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

JACQUELINE GERRETTIE,

Plaintiff,

REPORT AND
RECOMMENDATION

v.

02-C-408-C

JO ANNE B. BARNHART, Commissioner
of Social Security,

Defendant.

REPORT

This is an appeal from an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). As discussed below, it appears that because of missed opportunities to make a thorough record, this court must order a remand that won't necessarily change the outcome.

Plaintiff Jacqueline Gerrettie challenges the Commissioner's denial of her application for Disability Insurance Benefits or Supplemental Security Income payments under Sections 216(I), 223 and 1614(a)(3)(A)of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423 and 1382c(a)(3)(A). The Commissioner found that although plaintiff had severe impairments that limit her ability to work, she was nonetheless able to perform jobs existing in significant numbers in the national economy; therefore, plaintiff was not under a "disability" as defined in the Act.

Plaintiff contends that there is no substantial evidence to support the administrative law judge's conclusion that she had the residual functional capacity to perform the full range of light work on a 40-hour a week basis. She argues that the ALJ did not properly evaluate evidence in the record, namely, the opinion of her treating physician and her own statements regarding her pain and limitations, that show that her work limitations are more severe than those found by the ALJ. Plaintiff asks this court to reverse the Commissioner's decision and remand the case for further proceedings pursuant to sentence four of § 405(g).

Because the ALJ did not adequately consider evidence in the record supporting plaintiff's claim that she is disabled, I am recommending that this court reverse the decision of the Commissioner and remand the case for further proceedings. Although plaintiff devotes most of her arguments to her contention that she cannot sustain a 40-hour work week, my recommendation is based on the ALJ's failure to evaluate evidence in the record indicating that plaintiff may need the ability to change positions frequently during the day, commonly referred to as a sit/stand option. If credited, evidence of such a limitation would reduce the number of jobs in the national economy that plaintiff would be able to perform.

Based on my familiarity with the SSD system from previous cases, I predict that adding a sit/stand option to plaintiff's circumstances probably would not reduce the relevant job base below the statutory threshold that would qualify plaintiff for disability benefits. Remand nonetheless is required because the ALJ failed to elicit any testimony from the vocational expert to this effect, and this court cannot fill in the gaps on appeal. Although

this court does not expect perfect administrative proceedings, it cannot uphold a ruling because it suspects that the ALJ's misstep on a material issue didn't affect the outcome.

The following facts are drawn from the administrative record:

FACTS

I. Procedural History

Plaintiff applied for Disability Insurance Benefits and Supplemental Security Income payments on July 6, 1999, alleging that she had become unable to work on April 15, 1999, because of a lumbar disc disorder, status post discectomy, a history of depression, and chronic obstructive pulmonary disease. After the state disability agency denied her claim initially and on reconsideration, plaintiff requested a hearing before an administrative law judge. An administrative hearing was held on November 6, 2000, at which plaintiff appeared with an attorney. On February 23, 2001, the ALJ issued a decision denying plaintiff's claims. On June 20, 2002, the Appeals Council issued a decision denying plaintiff's request for review, making the decision of the ALJ the "final decision" of the Commissioner for purposes of judicial review under § 405(g).

II. Plaintiff's Background and Testimony

At the time of the ALJ's decision, plaintiff was 54 years old. She had a high school education and past work experience as a practical nurse, cashier and medical assistant.

Plaintiff testified that she had injured her back while working as a licensed practical nurse in March 1995. Subsequently, she underwent two surgical laminectomies. Although she did not return to her nursing job after her surgeries, she performed various full time jobs until April 1999. At the administrative hearing, plaintiff testified that she left her last full time job as a medical assistant at the Marshfield Clinic because two doctors who worked there made sexual remarks to her. At the time of the hearing, she was working 12 to 20 hours a week as a retail sales clerk at a tobacco outlet.

According to plaintiff, she was able to perform her job at the tobacco outlet because of accommodations from her employer, such as a flexible work schedule and an ability to perform tasks at her own pace. Plaintiff's claim file contains a letter dated August 13, 1999, in which she wrote:

> I really like the job I have right now because it is only part time and I can sit, stand, and walk when I want. So I sit for a while and when I can't handle that I get up and stock shelves for awhile and when I can't handle that I go and sit for awhile again. I have a terrific boss who understands the pain that I'm in and when I have a bad day and don't get too much done, she understands. I try not to let that happen too often though as I pride myself on my job.

AR 163.

Plaintiff testified that her main physical problems were back pain and emphysema. According to plaintiff, she lacked the concentration to perform full time work because of the pain in her back. Plaintiff testified that she was taking OxyContin (an opioid similar to Morphine) for her pain, and that her doctors had told her that additional surgery would not help improve her pain.

On forms completed in connection with her application for benefits, plaintiff indicated that her daily activities were limited because of her pain. Plaintiff stated that although she still performed household chores like laundry and cleaning, she worked slowly, had to rest often and often received help from her husband. Plaintiff indicated that although she likes to watch television and do cross stitch, she cannot do these activities for long because she cannot sit for long periods of time.

Plaintiff's ex-husband submitted a report that corroborated plaintiff's reports of pain and limited activities. In addition, the record included a letter dated November 1, 2000, from Linda Schmidt, plaintiff's manager at the tobacco outlet. Schmidt stated that plaintiff had frequent mood swings and sometimes cried at work because of pain in her back, leg and foot. However, she reported that plaintiff was a conscientious and dependable employee. Schmidt stated that plaintiff was able to work at her own pace, change positions frequently and avoid certain physical tasks, like shoveling snow. Schmidt wrote:

> [Plaintiff] tries very hard to do her job to the best of her ability and is a very conscientious worker. However, I have on numerous occasions have witnessed her crying and when asking her what was wrong she would tell me how badly her back, leg and foot were hurting her. There have also been numerous occasions where she has come in to work and told me that she has gotten very little sleep due to the pain.
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> * * *
>
> At least at this job Jackie can do her job most of the time at her pace. In other words, when she needs to take the time to stop and sit down, she can . . . I don't believe there are too many jobs out there available for her where she can stand, sit or walk when she needs to.

AR 196-97. On another report dated December 21, 1999, a different supervisor reported that various accommodations were made to accommodate plaintiff's disability, including not scheduling plaintiff on days when heavy lifting was needed and allowing her to change positions as needed. AR 183.

III. Medical Evidence

The medical evidence before the ALJ showed that plaintiff underwent discectomies in May 1995 and December 1996 for a L4-5 disc herniation following her injury at work.[1] Plaintiff's treating neurosurgeon for the second discectomy was Dr. Teofilo Odulio. After the second surgery, plaintiff continued to report pain in her back and lower extremities. She was treated with an epidural steroid injection and physical therapy, but neither afforded any permanent pain relief.

Dr. Odulio assigned plaintiff a seven percent permanent partial disability in comparison to the body as a whole due to a decrease in the motion of plaintiff's low back, persistent pain and lack of endurance. Dr. Odulio reported that plaintiff's prognosis was guarded and her pain would likely continue. On June 4, 1997, Dr. Odulio stated that

[1] The record also includes medical evidence relating to plaintiff's diagnosis of chronic obstructive pulmonary disease, her efforts to stop smoking, and a sleep study performed at the Marshfield Clinic. Because plaintiff is not contending that any of these conditions impose limitations on her ability to work, I have not reviewed this evidence in this report.

plaintiff could return to work with the following restrictions: lifting no more than 20 pounds occasionally and no repetitive bending or twisting. AR 318.

On December 30, 1997, vocational expert Michael Guckenberg prepared a vocational report in connection with plaintiff's claim for worker's compensation benefits. Guckenberg summarized plaintiff's medical history, including the work restrictions imposed by Dr. Odulio. Guckenberg noted that plaintiff also had been examined by James Huffer, M.D., a physician hired by her employer. According to Guckenberg's report, Dr. Huffer had assigned plaintiff permanent work restrictions that included the ability to change positions every hour. Guckenberg stated:

> Physical restrictions assigned by both Dr. Odulio and Dr. Huffer basically allow Ms. Gerrettie to perform work within the select sedentary/light category, as defined by the Dictionary of Occupational Titles. Given the requirements for her to change her activities at least on an hourly basis, she will require some accommodation from her employer, to change between sitting, standing and walking at this interval.

AR 206.

On March 23, 1998, Dr. Odulio wrote a "to whom it may concern" letter stating that plaintiff could lift up to 50 pounds occasionally and 15-25 pounds frequently. AR 319.

In a June 1999 report submitted in connection with plaintiff's claim for unemployment insurance, Dr. Odulio reported that he had treated plaintiff from November 1996 to March 1998 and had last seen her on June 4, 1997. In the report, Dr. Odulio opined that as of April 1999, plaintiff was restricted to medium work, which meant she could lift 20 to 50 pounds occasionally. In addition, Dr. Odulio restricted plaintiff to

occasional stooping, crawling, kneeling and reaching; no crouching or climbing; and limited balancing. When asked how many hours plaintiff could perform this work per week, Dr. Odulio reported "as patient can tolerate." AR 240.

In early 1999, plaintiff was evaluated at the Marshfield Clinic for complaints of headaches, snoring and excessive daytime sleepiness. Dr. Evan Sandok, a neurologist, performed a sleep study of plaintiff which was essentially normal. During the course of this evaluation, plaintiff reported that since her back surgery, she experienced intermittent pains in her left leg. Dr. Sandok indicated that he had detected no weakness or sensory change in her lower extremities, and opined that the pain may be neuropathic. Because plaintiff had a past history of depression, along with her recent complaints of headaches, Dr. Sandok prescribed a trial of amitriptyline, an antidepressant. About two weeks later, plaintiff reported that since starting the amitriptyline, her leg pains, headache and mood had improved.

On August 3, 1999, plaintiff saw Dr. Josefino Cabaltica for complaints of low back pain radiating into her right lower extremity. She reported that she had had the pain for a long time but that it had recently become unbearable. Dr. Cabaltica detected tenderness over the lubosacral area on the right. Straight leg raising was positive at 90 degrees; however, plaintiff's reflexes were intact and there was no evidence of weakness. Dr. Cabaltica advised plaintiff to continue taking Tylenol for pain. He also prescribed OxyContin and a trial of Neurontin. At a follow up visit on September 13, 1999, plaintiff

reported that although she had discontinued the Neurontin because of side effects, the OxyContin was helping her pain a lot.

On August 23, 1999, Dr. Ward Jankus performed a consultative examination of plaintiff in connection with her social security claim. Plaintiff described pain across her lower back, into the left buttock and down into her left foot, with some numbness in the left lower leg. Plaintiff said her pain was constant, rating it as a 4 or 5 on a 10-point scale, but that occasionally it flared to about 8 or 9. Plaintiff reported that her back pain made it difficult for her to do any bending and limited her ability to remain in one position for long periods of time. She estimated that she could walk two blocks, stand about 30 minutes at a time and sit for an hour at a time. She stated that when she was home, she alternated her position between sitting, lying down and standing.

On physical examination, Dr. Jankus observed that plaintiff appeared uncomfortable, tending to sit towards the edge of the chair and having difficulty maneuvering on the examining table. He noticed no exaggerated pain behaviors or functional overlay, and found that plaintiff gave the exam a good effort. Plaintiff could forward flex to 50 degrees, extend to about 15 to 20 degrees, and lateral side bend to 20-25 degrees. Dr. Jankus detected tenderness and tightness across the lower lumbar spine and paraspinal muscles. Straight leg raising was positive on the left with some pain. Plaintiff had diminished pinprick sensation over the left calf and part of the foot, although her strength was essentially normal in both lower extremities. Dr. Jankus diagnosed chronic discogenic low back pain with a probable

left L5 nerve root injury. X-rays of the lumbar spine showed mild degenerative changes at L3-4 and L4-5, with marked atherosclerotic calcification of the aorta.

On September 9, 1999, Claudia Bodway, Ph. D., performed a consultative psychological evaluation of plaintiff. Bodway observed that plaintiff appeared to be in pain and could not sit for long periods of time. Both plaintiff and her husband reported that plaintiff was often depressed, but less so since she had changed medications. Plaintiff reported that she was frustrated by her inability to do things she used to, and relied on her husband or friends for help at home. Also, plaintiff reported that she sometimes experienced anxiety attacks in large groups of people. She reported symptoms of depression including crying spells, weight gain, low energy and a sense of worthlessness. On mental status examination, plaintiff showed good personal hygiene, a pleasant personality, a good ability to relate, an ability to think logically and coherently, an ability to perform calculations and abstract reasoning, and good judgment and insight. Bodway opined that plaintiff suffered from constant pain due to her physical problems, depression and anxiety attacks. She gave plaintiff a score of 55 to 60 on the Global Assessment of Functioning Scale, indicating that plaintiff had moderate difficulty in social or occupational functioning as a result of her mental condition.

On September 15, 1999, Dr. Kenneth Bussan, a consulting physician for the state disability agency, completed a residual functional capacity assessment from his review of the evidence in plaintiff's file. Dr. Bussan opined that plaintiff had the residual functional

capacity to lift 20 pounds occasionally, 10 pounds frequently, stand about 6 hours in an 8-hour work day and sit about 6 hours in an 8-hour workday, with only occasional stooping and crouching. Dr. Robert Callear affirmed this residual functional capacity finding on January 6, 2000. On September 21, 1999, agency consultant Henry Kaplan, Ph. D. reviewed the record and completed a mental residual functional capacity assessment, on which he indicated that plaintiff had mild limitations in her ability to understand, remember and carry out detailed instructions; perform activities within a schedule and maintain regular attendance and punctuality; complete a normal workday and workweek without interruptions from psychologically-based symptoms and perform at a consistent pace without an unreasonable number or length of rest periods; and respond appropriately to changes in the work setting. He opined that plaintiff was moderately limited in her ability to set realistic goals or make plans independently of others.

On October 16, 2000, Dr. Cabaltica wrote a letter to plaintiff's attorney in which he indicated that he had treated plaintiff for persistent back pain and that he was unable to offer plaintiff anything other than medication to help with the pain. He stated that he "did not assess [plaintiff's] degree of disability," and suggested that plaintiff's attorney contact plaintiff's treating specialists for "more specific answers" to that question. On November 17, 2000, Dr. Cabaltica wrote a letter in which he stated that plaintiff continued to suffer from back pain despite being on chronic pain medication. He opined that plaintiff was not capable of any gainful employment requiring 40 hours per week.

IV. Vocational Expert Testimony

Michael Guckenberg, the vocational expert who prepared the report on behalf of plaintiff for her worker's compensation claim, testified as a vocational expert at the administrative hearing.[2] The ALJ asked Guckenberg to assume an individual of plaintiff's age, education and work experience who had the mental and physical residual functional capacity as found by the state disability agency consulting physicians. Guckenberg testified that such an individual would not be able to perform plaintiff's past work as a licensed practical nurse, but would be able to meet the physical demands of the full range of light work. Regarding plaintiff's mental abilities, Guckenberg stated:

> Given what she has been doing, the only issue that might still, I guess, be a question is the sustained concentration and persistence issue. The other one is in terms of ability to respond to the work setting changes or work independently, perform activities on a schedule, etc. From a mental impairment issue, it did not appear to be a factor in her ability to at least work at the capacity she is now.

AR 57. Guckenberg testified that, assuming plaintiff could maintain sustained concentration and persistence for 40 hours a week, she would be able to perform the full range of light work, which would include jobs such as ticket seller, clerk, and her current work as a sales associate.

[2] At the administrative hearing, plaintiff's attorney stated he had no objection to Guckenberg testifying.

At the conclusion of Guckenberg's testimony, the ALJ stated that plaintiff's claim "boils down to the sustainability issue." AR 59. When he asked plaintiff's counsel whether he had a different view of the matter, counsel replied, "no." *Id*.

V. Legal Framework and the ALJ's Decision

Under the Social Security Act, a disability is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(C).

The Commissioner's regulations establish a five-step sequential inquiry to determine whether a claimant is disabled:

(1) Is the claimant currently employed?

(2) Does the claimant have a severe impairment?

(3) Does the claimant's impairment meet or equal one of the impairments listed by the SSA?

(4) Can the claimant perform his or her past work? and

(5) Is the claimant is capable of performing work in the national economy?

See 20 C.F.R. § 416.920.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents him from performing past relevant work. If he can show this, the burden shifts to the Commissioner to show that plaintiff was able to perform other work in the national economy despite the severe impairment. *See Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

In his written decision, the ALJ conducted a five-step evaluation. At steps one through three, the ALJ found that plaintiff had not engaged in substantial gainful activity after her alleged onset date; that she had severe impairments consisting of a lumbar disc disorder, status post discectomy, a history of depression and chronic obstructive pulmonary disease; and that none of plaintiff's impairments met or equaled an impairment listed in Appendix 1, Subpart P, Regulations No. 4. These findings are not in dispute. At step four, the ALJ found that plaintiff had the residual functional capacity for unskilled work requiring lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing or walking six hours of an eight hour day; and sitting six hours of an eight hour day. In addition, the ALJ found that plaintiff could perform only occasional bending, stooping and crouching. Relying on the testimony of the vocational expert, the ALJ found that plaintiff could not perform her past relevant work.

At step five, the ALJ turned to the Medical-Vocational Guidelines, also known as the "grids." The grids take administrative notice of the existence of occupations in substantial numbers in the national economy when the specific criteria of a Medical-Vocational rule are

met. Finding that plaintiff met all the criteria for Rule 202.13, the ALJ found that the rule directed that an individual of plaintiff's age, education and work history who could perform a full range of light work was not disabled. The ALJ noted that the vocational expert testified that an individual with the physical limitations found by the state agency consulting physicians could perform a full range of unskilled, light work. In addition, he found that the vocational expert testified that plaintiff's mental limitations as found by the state disability agency consultant did not prevent her from performing full time work.

The ALJ made the following specific findings:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(I) of the Social Security Act and is insured for benefits through the date of this decision.

2. The claimant has not engaged in disqualifying substantial gainful activity since the alleged onset of disability, April 15, 1999.

3. The claimant has an impairment or a combination of impairments considered "severe" based on the requirements in the Regulations 20 CFR §§ 404.1520(b) and 416.920(b).

4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.

6. The undersigned has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairments. 20 CFR §§ 404.1527 and 416.927.

7. The claimant has the following residual functional capacity: lifting and carrying 20 pounds occasionally and 10 pounds frequently; standing and/or

walking 6 hours of an 8 hour day; sitting 6 hours of an 8 hour day; occasional bending, crouching, and stooping; and unskilled work.

8. The claimant is unable to perform any of her past relevant work. 20 CFR §§ 404.1565 and 416.965.

9. The claimant is an "individual closely approaching advanced age." 20 CFR §§ 404.1563 and 416.963.

10. The claimant has a "high school (or high school equivalent) education." 20 CFR §§ 404.1564 and 416.964.

11. The claimant has no transferable skills from any past relevant work. 20 CFR §§ 404.1568 and 416.968.

12. The claimant has the residual functional capacity to perform the full range of unskilled, light work. 20 CFR §§ 404.1567 and 416.967.

13. Based on an exertional capacity for light work, and the claimant's age, education, and work experience, the claimant is not disabled within a framework of Medical-Vocational Rule 202.13.

14. The claimant is not under a "disability" as defined in the Social Security Act, at any time through the date of the decision. 20 CFR §§ 404.1520(f) and 416.920(f).

ANALYSIS

I. Standard of Review

Under 42 U.S.C. § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." *See Stevenson v. Chater*, 105 F.3d 1151, 1153 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1390 (7th Cir. 1997). "Substantial evidence is more than a mere scintilla. It is such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Stevenson*, 105 F.3d at 1153 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), as quoted in *Richardson v. Perales*, 402 U.S. 389, 401 (1971)) (other citations omitted). A standard this low could allow for different supportable conclusions in a given claimant's case. That being so, this court cannot in its review 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. *See Brewer*, 103 F.3d at 1390 (citations omitted); *Kapusta v. Sullivan*, 900 F.2d 94, 96 (7th Cir. 1990).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review, *see Brewer*, 103 F.3d at 1390, and the ALJ's written opinion need not evaluate every piece of testimony and evidence submitted, the ALJ "must at least minimally discuss a claimant's evidence that contradicts the Commissioner's position." *Godbey v. Apfel*, 238 F.3d 803, 808 (7th Cir. 2001). The ALJ's opinion must adequately articulate how the evidence was weighed so that this court may trace the path of his or her reasoning. *Id*. For example, ignoring an entire line of evidence would fail this standard. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). However, as with any fact finder, the ALJ is entitled to choose between competing opinions. *Luna v. Shalala*, 22 F.3d 687, 690 (7th Cir. 1994). Most importantly, "the ALJ must build an accurate and logical bridge from the evidence to his conclusion." *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000). In addition, the court

reviews the ALJ's decision to ensure that no errors of law occurred. *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001).

II. Sit/Stand Option

Plaintiff contends that the ALJ's finding that she can perform the full range of light work is not supported by substantial evidence because it fails to account for her need to change positions frequently, commonly referred to in vocational circles as a "sit/stand option." To perform light work, a person must be able (among other things) to walk and stand for approximately six hours per eight-hour workday. 20 C.F.R. § 404.1567(b); Social Security Ruling 83-10. A requirement that a claimant have a sit/stand option is a non-exertional impairment that may decrease significantly the number of jobs the individual can perform, particularly when the individual is limited to unskilled work. *See* Soc. Sec. Ruling 83-12, 1983 WL 31253, *4 (S.S.A. 1983) (individual who "may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting . . . is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work . . . or the prolonged standing or walking contemplated for most light work").

In concluding that plaintiff was able to perform the full range of light work, the ALJ relied on the residual functional capacity assessment completed by the SSA's consulting physicians, noting that it was consistent with the work restrictions imposed by Dr. Odulio during the time of her treatment. Plaintiff argues that the ALJ overlooked other evidence

that suggests that her limitations were more restrictive, including Guckenberg's 1997 vocational report (based partly on the opinions of Dr. Odulio and Dr. Huffer), which stated that plaintiff needed to alternate between sitting and standing on an hourly basis; her various reports to the social security administration that she needed to change positions frequently during the day; and Bodway's observation that plaintiff appeared to be in pain and changed positions frequently during her psychological consultation.[3] In addition, plaintiff's employer indicated that plaintiff's ability to change positions as needed was one of the reasons she was able to perform her part-time job as a cashier.

This evidence cited by plaintiff amounts to a "line of evidence" that the ALJ should have considered and discussed in his decision. According to the Commissioner's regulations, an ALJ may not rely solely on objective medical evidence when making a residual functional capacity assessment but must consider all of the relevant evidence in the case record, including the effects of treatment; reports of daily activities; lay evidence; recorded observations; effects of symptoms, including pain; evidence from attempts to work; and other relevant factors. Soc. Sec. Ruling 96-8p. In particular, the ALJ is to give "[c]areful consideration . . . to any available information about symptoms because subjective descriptions may indicate more severe limitations or restrictions than can be shown by objective medical evidence alone." *Id*. *See also Zurawski v. Halter*, 245 F.3d 881, 887 (7th

[3] In her briefs, plaintiff did not clearly identify the sit/stand issue as a separate ground for reversing the Commissioner's decision, but referred to it during her discussion of the other issues she raises on appeal.

Cir. 2001) (ALJ must "investigate all avenues presented that relate to pain") (quoting *Luna v. Shalala*, 22 F.3d 687, 691 (7th Cir. 1994)). Furthermore, he must discuss the evidence that supported plaintiff's claim. *See Herron v. Shalala*, 19 F.3d 329, 333 (7th Cir. 1994) (ALJ must consider all relevant evidence and may not select and discuss only that evidence that favors his ultimate conclusion).

The transcript from the administrative hearing and the ALJ's written decision show that the ALJ inquired only marginally about plaintiff's pain and either ignored or mischaracterized evidence that suggests that plaintiff cannot perform jobs requiring prolonged sitting or standing. Although the ALJ stated at the beginning of his decision that he had reviewed all the exhibits in the file, his decision suggests that he did not *examine* the evidence supporting plaintiff's claim. *See Zurawski*, 245 F.3d at 888 ("Both the evidence favoring the claimant as well as the evidence favoring the claim's rejection must be *examined*, since review of the substantiality of evidence takes into account whatever in the record fairly detracts from its weight.") (quoting *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir.1986) (emphasis added). The ALJ did not mention Guckenberg's 1997 report or Dr. Huffer's findings at all. With respect to the letter from plaintiff's employer, the ALJ stated:

> The undersigned finds that the claimant has been able to continue working with certain "accommodations" made by employers. There is no evidence of excessive absences from work. Her employers have reported that the claimant is enthusiastic [sic] about work, a good worker, and makes herself available to work.

AR 26. However, the ALJ did not identify or discuss the "accommodations" that plaintiff's employer provided or mention the observations from plaintiff's employer regarding plaintiff's pain. As a result, the ALJ's decision does not permit this court to determine what weight, if any, he gave to the fact that plaintiff's job at the time of the hearing allowed her to sit or stand at will, or to the credibility of her employer's observations.

Similarly, the ALJ's decision does not assure me that he adequately considered plaintiff's allegations regarding her need to change positions throughout the work day. Although he stated in his decision that he considered plaintiff's subjective complaints, he referred to them only in general terms, describing them as her "allegations of disabling pain and incapacitating limitations" and testimony "that she cannot work because of significant problems with her low back." Furthermore, the reasons he cited for rejecting plaintiff's subjective complaints do not adequately support a conclusion that plaintiff is able to work without a sit/stand option. The ALJ found that plaintiff was able to perform a "wide range" of daily activities, including cooking, cross-stitching and painting. Because no testimony was elicited from plaintiff about her daily activities at the hearing, I presume that the ALJ was referring to the Daily Activities Questionnaire that plaintiff had completed in connection with her claim. A review of this questionnaire shows that the ALJ's summary of plaintiff's activities was incomplete. The ALJ failed to note that plaintiff indicated that her "cooking" consists of TV dinners and sandwiches, she cross stitches or paints only monthly, takes breaks while she does these activities and changes positions frequently. Absent some

indication that plaintiff lied in her questionnaire, plaintiff's activities, when viewed in their entirety, are neither strenuous nor prolonged and might support her contention that she cannot perform the full range of light work. *See Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir. 2000) (claimant's ability to care for home and her children was not basis to find her testimony incredible because "[s]uch work by its nature provides the type of flexibility to alternate standing, sitting and walking, and to rest and elevate the legs when necessary").

The ALJ also found that plaintiff's subjective complaints were inconsistent with her application for unemployment benefits, which required the claimant to assert that she was able to work. Although a claimant's statement that she is ready, willing and able to work for the purposes of seeking unemployment compensation may adversely affect the credibility of her claim of total disability for the same time period, it is not conclusive. *See*, *e.g.*, *Jernigan v. Sullivan,* 948 F.2d 1070, 1074 (8th Cir. 1991); *Perez v. Secretary of HEW*, 622 F.2d 1, 3 (1st Cir. 1980); *Bartell v. Cohen*, 445 F.2d 80, 82 (7th Cir. 1971) (plaintiff's attempts to find job were "relevant only to her motivation and not to whether she was, in fact, disabled"). In this case, plaintiff's assertion that she was able to work is not necessarily inconsistent with her assertion that she needs a job that affords her the ability to alternate between sitting and standing as needed. Moreover, plaintiff testified at the hearing that she attempts to work even though she is in pain because she has bills to pay. Under the facts of this case, plaintiff's statement that she was able to work for unemployment compensation purposes

does not constitute sufficient evidence to support the ALJ's conclusion that all of plaintiff's subjective complaints, including her need to change positions frequently, were not credible.

In sum, the ALJ's decision in its present form does not assure me that he considered the record as a whole when he determined that plaintiff could perform the full range of light work. Perhaps the ALJ's failure to address the evidence relating to the sit/stand option can be blamed on plaintiff's attorney, who did not elicit any testimony from his client at the hearing regarding whether she needed this option. In fact, plaintiff's attorney asked hardly any questions of plaintiff. This tack makes sense when the ALJ conducts a thorough examination of plaintiff, but in this case the ALJ did not.

Indeed, plaintiff's attorney effectively conceded the sit/stand issue at the hearing when he agreed with the ALJ that the essential issue in the case was whether plaintiff's impairments rendered her unable to work a 40-hour week. I question why plaintiff's attorney would make such a concession given the colorable evidence in the record supporting the sit/stand limitation and the Seventh Circuit's admonition that an ALJ may assume that an applicant for social security benefits who is represented by counsel is making her strongest case for benefits. *See Glenn v. Secretary of Health and Human Services*, 814 F. 2d 387, 391 (7th Cir. 1987).

However, hearings to determine whether claimants are entitled to benefits are not adversarial, so a lawyer's concession does not have the binding effect that it would in court. *See Kendrick v. Shalala*, 998 F.2d 455, 456 (7th Cir. 1993) (procedures before ALJ are

informal, evidentiary rules do not apply, and ALJ has duty of developing complete record). Furthermore, the regulations provide that the ALJ is to consider "all evidence" in the case record when making a disability determination. 20 C.F.R. § 404.1520(a).

In sum, even though plaintiff's lawyer may have indicated at the hearing that he agreed with the ALJ's view of the case, the ALJ nonetheless was obliged to consider all the evidence in the file, including that which indicated that plaintiff needed a sit/stand option. His failure to discuss even minimally any of this evidence leaves this court without a basis to uphold his finding that plaintiff could perform the full range of light work. Accordingly, I recommend that this court remand the case for a redetermination of plaintiff's residual functional capacity and consultation with a vocational expert, if necessary. *See Peterson v. Chater*, 96 F.3d 1015, 1016 (7th Cir. 1996) (where nonexertional limitation might substantially reduce range of work individual can perform, use of grids inappropriate and ALJ must consult vocational expert).

On the other hand, if the court is not convinced that the question of a sit/stand option is so important to the analysis, and/or that plaintiff's attorney essentially conceded the issue at the hearing, then the court should uphold the Commissioner.

III. Sustained Basis

Plaintiff contends that the record does not adequately support the ALJ's conclusion that she can work 40 hours a week. Under the Commissioner's regulations, a claimant who

is unable to perform the demands of work on a "regular and continuing basis," meaning 8 hours a day, for 5 days a week, or an equivalent work schedule, is disabled. Soc. Sec. Ruling 96-8p, 1996 WL 374184, *1 (July 2, 1996). Although he focused on this issue at the hearing, the ALJ referred to it only obliquely at various places in his written decision. He noted that "[t]he claimant's treating physician, Dr. Cabaltica restricted the claimant from full-time employment; however, the record does not clearly identify objective medical findings to support such restrictions." AR 26. In addition, the ALJ found that the vocational expert "testified that [the mental residual functional capacity assessment form completed by agency consultant Kaplan] allows for the performance of full-time employment." AR 28. Finally, the ALJ may have been referring to plaintiff's ability to work full time when he noted that she did not have excessive absences from work and that her employers had reported that she was enthusiastic about work, a good worker and made herself available to work.

Plaintiff contends that the ALJ improperly discounted the opinion of Dr. Cabaltica, her treating physician. Although opinions from treating sources are generally given great weight, 20 C.F.R. § 404.1527(d)(2), the ALJ may reject opinions that are not "well-supported by medically acceptable clinical and laboratory diagnostic techniques [or] . . . inconsistent with the other substantial evidence in [the claimant's] case record." *Id*. When a treating source's opinion is not entitled to controlling weight, the ALJ must determine independently the weight to give the opinion on the basis of the following factors:

the length, frequency, nature and extent of the treatment relationship; the degree to which the medical signs and laboratory findings support the opinion; the consistency of the opinion with the record as a whole; and the specialization of the physician. *See* 20 C.F.R. § 404.1527(d)(2)-(5).

The ALJ reasonably applied the regulations in concluding that Dr. Cabaltica's opinion was entitled to little weight. In his opinion, the ALJ noted that Dr. Cabaltica was plaintiff's treating physician and that he had prescribed pain medication for her. However, as the ALJ pointed out in his decision, Dr. Cabaltica did not support his opinion with any medical signs or laboratory findings. In fact, in a letter to plaintiff's attorney dated just one month earlier, Dr. Cabaltica stated that he "did not assess [plaintiff's] degree of disability" and deferred to plaintiff's specialists on that matter. While it is true that other medical reports in the record, such as that prepared by Dr. Jankus, contain medical findings documenting plaintiff's back injury and resulting pain, these findings do not speak to plaintiff's ability to work on a regular and continuing basis. Dr. Jankus did not perform any tests to determine plaintiff's capacity for work and did not offer an opinion on that issue. Thus, his report neither supports nor detracts from Dr. Cabaltica's opinion regarding plaintiff's work tolerance. The ALJ was not required to accept Dr. Cabaltica's opinion in the absence of any supporting clinical findings or objective evidence.

Nonetheless, I am troubled by the ALJ's analysis of the sustainability issue for two reasons. First, it appears to have been based largely on a misunderstanding of the vocational

expert's testimony. Contrary to the ALJ's description of the testimony, the expert did not testify that an individual who had the limitations identified on the mental residual functional capacity form completed by the agency's reviewing psychologist would be able to perform full-time employment. He testified that, *assuming* plaintiff could maintain concentration and persistence for 40 hours a week, she could perform a full range of light work given the other parameters of the ALJ's hypothetical. He expressed no opinion as to whether the mental residual functional capacity form completed by Kaplan allowed for the performance of full time employment, observing only that plaintiff's mental limitations "did not appear to be a factor in her ability to at least work at the capacity she is now." In other words, the vocational expert was stating a tautology: regardless what the mental residual functional capacity form said, plaintiff's ability to work part time showed that she had the mental ability to work part time. His testimony does not support the ALJ's finding that plaintiff has the mental and physical ability to work full time.

Likewise, the comments of plaintiff's employer regarding plaintiff's attendance record and enthusiasm and availability for work do not lend support to the ALJ's finding. The reason these comments have limited evidentiary significance should be apparent: plaintiff worked only part time. The fact that plaintiff had an excellent attendance and performance record may be precisely *because* she worked only part time and not full time.

This court may not sustain an ALJ's findings that are based on inaccurate facts or illogical reasoning. *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996). In this case, the

ALJ's determination that plaintiff can work full time was based on both. Nonetheless, I would probably not recommend reversal if sustainability was the only disputed issue in this case. As the ALJ noted, plaintiff was able to work full time through April 1999 despite her back injury. There is nothing in the administrative record to indicate that plaintiff's back condition worsened significantly or to otherwise explain why plaintiff could no longer work full time after that date.[4] In addition, as noted by the ALJ, plaintiff's application for unemployment benefits tends to undermine her claim that she cannot work full time. Finally, the agency consulting psychologist concluded that plaintiff's mental abilities presented only a mild limitation in her ability to maintain regular attendance and complete a normal workweek without interruption. This evidence–which the ALJ discussed in his decision–is probably adequate to support the ALJ's finding with respect to plaintiff's ability to work full time.

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[4] In fact, at the administrative hearing, plaintiff testified that she left her full time job at the Marshfield Clinic in April 1999 because two of the doctors with whom she worked made sexual remarks to her, not because her condition had worsened. When asked by the ALJ if she would have been unable to continue performing her job if she had not left voluntarily, plaintiff replied, "I don't know." AR 51. In a letter submitted after the hearing, plaintiff stated that she did not think she would have lasted at the Marshfield Clinic job because "it was too fast paced, too much computer stuff that I just couldn't get, and the way their desk was set so high was very hard on my back." AR 217. The absence of any evidence to suggest that plaintiff's condition worsened in April 1999 is the most compelling evidence of plaintiff's ability to work full time.

Inexplicably, the ALJ did not mention this in his opinion. As a result, this court may not rely on this testimony as a basis for upholding the ALJ's decision. *See Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002) ("regardless whether there is enough evidence in the record to support the ALJ's decision, principles of administrative law require the ALJ to rationally articulate the grounds for her decision and confine our review to the reasons supplied by the ALJ"); *O'Connor v. Sullivan*, 938 F.2d 70, 73 (7th Cir. 1991) (court has no authority to supply a ground for agency's decision).

That said, if the district court accepts my recommendation and remands the case for additional proceedings with respect to the sit/stand issue, then I recommend that it also order the agency to more clearly articulate its reasons for rejecting plaintiff's claim that she cannot work full time. Although I am not overly concerned about the ALJ's findings on this issue, there are enough gaps in his reasoning to warrant more articulation, particularly when the case will already be before the agency for a new residual functional capacity assessment.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner denying plaintiff Jacqueline Gerrettie's application for Disability Insurance Benefits and Supplemental Security Income be REVERSED AND REMANDED to the Commissioner for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 13th day of February, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge