

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

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THERESA LaROCK,

OPINION AND ORDER

Plaintiff,

11-cv-318-bbc

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.  
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Plaintiff Theresa LaRock brings this action appealing the denial of her April 11, 2008 application for disability insurance benefits. She contends that the administrative law judge erred in not properly evaluating her mental impairments, in his assessment of the treating and examining sources and in his failure to give proper consideration to the opinions of Dr. Jane Stark, one of plaintiff's treating doctors. Although the administrative law judge wrote a careful and comprehensive opinion in this case, he overlooked relevant information in plaintiff's medical records in reaching his decision and he relied on inadequate information from the vocational expert. Accordingly, the case must be remanded for further consideration.

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

## FACTS

### A. Background

Plaintiff was born on March 31, 1959. AR 47. Her past work includes work as a housekeeper, server, food service/cashier and food service/checker. AR 120. She stopped working as of February 12, 2008. AR 119.

Plaintiff applied for disability insurance benefits on April 24, 2008, alleging disability beginning February 13, 2008. In various reports and letters to the Social Security Administration, she reported that she was suffering from degenerative disc disease of low back, osteoarthritis, depression, numbness in her feet, plantar fasciitis, carpal tunnel of the left wrist, heart murmur, hypertension, gastroesophageal reflux disease, heel spurs and otosclerosis of the bones in the ear. AR 102, 119.

Plaintiff's application was denied initially and after she moved for reconsideration. She appealed and was given a hearing on February 2, 2010, by videoconference before Administrative Law Judge Zane Lang. AR 35. The only witnesses were plaintiff and a neutral vocational expert. The administrative law judge issued a decision on February 11, 2010, finding plaintiff not disabled. AR 49-65. On December 9, 2010, the Appeals Council denied plaintiff's petition to review the administrative law judge's decision, AR 4, making the administrative law judge's decision the final decision of the commissioner.

## B. Medical Evidence

### 1. Abens Olson Chiropractic

Plaintiff had 24 chiropractic treatments from January 8, 2007 to March 26, 2008 at Abens Olson Chiropractic, 23 of them with Dr. Abens. AR 280-90. On February 13, 2008, Dr. Abens reported that plaintiff had low back pain radiating into her legs, with pain and paresthesia. The paresthesia in her feet involved numbness, pain or achiness in the toes. AR 289. On March 12, 2008, Dr. Abens told plaintiff that if she returned to work, it should be on a “reduced time schedule as well as [with] restrictions regarding twisting, bending, lifting, etc.” AR 290. On March 26, 2008, Dr. Abens stated that plaintiff had not returned to work because there was no work available to be done on a light work or restricted basis. AR 290.

### 2. Pine Grove Family Practice Associates, Drs. Polus and Thompson

Dr. Jacqueline Polus is plaintiff’s primary physician. Her notes show that in July 2007 plaintiff had been in for a followup appointment after a recent hospitalization (apparently for coughing possibly secondary to reactive airway disease with good response to bronchodilators and normal pulmonary function testing) and had reported fatigue, grief over her mother’s recent death and her daughter’s leaving home to start college. AR 339. Polus assessed plaintiff as having “reactive depression.” Nothing in the notes says anything

about lower back pain or foot numbness.

Dr. Polus saw plaintiff again on September 9, 2007 to review lab results. AR 338. At the time, plaintiff was complaining of flashes and night sweats. Id. Polus prescribed Premphase to ease the effects. AR 337.

On September 26, 2007, Dr. Polus noted that plaintiff had come in with some left wrist pain and hand numbness and that she had a positive Phalen's sign [a test for carpal tunnel syndrome]. AR 336. Polus noted "probable carpal tunnel syndrome" and wrote that she had advised plaintiff to get a "cock-up" wrist splint for her left wrist and a tennis elbow support for her left forearm and might recommend an EMG if these measures did not help. Id. She did not include depression in her assessment of plaintiff's condition.

Polus saw plaintiff again on October 8, 2007, for complaints of swollen feet. AR 335. On questioning, plaintiff said that her feet were not actually swollen but felt puffy or more numb. An examination of the feet showed

some patchy deficits in testing her for light touch. Babinski's were +/- up going bilaterally [the Babinski sign can indicate upper motor neuron lesion constituting damage to the corticospinal tract. Wikipedia (visited Jan. 6, 2012)]. DTRs [deep tendon reflexes] were brisk and symmetric for the knees and ankles, as well as the biceps. Muscle strength was intact and symmetric both upper and lower extremities. Patient had little difficulty with tandem gait. Romberg was normal.

Id. Polus's assessment was that plaintiff had dysesthesias of the feet, hypertension under good control and possible early hypothyroidism and that she was perimenopausal. AR 334.

She did not mention depression.

Polus saw plaintiff again on November 21, 2007. AR 331. Plaintiff was complaining of aching legs, numbness in her feet, difficulty sleeping and some stiffness in the morning. Polus thought the generalized aching could be consistent with degenerative joint disease and she noted that plaintiff was frustrated at not getting a definite diagnosis from a consultation with Dr. Konzen, a doctor of osteopathic-neurology. Id. She did not mention depression in her assessment of plaintiff.

On February 8, 2008, plaintiff saw Polus, complaining of “a lot of pain,” AR 327, most noticeably in her lower back, “which hurt[] all the time,” particularly at the end of the day, and pain going down her right leg. Id. She also complained of neck stiffness. Polus noted that Dr. Konzen had done an MRI of plaintiff’s back that showed multiple levels of degenerative disc disease but no particular nerve impingement. Id. Polus recommended to plaintiff that, in light of her symptoms, she consider taking a month off work to bring her back to a baseline. Polus also recommended physical therapy. AR 326.

On March 3, 2008, Polus reported that plaintiff “has been off work for three weeks now with back pain, as well as perimenopausal mood disorder. She is feeling significantly better. She is doing well with physical therapy, although she still has pain on a continual basis.” AR 325. She said her pain medications were helping. Id. On examination, Polus found tenderness in plaintiff’s left sacroiliac area. She decided to keep plaintiff off work

another month to work on strengthening, flexibility and pain management. AR 324.

On March 24, 2008, plaintiff came in for a recheck on her back. Dr. Polus examined her and found tenderness in the lumbar area. AR 323. She suggested to plaintiff that she return to light duty work in two weeks. Plaintiff's anxiety had increased because she was afraid she would be fired after another month if no light duty work was available. Dr. Polus suggested a consultation with an occupational medicine specialist, noting that "certainly the type of work Theresa has been doing is going to be an ongoing stress to her back and even with strengthening of her musculature it is difficult to say if she will be able to return to that type of work without modifications." Id. On April 17, 2008, plaintiff called requesting samples of prescriptions because she was unable to pay for prescriptions. The clinic gave her six weeks' worth of samples of Nexium, Lexapro, Lunesta, Avapro, and Lyrica. AR 322. On September 4, 2008, plaintiff was prescribed hydrocodone. AR 377.

On December 19, 2008, plaintiff told Polus that she had become more depressed since her last visit. Polus thought this had been exacerbated by her anxiety about being out of work. Plaintiff did not assess plaintiff as having depression. AR 412.

In April 2009, Dr. Polus found that plaintiff had 75 to 90 degree anterior flexion; otherwise the range of motion in her back was normal. Plaintiff had stiffness on the right side allowing her leg to be passively raised to only 60 degrees while her left side went to 75 degrees. Straight leg raising did not produce any discomfort in her lower back. Her hip

range of motion was slightly restricted on the right side. Muscle strength was intact in her lower extremities. AR 408. Polus assessed plaintiff as having “depression/perimenopausal mood disorder” that had improved with an increased dose of Lexapro. AR 407.

On July 21, 2009, plaintiff came into the clinic and saw Dr. J. Thompson for left shoulder pain. AR 428. Thompson found that she had bilateral tightness in her trapezium. The exam revealed good range of motion, lack of tenderness in the cervical spine and some difficulty in raising her left arm above her head. The doctor noted that plaintiff was “chronically” on hydrocodone twice a day but that the medication did not relieve the pain. Id.

On August 12, 2009, plaintiff came in to see Dr. Polus for a followup to her appointment with Dr. Thompson, still complaining of left shoulder pain, as well as left hand numbness. AR 426. An examination of her left shoulder showed trapezius tenderness but no muscle spasm. Plaintiff also had tenderness around her left rotator cuff and her biceps, but not in the subacromial bursa region. Plaintiff had full range of motion in her shoulders. Adduction and external rotation maneuvers of the shoulders caused her hands to go numb. When her arm was at waist level, her pulse was normal but when it was raised, her left pulse was undetectable. Phalen’s maneuver was negative and her strength was intact and symmetric in her upper extremities. AR 426. Polus did not assess depression. AR 425.

On November 18, 2009, plaintiff saw Dr. Polus for what she reported was constant

neck and back pain that she rated as 8 out of 10 normally and as 9 or 10 out of 10 when doing a lot of lifting or bending. AR 434. She reported constant pain at an 8-out-of-10 level. She said she was experiencing occasional dizziness and was using a walker with a seat for long distances. AR 435. She reported having had carpal tunnel surgery that helped her left shoulder pain. An examination revealed that she had full range of motion in her shoulders, hips and knees and limitation of anterior flexion when forward bending. Plaintiff said she was open to neuropsychiatric testing. AR 434-35.

On January 8, 2010 and again on January 11, 2010, Dr. Polus produced Medical Source Statements for the Social Security Administration. Exh. #31F, AR 445-51. In the January 8 statement, which focused on plaintiff's arthritis, she wrote that plaintiff had neck and back pain, dizziness, fatigue and anxiety, impaired sleep and tenderness in her joints. Polus reported that plaintiff had to walk every 30 minutes for ten minutes and needed an unscheduled daily break of at least 30 minutes in which to rest, along with an opportunity to shift positions regularly. Polus said that plaintiff could lift ten pounds occasionally and should never lift as much as 20 to 30 pounds, that she could grasp and turn objects 67% of the day, make fine manipulations 67% of the day and reach out and upward with her arms 11% of the day. She could sit or stand for only ten minutes at a time and for less than two hours a day. Her emotional condition contributed to her difficulties in working and she could handle only a low stress job. Id.

In another report completed on January 11, Polus said that plaintiff could do no pulling, bending, stooping or kneeling and would have to miss work more than three times a month. Exh. #33F, AR 455-58.

### 3. Eau Claire Therapy & Fitness

On February 19, 2008, plaintiff began physical therapy as prescribed by Dr. Polus. Her physical therapist noted that plaintiff had “increased lumbar lordosis, pain, abdominal weakness.” AR 313. She was to engage in therapy twice a week for four weeks, but it appears from the record that she continued in physical therapy through the end of April 2008. Id.

### 4. Marshfield Clinic-Eau Claire Center

On April 2, 2008, plaintiff saw Dr. Jane Stark in the Department of Occupational Medicine at the Eau Claire Center of the Marshfield Clinic for evaluation of her lower back, on referral from Dr. Polus. Stark noted that plaintiff had “varied muscle and joint aches, history of osteoarthritis diagnosis, some persistent although improving foot numbness of the nonradicular pattern of questionable etiology and some degenerative disk disease with chronic low back symptoms.” AR 295. However, she reported on examination only tenderness to palpation of the lumbosacral spine, with no signs of guarding or pulling away

in response to the palpation, no tightness of the paraspinal musculature, no limitation of motion, no difficulty with heel/toe walk, no difficulty moving from standing to sitting or vice versa, no problems with gait or station and no positive finding upon straight leg raising. AR 296. Stark diagnosed back pain, degenerative disk disease, numbness in bilateral feet, obesity and deconditioning. AR 297. She did not anticipate that the degenerative disk disease would improve and suggested that it might get worse. AR 297.

Dr. Stark reviewed plaintiff's complaints and work history and concluded that plaintiff could work eight-hour days, five days a week, with the following restrictions: light working only, rarely lifting 30 pounds, occasionally lifting 10-20 pounds, frequent transitions between sitting, standing, walking and driving as needed, occasional bending or twisting, climbing stairs, working below waist height or with outstretched arms, seldom kneeling, squatting or crawling, rare use of ladders and no high-impact activities. AR 297. In a return to work report, she wrote that plaintiff would need a chance to "stretch pause" every 30 to 60 minutes and would have to alternate sitting, standing and walking during the work day. AR 292.

### C. Consulting Physicians

#### 1. Dr. Mina Khorshidi

On June 26, 2008, state agency physician Dr. Mina Khorshidi signed a Disability

Determination and Transmittal sheet in which she found that plaintiff was not disabled. Her primary diagnosis was “disorders of back”; her secondary diagnosis was “affective disorders.” AR 347-54. On the same day, Dr, Khorshidi drafted a Physical Residual Functional Capacity Assessment in which she gave the primary diagnosis as “DDD,” secondary diagnosis as “numbness in feet” and other alleged impairments as “plantar fasciitis, GERD, HTN.” AR 347. (I assume that “DDD” refers to degenerative disk disease and that “HTN” refers to hypertension.) Khorshidi limited plaintiff to occasionally lifting 20 pounds, frequently lifting ten pounds, standing or walking for a total of two hours in each eight-hour day, sitting for a total of six hours each eight-hour day, and limited pushing and pulling in the lower extremities. AR 348. She assessed plaintiff as being capable of balancing frequently and occasionally climbing, stooping, kneeling, crouching or crawling. AR 349. She added that her opinions were not substantially different from those of plaintiff’s treating or examining physicians. AR 353.

## 2. Syd Foster, D.O.

On November 18, 2008, state agency physician Dr. Syd Foster signed a Disability Determination and Transmittal sheet in which he stated that plaintiff was not disabled. He found her primary diagnosis to be “osteoarthritis and allied disorders” and her secondary diagnosis “affective disorders.” AR 348. On the same day, he found from the record that

plaintiff could lift 20 pounds occasionally, lift ten pounds frequently, stand or walk for a total of six hours each eight-hour day, sit for a total of six hours each eight-hour day and that she had limitations on pushing and pulling in her lower extremities because of her foot numbness and tingling. AR 381. Dr. Foster's walking and standing evaluation, AR 381, differed from Dr. Khorshidi's evaluation. AR 318. Foster found plaintiff's statements about her pain and limitations credible with the exception of a restriction on her walking more than one block, for which he saw no supporting evidence in the record. AR 385. He stated that his opinions were not substantially different from those of plaintiff's treating or examining physicians. AR 386.

### 3. Deborah Pape, Ph.D.

State agency psychologist Deborah Pape, Ph.D., filled out a Psychiatric Review Technique form on July 11, 2008, in which she found plaintiff's impairment not severe and suggested that a co-existing non-mental impairment required referral to another medical specialty. AR 355. [She did not identify the co-existing impairment.] Pape found plaintiff's medically determinable mental impairments to be perimenopausal mood disorder and anxiety disorder, AR 358 and 360, but found that these impairments produced no functional limitations on the activities of plaintiff's daily life, presented no difficulties to plaintiff in maintaining social functioning or in concentration, persistence and pace and did not produce

episodes of decompensation. AR 365.

4. Roger Rattan, Ph.D.

Dr. Rattan reviewed plaintiff's case on November 25, 2008, about four months after Pape's review. AR 388. Dr. Rattan's opinion differed from Dr. Pape's in two respects. Like Pape, he found two impairments, one of which was anxiety disorder, but he found depression disorder instead of perimenopausal mood disorder. AR 391 and 393. He found that plaintiff was "doing better with her anxiety and depression." AR 400. Rattan disagreed with Pape, who had found that plaintiff's mental impairments did not present any difficulty to plaintiff in maintaining concentration, persistence or pace. Rattan found that they produced a mild limitation on these activities. AR 398. Dr. Rattan said that he found plaintiff's statements about her symptoms and the effect on her functioning to be fully credible. AR 400.

D. Additional Records

1. Neuropsychological evaluation

Jason Kanz, Ph.D., performed a neurological evaluation of plaintiff on December 8, 2009. He found plaintiff alert and well oriented to person, place, time and situation. AR 444. Her mood was neither elevated nor depressed and she showed no evidence of thought

disorder. Her remote memory was intact and her recent memory seemed unimpaired. Her thoughts were logical and coherent and her motor function appeared unimpaired. He noted that plaintiff had exhibited normal attention, normal insight, memory, judgment and concentration, with no evidence of distractability. Id. He found, however, that her fund of general knowledge and constructional skills was mildly defective, that her mental arithmetic was borderline and her psychomotor processing speed was sluggish. AR 444. Her responses to questionnaires suggested prominent depression, anxiety and somatic tendencies. Id. Plaintiff's score on the Beck Depression Inventory II test was "indicative of moderate depression." Id. On the Minnesota Multiphasic Personality Inventory 2-RF test, "she complained of poor health suggestive of a somatoform disorder." Id. "A similar validity profile was evident on the MBMD [Kanz did not explain what this test was], yet there is still evidence of depression, anxiety, and somatic preoccupation." Id. Kanz stated that plaintiff's "physical complaints would not be expected to improve with physical treatment." AR 443. He suggested continued psychiatric treatment and he noted his belief that plaintiff would benefit from visiting a pain physician or pain psychologist. AR 443.

## 2. Neurological report

Dr. Jon P. Konzen, a Doctor of Osteopathy-Neurology, undertook a neurological assessment of plaintiff on or around January 30, 2008, on referral from Dr. Polus. From his

report, it appears that plaintiff had previously had neural imaging that showed “nonspecific white matter changes,” but that in a recent study, she had shown no progression of disease. AR 245. She underwent lumbar puncture with spinal fluid analysis. Tests for multiple sclerosis and Lyme Disease were undertaken but turned out to be negative. Dr. Konzen reported that plaintiff’s symptoms were really focused on her lower extremities, with numbness and tingling in her feet and toes, stiffness in her legs and low back pain. Id. He observed that plaintiff had some mild upper extremity symptoms with stiffness in her shoulders but that the symptoms were minor compared to the lower extremity symptoms. Id.

## E. Hearing Testimony

### 1. Plaintiff’s testimony

At the hearing before the administrative law judge that took place on February 2, 2010, plaintiff appeared with a representative. The representative told the administrative law judge that plaintiff suffered from a combination of problems, including degenerative disc disease, arthritis in her neck and shoulders, pain and numbness going down her arm, plantar fasciitis in her feet, depression, anxiety and arthritis, as shown in Dr. Polus’s report of April 2007. AR 37-38. When asked about the bases for the parasthesias, the representative replied that plaintiff had had an EMG that showed numbness, that she had subsequent

carpal tunnel syndrome and that her doctor's opinion was that the problem was in her back.

AR 38.

Plaintiff testified that she was not working at the time and had last worked in February 2008, when she was a housekeeper and food server for Harvest Management at a facility called Oakwood Hills Retirement. AR 39. In that job, the heaviest weight she lifted as a housekeeper was 30 pounds and the heaviest weight she lifted as a food server would have been 40 pounds. Id. She had held similar jobs at two other facilities and she had worked in food service at the University of Wisconsin - Eau Claire in the salad department. AR 40. In this last job, the heaviest weight she lifted was 50 pounds. Id. Before that she had worked as a dishwasher and had checked the identification cards of students coming through a cafeteria line. Id.

Plaintiff testified that she was 50 at the time of the hearing, that she lived with her husband and that her typical day consisted of sitting and watching television. AR 40-41. She said that she lacked the energy to get things done. She said that she helped with some dishes and did light cooking in the microwave, but that her husband helped with most things. She said that she had a driver's license but drove only if she had a doctor's appointment and her husband could not drive her. She said that her husband did the grocery shopping. She went with him once in a while and found find a chair if she got too tired. Id.

Under questioning by her representative, plaintiff testified that she left her last job because she could no longer do the lifting and perform the job. AR 41. She said that she was in pain and had numbness in her feet from being on them all day. AR 42. She testified that she took Hydrocodone twice a day for chronic pain, used a heating pad most of the day and avoided doing anything strenuous that would affect her back. Id.

Plaintiff testified that she took Cymbalta and Buspirone for depression and anxiety and that the medications made her tired, drowsy and without ambition. Id. She added that the depression itself caused her to lose interest in doing things and made her constantly tired and low on energy. Id. She testified that her pain had worsened since she had been injured while working at Sacred Heart Hospital in 2005, that she had osteoarthritis in her neck that affected her all day, and arthritis in her shoulder “where the pain goes down [her] arm.” AR 42-43. She has numbness in her hands once in a while and pain in her feet from plantar fasciitis. AR 43. Plaintiff told the administrative law judge that she did not think she could do a light job on a full-time basis because of her pain and her need to rest often and reposition herself. AR 41.

## 2. Vocational expert

Dr. Jen Hagen testified as a vocational expert. AR 43. She described plaintiff’s past work as tray worker, which is an unskilled job, requiring medium exertion, and as a cleaner,

hospital, which is also classified as medium, unskilled work. AR 44. She noted that the facility where plaintiff had last worked had described the job as light lifting. Id. Hagen said that pantry cook (the classification of plaintiff's job in the salad department) was light, semi-skilled and that the cashier II job was light, unskilled. Id.

The administrative law judge asked Hagen whether a hypothetical person of plaintiff's age, education and work experience could perform any of plaintiff's prior work if she could lift 20 pounds occasionally, ten pounds frequently, sit, stand or walk six hours out of an eight-hour day, do occasional pushing and pulling with the lower extremities and occasional climbing, stooping, kneeling, crouching and crawling. She said that such a person could perform both the pantry cook work as generally performed and the cashier II job. AR 44-45. The administrative law judge then asked whether a person with the same limitations, who was right-handed and able to do frequent but not constant fingering with the left upper extremity, could perform plaintiff's past work as pantry cook and cashier II. She answered yes again. However, when he asked whether such an individual could not do that work if she had body pain and depression, she said that such a person would not be able to do the work. AR 45.

#### F. Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge

performed the required five-step sequential analysis. 20 C.F.R. § 404.1520. At step one, he found that plaintiff had not engaged in substantial gainful activity since February 2008, the application date. AR 54. At step two, he found that plaintiff had the severe impairments of degenerative disc disease and carpal tunnel syndrome, but that she did not have a severe mental impairment.

At step three, he found that plaintiff's physical impairments did not meet or equal a listing in 20 C.F.R. § 404, Subpart P, Appendix I, either singly or in combination. Although he had found that plaintiff's degenerative disc disease was severe under the regulations, he found that it did not meet or equal any listed impairment because it did not have the requisite neurological deficits, such as motor loss, or the required functional limitation, such as the inability to ambulate effectively. AR 56. Her carpal tunnel syndrome did not meet or equal a listing because it did not cause plaintiff significant and persistent disorganization of motor function, sustained disturbance of gross and dexterous movements or involve two extremities. Id.

At step four, the administrative law judge found that plaintiff had the residual functional capacity to perform her past relevant work as a pantry cook or cashier II. Having made this finding, he did not address step five, which would have required him to find whether plaintiff could perform any substantial gainful work in the national economy.

## OPINION

### A. 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). 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 administrative law judge 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).

### B. Plaintiff's Disagreements with Administrative Law Judge's Decision

#### I. Step one and two findings

The parties take no issue with the administrative law judge's finding with respect to steps one, that plaintiff had not been engaged in any substantial gainful employment since February 13, 2008, or his finding at step two that her degenerative disc disease and carpal tunnel syndrome were severe impairments. However, plaintiff disagrees with the administrative law judge's determination that she does not have a severe mental impairment.

In her view, Dr. Kanz's evaluation of her level of depression as "moderate" means that her depression is a severe impairment. Plaintiff arrives at this position by referring to the five-point scale used for evaluating a medically determinable mental impairment. 20 C.F.R. § 404.1520a(b)(1). The first step in the process is to rate the degree of functional limitation in four broad areas: (1) activities of daily living; (2) social functioning; (3) concentration, persistence and pace; and (4) episodes of decompensation. *Id.*; see also *Craft v. Astrue*, 539 F.3d 668, 674-75 (7th Cir. 2008). The first three functional areas are rated on a five-point scale of none, mild, moderate, marked and extreme, and the fourth is rated on a four-point scale: none; one or two; three; or four or more. 20 C.F.R. § 404.1520a(c)(4). If the degree of limitation in the first three functional areas is "none" or "mild" and "none" in the fourth area, the agency will generally conclude that the applicant's impairment is not severe. § 404.1520a(d)(1). Plaintiff argues from this that the finding of "moderate depression" requires a finding that her depression is a severe impairment.

The administrative law judge is required to incorporate the pertinent findings into the written decision, *Craft*, 539 F.3d at 675, and incorporate "a specific finding as to the degree of limitation in each of the functional areas." § 404.1520a(e)(4). In this case, the administrative law judge found from Kanz's report and from plaintiff's own statements to the agency that she had no functional limitation in three of the four areas and only mild limitation in the area of concentration, persistence or pace. From this he concluded that her

medically determinable mental impairments were non-severe under § 404.1520a(d)(1). He observed that Kanz had reported that plaintiff had exhibited normal attention and concentration at her meeting with him, that her mood had been neither elevated or depressed, that her memory, insight and judgment were all normal and that she had not sought treatment by a mental health professional.

Plaintiff argues in his brief that Kanz found that plaintiff's level of depression was "moderate," but in fact Kanz found only that plaintiff's score on the Beck Depression Inventory II was "indicative of moderate depression." AR 443. However, the administrative law judge did not discuss Kanz's statement that "[plaintiff's] responses on questionnaires would suggest prominent depression, anxiety and a tendency toward somatic concern." *Id.* This omission would not necessarily change the outcome at this step, but it may play a role in determining whether plaintiff can return to her past relevant work (step four in the analysis).

## 2. Step three findings

At the third step, the administrative law judge must determine whether the claimant's impairments meet or equal one of the impairments listed in 20 C.F.R. § 404 Subpt. P, App. 1, 4. Plaintiff argues that the administrative law judge erred in finding that her degenerative disc disease and carpal tunnel syndrome did not meet or medically equal the severity

requirements of any listed impairment, but this argument is unpersuasive. The administrative law judge explained that plaintiff did not exhibit the requisite neurological deficits for disc disease, such as motor loss or the inability to ambulate effectively, or the deficits required for carpal tunnel syndrome that would meet or equal a listed impairment. Plaintiff has not shown that this determination was erroneous.

### 3. Step four findings

Once the administrative law judge concluded that plaintiff's impairments were not severe enough to establish that she was presumptively disabled under the regulations, he proceeded to step four, which requires an assessment of the applicant's plaintiff's work-related limitations to determine her residual functional capacity to perform her past relevant work. He found that plaintiff could work at either of two jobs that she had performed in the past, both of which are performed at the "light" level of exertion: pantry cook, which is rated semi-skilled and cashier II, which is rated unskilled. AR 60. Having made this finding, he did not go on to step five and consider whether plaintiff could perform any jobs that existed in the national economy.

#### a. Plaintiff's physical impairments

The administrative law judge found that plaintiff retained the residual functional

capacity to perform “light work” with lifting of 20 pounds occasionally and ten pounds frequently, standing or walking for a total of six hours in an eight-hour day and sitting for a total of six hours in an eight-hour day, with some restrictions. She could occasionally push or pull or both with her lower extremities, occasionally climb, stoop, crouch or crawl and frequently, but not constantly, use her left (non-dominant) hand for handling or fingering or both. AR 56-57. He found that plaintiff’s medically determinable impairments could reasonably be expected to cause low back pain, numbness in her feet, symptoms of pain in her sciatic nerves and weakness in her legs, as well as pain in her neck and numbness in her hands, but that her statements about the intensity, persistence and limiting effects of these symptoms were not credible to the extent they were inconsistent with his residual functional capacity assessment. AR 57.

In support of this conclusion, the administrative law judge noted that in February 2008, plaintiff had taken a medical leave from her housekeeping job, which reportedly involved lifting of up to 60 pounds, but that she was released by her doctor to return to work shortly after that. In April 2008, Dr. Stark recommended that plaintiff return to full-time work with lifting restrictions of 20 pounds occasionally and 10 pounds frequently. She did not return to work because her employer had no work available with the kinds of restrictions plaintiff needed. The administrative law judge thought that this suggested that plaintiff’s failure to return to work was not based on physical limitations but the unavailability of

work. AR 57. He noted also that plaintiff had followed an essentially routine or conservative course of treatment for her alleged impairments, engaging in one course of physical therapy, but otherwise seeing only a general practitioner (Dr. Polus) for the majority of her treatment and even then, not always complaining about the alleged impairments when she did see her doctor. AR 58. He added that Polus's records showed "very few clinical signs of impairment": some tenderness over plaintiff's lower lumbar area, no tenderness in her sacroiliac joints or over the sciatic nerve and normal range of motion of the spine. A year later, Polus found normal range of motion of the back, intact motor strength and sensation in all muscles of the lower extremities and normal heel to toe walking. Six months later, she found that plaintiff had some limitation of anterior flexion in her back when bending forward but full range of motion of her back, shoulders, hips and knees and no gait abnormality. Id.

The administrative law judge noted that Dr. Stark had found no problems when she examined plaintiff in April 2008, except for some tenderness to palpation of the lumbosacral spine. She had observed no signs of guarding or pulling away in response to palpation, no tightness of the paraspinal musculature, no limitation of motion, no difficulty with the heel/toe walk, no difficulty with moving from standing to sitting or vice versa, no problems with gait or station and no positive finding upon straight leg raising. Id. Dr. Konzen, a neurologist, had found in September 2010 that plaintiff had a normal motor examination,

normal muscle tone and bulk throughout, full strength in all muscle groups, intact sensory examination and normal gait and station, with no difficulty standing from a sitting position or difficulty with heel/toe walking. The administrative law judge concluded that the mild/minimal laboratory findings and the paucity of clinical findings failed to support plaintiff's alleged limitations or indicate that she would have greater limitations than the ones he had identified in his residual functional capacity finding. He did not mention Stark's April 2008 "return to work report" in which she had said that plaintiff would need to alternate sitting, standing and walking throughout the workday and would have to take 30-minute "stretch pauses" each day.

The administrative law judge stated that when it came to the opinion evidence, he had considered the statements from all the physicians who had treated or examined plaintiff, together with the opinions of the state agency medical consultants. He gave significant weight to the opinion of Syd Foster, D.O., a state medical consultant who did not examine plaintiff, because he found Foster's opinion consistent with Dr. Stark's. He gave little weight to the two statements prepared by Dr. Polus in January 2010, because he found no support in any medical signs, findings or explanation for the extreme limitations she had assessed in those reports. AR 59. Polus's own records did not show the types of significant medical abnormalities that would be expected to be present if plaintiff were as limited as Polus had found. Id.

With respect to physical functioning, plaintiff takes particular issue with the administrative law judge's disregard of Dr. Polus's January 2010 reports finding plaintiff unable to work. She points out that the Court of Appeals for the Seventh Circuit has emphasized in a number of cases that unless well-supported contradictory evidence is introduced, a treating doctor's evidence is entitled to controlling weight. 20 C.F.R. § 404.1527(d)(2); Bauer v. Astrue, 532 F.3d 606, 608 (7th Cir. 2008); Hofslien v. Barnhart, 439 F.3d 375, 376 (7th Cir. 2006). She maintains that the only contradictory evidence in her case consists of "snippets" of the record that supported a finding of "non disabled," which the administrative law judge overemphasized while discounting evidence favorable to plaintiff.

Plaintiff's criticism is not well founded. The administrative law judge explained in detail the evidence on which he was relying when he chose to disregard Dr. Polus's January 2010 reports. Both Dr. Polus and Dr. Stark cleared plaintiff to go back to work full-time with some light-duty restrictions in the spring of 2008; Polus's treatment records show very few clinical signs of impairment; in fact, the only positive finding that she noted in March 2008 was that plaintiff had some tenderness over her lower lumbar area. When Polus examined plaintiff more than a year later, she found no significant abnormalities when she examined plaintiff and normal range of motion in her back, negative straight leg raising, intact motor strength in all muscles of the lower extremities, intact sensation and normal

heel/toe walking. In July 2009, when plaintiff began complaining of upper extremity numbness, Polus noted only that plaintiff had some muscle tightness throughout the trapezius bilaterally, but no tenderness or limitation of motion of the cervical spine, no tenderness or any other abnormalities of the shoulders and normal grip strength. (The administrative law judge erred in saying that exhs. ##26F and 32F do not indicate that Dr. Polus actually examined the plaintiff, so they “are absent any significant objective findings.” AR 58. My own review of these exhibits shows that Polus reported having examined plaintiff, AR 425-26 & AR 452-33, but the reports do not add particularly to the weight of the evidence favoring severe physical limitations.)

The administrative law judge found similar evidence in Dr. Stark’s report that plaintiff was not seriously impaired. Stark reported only tenderness to palpation of the lumbosacral spine, with no signs of guarding or pulling away in response to the palpation, no tightness of the paraspinal musculature, no limitation of motion, no difficulty with heel/toe walk, no difficulty moving from standing to sitting or vice versa, no problems with gait or station and no positive finding upon straight leg raising. Dr. Konzen found similar results when he saw plaintiff for a neurological examination. Plaintiff’s EMG results were normal.

Plaintiff argues, correctly, that the administrative law judge erred in one respect in his reading of Dr. Stark’s opinion. Stark did release plaintiff to “light work,” indicating that

plaintiff could lift, carry, push or pull ten pounds frequently and 30 pounds rarely and could frequently walk, stand, sit and drive and occasionally perform postural activities and use her non-dominant right hand to frequently grasp or finger or both. However, as plaintiff asserts, Stark also said that plaintiff should be allowed to alternate frequently between sitting, standing and walking on an “as needed” basis throughout the day. This was an aspect of her report that the state agency physician, Dr. Foster, did not include in his findings. More important, it was a factor that the administrative law judge never asked the vocational expert to consider when deciding whether plaintiff had the ability to return to her past work. This omission undermined the reliability of the vocational expert’s opinion about the kind of work plaintiff can still do. As plaintiff points out, the major difference between “sedentary” and “light work” is that most “light jobs,” particularly those that are classified as “unskilled,” require a person to be walking or standing during most of the workday.

Overall, the administrative law judge’s formulation of the hypotheticals he posed to the vocational expert were lacking in detail and precision. SSR 82-62 directs the decision maker to consider past work experience carefully to assure that the available facts support a conclusion about the claimant’s ability to perform the functional activities required by the work. The administrative law judge did not ask the vocational expert to break down the tasks that plaintiff would have to perform as a pantry cook or cashier II and whether those are the same tasks that plaintiff performed when she worked in those capacities. Instead,

he asked about how the work in those jobs was performed generally and elicited a one-sentence answer that plaintiff could perform the jobs of pantry cook and cashier II as generally performed.

b. Mental impairments

Turning to plaintiff's alleged mental and emotional impairments, the administrative law judge noted that Dr. Polus had prescribed antidepressants for plaintiff for her symptoms of depression. He assessed these symptoms as symptoms of "situational depression and anxiety in response to not being able to return to her previous job" and noted that plaintiff's symptoms had improved with medication. Dr. Polus's subsequent treating records included few documented signs of significant mental impairment and she and other physicians had repeatedly noted plaintiff's mental status as being "normal upon examination." AR 55 (citing Exhs. ##9F, 13F, 16F, 14F, 26F and 29F).

The administrative law judge observed that plaintiff's mental impairments had not caused more than minimal limitations on her ability to perform basic mental work activities. He relied on plaintiff's own statements about her mental functioning, which indicated no reports of difficulty with memory, task completion, concentration, understanding/following instructions or getting along with others. AR 55. Plaintiff had reported that she was able to handle her own finances, handle stress and follow instructions well or very well. Id.

In discussing Dr. Kanz's examination, the administrative law judge observed that Kanz had found that plaintiff had exhibited normal attention and concentration, with no evidence of distractability, normal insight, memory and judgment, and that her mood was neither elevated nor depressed. AR 55. The administrative law judge noted that plaintiff had never sought outpatient treatment with a mental health provider. Id. He did not discuss Kanz's reports that plaintiff's test reports showed depression and anxiety.

The administrative law judge never discussed what effect plaintiff's tendency to somatization might have on her ability to work and he failed to evaluate plaintiff's own reports of the worsening of her condition over time. Instead, he placed major weight on her earlier reports, in which she had omitted any allegation of mental limitation and had indicated that she had no difficulty with memory, task completion, concentration, following instruction and getting along with others. He did not ask the vocational expert to take into consideration Kanz's observations of plaintiff's borderline working memory and sluggish psychomotor processing speed, factors that a vocational expert would want to know before finding that the person in question could perform the kind of work she had done in the past.

It is true that Kanz was the only consultant who discussed plaintiff's depression in any detail and that the evidence from the physicians that saw her or reviewed her medical records suggests that her depression was not as severe as plaintiff alleges. On the other hand, Kanz was the only professional whose examination of plaintiff focused on her mental and

emotional status. It may be that Kanz's observations are not enough to sustain a finding that plaintiff's mental and emotional limitations would adversely affect her ability to work, but the administrative law judge lacks the necessary medical expertise to gauge the effect of the observed limitations. One of the state agency psychologists might have been able to supply the missing expertise, but neither of them reviewed plaintiff's file after Dr. Kanz had submitted his report.

In summary, the administrative law judge erred in finding that plaintiff's mental and emotional problems would not impair her ability to perform her past relevant work, when he did not have a medical expert to evaluate Kanz's report. His finding that plaintiff retained the physical and mental capacity to perform her past work cannot be sustained, given his reliance on a vocational expert's opinion that did not take into consideration material limitations on plaintiff's mental and physical capacity to perform her past work. Accordingly, the case will be remanded to the commissioner for further proceedings.

#### ORDER

IT IS ORDERED that the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff Theresa LaRock's application for disability insurance benefits is REVERSED and REMANDED to defendant under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion. The clerk of court is directed

to enter judgment for plaintiff and close this case.

Entered this 13th day of January, 2012.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge