use of prescribed pads; plaintiff's wide range of daily activities; and plaintiff leaving her past job because she moved to another state.

Plaintiff raises valid objections to some of these findings. For example, I agree that it was improper for the ALJ to criticize plaintiff for not attempting to control her diarrhea by altering her diet, timing her meals or using "prescribed" pads when there is no evidence that plaintiff's treating gastroenterologist, Dr. McClelland, recommended these approaches to the problem. I also question whether it was appropriate for the ALJ to adopt the opinion of Dr. Steiner, a physiatrist, over that of Dr. McClellan, a specialist in gastrointestinal disorders, concerning the likelihood that secondary problems would result from diarrhea of the severity reported by plaintiff. Finally, the various and rather extensive daily activities in which plaintiff engages say little about plaintiff's ability to be employed competitively

because these activities occur primarily in her home where plaintiff has unrestrained access to a restroom.

In spite of these concerns, the ALJ's credibility determination is not patently wrong. As the ALJ noted, there was sparse objective medical evidence to corroborate the claimed severity of plaintiff's symptoms. Even if plaintiff is correct that irritable bowel syndrome is akin to fibromyalgia and other disorders for which there are no objective tests, the ALJ was entitled to take the lack of objective medical evidence into account so long as she also considered the other factors the commissioner deems relevant to evaluating a claimant's subjective complaints, including plaintiff's course of treatment, efforts to alleviate symptoms including use of medications, daily activities and work history. *Knight v. Chater*, 55 F.3d 309, 314 (7th Cir. 1995); 20 C.F.R. § 404.1529(c).

In addition to the lack of objective evidence, the ALJ noted plaintiff's lack of treatment from June 2003 to March 2004; the effectiveness of proton pump inhibitor therapy in reducing plaintiff's symptoms of abdominal pain and nausea; and plaintiff's having left her past job in part because she moved as factors undermining the credibility of plaintiff's complaints. In making her credibility determination, the ALJ cited accurately to the record and articulated clearly how she was weighing the evidence. Even after setting to one side the questionable findings noted above, I cannot conclude the ALJ erred in discounting plaintiff's testimony. *Herron v. Shalala*, 19 F.3d 329, 336 (7th Cir. 1994) (court can affirm ALJ's credibility finding if some but not all reasons cited by ALJ are supported by

record); *Edwards v. Sullivan*, 985 F.2d 334, 338 (7th Cir. 1993) ("[D]eterminations of credibility often involve intangible and unarticulable elements which impress the ALJ, that, unfortunately leave no trace that can be discerned in this or any other transcript.")

Plaintiff maintains that even if the ALJ properly determined that plaintiff's allegations of disabling symptoms were not entirely credible, this determination does not answer the question whether plaintiff's symptoms preclude her from performing her past employment. According to plaintiff, to determine plaintiff's ability to return to her former employment, the ALJ was obliged to make a specific finding of how often and at what intervals plaintiff would have to use the bathroom. Absent such a finding, argues plaintiff, the ALJ's conclusion that plaintiff is capable of performing her past work is not supported by substantial evidence. Plaintiff also points out that contrary to the ALJ's finding, Dr. Steiner never testified that plaintiff could work so long as she had bathroom breaks as needed; rather, he testified only that the need to have proximity to a bathroom and to take unscheduled bathroom breaks was consistent with a diagnosis of irritable bowel syndrome.

There may be convincing counter-arguments to plaintiff's position, but the commissioner hasn't made them. For example, an argument could be made that because the evidence indicated that plaintiff was able to perform her past job in spite of her frequent trips to the bathroom, it was not necessary for the ALJ to rely on the VE's findings or to make findings regarding precisely how often and for how long plaintiff would be away from her work station. *See* 20 C.F.R. § 404.1560 (to be found capable of performing past relevant

work, a claimant must be able to perform her past work either as the job is generally performed in the national economy or as the claimant actually performed it).[3] In response to plaintiff's argument, the commissioner asserts only that

> [P]laintiff . . . cites no authority for the proposition that an ALJ must question a claimant about every discrepancy that exists between her testimony and the record evidence. Moreover, Plaintiff offers no explanation why her attorney could not have questioned her about [the frequency of her bathroom needs] at the hearing.

Mem. in Supp. of Comm.'s Dec., dkt. #16, at 20.

The commissioner's argument is a non sequitur. In response to questioning by the ALJ, plaintiff testified that she suffered from explosive, unpredictable bouts of diarrhea that required her to use the bathroom not less than seven times every day. What additional information might plaintiff's own attorney have adduced through additional questioning? It seems that the commissioner is suggesting that the plaintiff should have hedged her bets by proposing a lower fallback number in the event the ALJ disbelieved her testimony regarding seven or more breaks per day. Since plaintiff's position is that she really does need at least seven restroom breaks each day, this wasn't an option.

Plaintiff's argument is that if the ALJ thought plaintiff was exaggerating the frequency of her bathroom usage, and if the ALJ had determined that "as needed" for plaintiff meant

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[3] Ordinarily this court does not entertain new arguments after the report and recommendation issues, but 28 U.S.C.§ 636(b)(1) allows the district judge to amplify the record as she sees fit when providing her de novo ruling on plaintiff's summary judgment motion.

something less than seven restroom breaks per day, then the ALJ had to assign a numerical value to "as needed" in order properly to support her finding that plaintiff was not disabled by the frequency of her diarrhea. According to plaintiff, it was necessary for the ALJ to quantify how many breaks plaintiff actually needed because the VE testified that even in a professional setting, too many unscheduled breaks would preclude competitive employment.[4] The commissioner's response does not address this point.

Plaintiff makes a valid point when she argues that the ALJ could not just jump from her conclusion that plaintiff's complaints were not entirely credible to her finding that plaintiff could return to her past relevant work without explaining how she reconciled plaintiff's need to use the bathroom at will with the VE's testimony concerning the degree to which such bathroom use is generally tolerated by employers. The only evidence the ALJ cited was Dr. Steiner's testimony, but as plaintiff points out, Dr. Steiner never offered an opinion regarding how often plaintiff would need to use the bathroom or whether that use would preclude competitive employment.

Accordingly, I am recommending that this court remand the case to the commissioner so that she can make a specific finding concerning the frequency and duration of plaintiff's bathroom usage and determine whether, in light of those findings, plaintiff is able to work.

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[4] In her reply brief, plaintiff asserts that the VE at the first hearing testified that "unscheduled breaks would preclude [past relevant work] and other work in the national economy." Plt.'s Reply Mem., dkt. #17, at 2. This is a misstatement of the VE's testimony. *See* AR 405-406.

III. Plaintiff's Remaining Claims

Plaintiff's remaining arguments merit little discussion. Plaintiff contends the ALJ erred in failing to find that her cirrhosis[5] is a severe impairment. However, to be "severe," an impairment must "significantly limit" the claimant's ability to perform basic physical or mental work tasks. 20 C.F.R. § 404.1520(c). Apart from the diagnosis itself, plaintiff points to no evidence in the record to suggest that the condition imposed any significant limitations on her ability to work. Neither Dr. Steiner nor the two state agency consulting physicians who reviewed the record identified any non-exertional limitations resulting from plaintiff's cirrhosis. Substantial evidence supports the ALJ's conclusion that plaintiff's cirrhosis is not a severe impairment.

The medical literature that plaintiff has attached to her brief was not before the ALJ and therefore is beyond the scope of judicial review. Even so, that literature shows only that *some* people with cirrhosis may experience abdominal pain and nausea; it does not constitute substantial evidence to show that *plaintiff*'s cirrhosis produces such symptoms. In any case, the ALJ considered plaintiff's complaints of abdominal pain and nausea and found that they were effectively controlled with medication. She committed no error with respect to her evaluation of plaintiff's cirrhosis.

Plaintiff also criticizes the ALJ for dismissing letters from Dr. McClelland and plaintiff's family physician, Dr. Lira, which indicated that plaintiff's symptoms of abdominal

[5] In her reply brief, plaintiff erroneously refers to this condition as "sclerosis."

pain and chronic diarrhea were disabling. As the ALJ noted, however, both doctors' statements were based upon plaintiff's own allegations concerning the severity of her symptoms. Because the ALJ found plaintiff's allegations not credible, she could properly reject these derivative reports. *Diaz v. Chater*, 55 F.3d 300, 308 (7th Cir. 1995).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that commissioner's decision denying plaintiff Dorothy Brueggen's application for disability insurance benefits be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this report.

Entered this 15th day of December, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

December 15, 2006

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Re: Brueggen v. Barnhart
Case No. 06-C-154-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 January 5, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by January 5, 2007, 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