

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

MICHAEL DEMMER,

Plaintiff,

v.

JO ANNE B. BARHNART,
Commissioner of Social Security,

Defendant.

REPORT AND
RECOMMENDATION

02-C-601-C

REPORT

[R]egardless 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.

Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002). When the court's report begins with this quote, the Commissioner has a pretty good notion what's in store.

This is an appeal from an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Michael Demmer seeks judicial review of the final decision of the Commissioner denying his applications for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 405(g), 1381, 1382c. Plaintiff applied protectively for DIB and SSI on April 10, 2000, alleging that he was disabled since May 10, 1997 because of

headaches, backaches and leg, knee and ankle problems. After his claims were denied at the initial and reconsideration stages, plaintiff requested an administrative hearing. A hearing was held on October 23, 2001 at which plaintiff and a vocational expert appeared and testified. In a decision dated November 29, 2001, the ALJ found that plaintiff was not disabled because there was a significant number of jobs in the economy that he could perform despite his impairments. On August 30, 2002, the Appeals Council denied plaintiff's request for review, making the decision of the ALJ the final decision of the Commissioner. This appeal followed.

I am recommending that this court reverse the decision of the Commissioner and remand it for a new credibility determination. Although information was—and is—available in the record to support the ALJ's adverse credibility determination, the ALJ failed to use this information in a manner that would allow this court to uphold his determination. As things now stand, to affirm the ALJ's credibility determination would require this court to perform its own review of the record and make its own credibility determination (which essentially is what the Commissioner has urged in her brief). This is an unfortunate dissipation of limited resources because it's not as though the outcome is going to change on remand; however a pro se plaintiff is entitled to have the SSA follow its own rules, in this case by actually articulating a discernible path between the facts actually relied on and the finding that plaintiff is not credible.

Apart from that error, there are no other grounds that would support a remand.

From the administrative record, I find the following facts.

FACTS

I. Background and Medical Evidence

Plaintiff was born on February 1, 1962, making him 39 years old at the time of the ALJ's decision. He has a high school equivalent education and past relevant work experience as a truck driver, store manager, bartender, painter and card dealer. Over the course of his life, plaintiff has been in several accidents resulting in various broken bones, including his left leg, left knee, left arm and left ankle. The most serious of these accidents was in 1988 when plaintiff crashed his motorcycle into a parked car, resulting in compound fractures in his left leg and left arm as well as a closed head injury. In 1990, plaintiff sustained a laceration to his right forearm resulting in exploratory surgery and repair of the median nerve.

On January 20, 2000, plaintiff saw Dr. Aditya Sukhwal for a complete physical. Plaintiff complained of severe backaches, severe headaches, pain radiating down his right leg to his knee, and chronic numbness on the lateral aspect of his thigh. He also reported having pain and swelling in his joints in the morning, although he said this was a longstanding problem for him. He stated that he had a drinking problem, reporting that he consumed more than 24 alcoholic beverages a week. His weight was 310 pounds. On physical examination, plaintiff had full range of motion in the neck. Neurological examination was

normal. Dr. Sukhwal referred plaintiff to a chiropractor, ordered lab tests and recommended that he lose weight and reduce his alcohol intake.

Plaintiff treated with a chiropractor from January to May 2000. Plaintiff reported intermittent dull aching pain in his back, pain in the right leg, headaches and arm numbness. He reported that he was self employed raising exotic animals and that his work required him to sit, stand, lift and bend. Plaintiff rated his pain as a 10 on a 10-point scale.

On March 23, 2000, plaintiff reported having severe back pain with some pain going down his legs, for which chiropractic treatment had not been helpful. Dr. Sukhwal prescribed Flexeril and ordered an MRI.

An MRI of plaintiff's lumbar spine on April 6, 2000 revealed normal alignment with no evidence of disk herniation or spinal stenosis. Mild degenerative changes were noted at the L1-L2, L2-3 and L3-L4 levels.

At a visit with Dr. Sukhwal on April 13, 2000, plaintiff reported that his back pain had gotten progressively worse. Plaintiff was waking up at night with a lot of numbness in his upper arms and legs, but he was sleeping better with Flexeril and was otherwise doing fairly well.

Plaintiff was referred to physical therapy on April 18, 2000. Plaintiff was educated about home exercises and proper body mechanics. Plaintiff did not show up for any further appointments and his file was closed for lack of follow-through.

Plaintiff was seen by Dr. Charles Miley, a neurologist, on May 4, 2000. Plaintiff reported that his current medications were Flexeril, Percocet, Zantac and Restoril. Plaintiff had good range of motion in his neck and normal strength in the arms and legs. His tendon reflexes were sluggish but symmetrical. He had diminished sensation in his arms. Dr. Miley recommended an MRI of the cervical spine and nerve conduction studies. MRI of plaintiff's cervical spine showed no evidence of spinal stenosis or herniation, and only minimal degenerative changes.

On May 15, 2000, plaintiff told Dr. Sukhwal that his back was doing pretty well. He had lost close to 20 pounds on Phentermine and was doing his physical therapy exercises at home. He reported that he was taking Percocet once or twice a day and Flexeril at night as needed. On June 12, 2000, he reported that he was still having numbness in his right hand. Plaintiff said he was out riding his lawnmower and it flipped over and hit him on the head. Dr. Sukhwal noted that plaintiff was "wondering if he can get some more Percocet for that, but otherwise I don't think he's having too many problems." AR 340. Plaintiff's weight was down to 285.

Plaintiff had a reevaluation with Dr. Miley on July 13, 2000. Plaintiff reported pain in the lateral right thigh and numbness in his right hand. Dr. Miley opined that the right thigh pain was meralgia paraesthetica¹, which was a complication of plaintiff's obesity. He

¹ A type of entrapment neuropathy caused by entrapment of the lateral femoral cutaneous nerve at the inguinal ligament, causing paresthesia, pain, and numbness in the outer surface of the thigh in the region supplied by the nerve. *Dorland's Illustrated Medical Dictionary* at 1087 (29th ed. 2000).

noted that the lumbar MRI had shown no disk herniation or bony involvement in the spinal canal or neural foramina. Dr. Miley reviewed plaintiff's nerve conduction studies and noted that plaintiff had an "ancient" right median neuropathy in the forearm, causing very impaired recruitment in the thenar muscles. Dr. Miley opined that plaintiff also had active moderate right carpal tunnel syndrome. On the left side, plaintiff's nerve conduction studies were normal. Dr. Miley recommended that plaintiff continue with conservative pain management and consider carpal tunnel release on the right hand. He prescribed neurontin for the neuralgic pain in the right thigh.

On September 1, 2000, Dr. Sukhwal noted that plaintiff was still having back pain and was not interested in surgery. Dr. Sukhwal recommended that plaintiff undergo a course of epidural steroid injections.

On January 24, 2001, plaintiff was seen by Dr. Ilyas Munshi, a neurosurgeon. Dr. Munshi noted that plaintiff was still having back pain that shot down the back of his legs to his knee, with occasional numbness in the legs. He noted that neither steroid injections or physical therapy had provided much help. Dr. Munshi reviewed the MRI and concluded that it showed stenosis at L2-L3 and L3-L4 with no disc herniation. He diagnosed plaintiff with lumbar stenosis, and recommended that he undergo a laminectomy.

II. Daily Activities Questionnaire

Plaintiff completed a daily activities questionnaire for the local disability agency on October 22, 2000. Plaintiff stated that he could stand, sit, bend or walk for only limited amounts of time because of pain and numbness. He indicated that he had good days on which he could be “fairly productive,” doing laundry, cooking dinner, picking up the mail at the mailbox and using the computer, but on his “bad days,” he could only do one or two of these things. He indicated that there were days that he could hardly walk and that he did not drive alone for more than 15 minutes at a time. He indicated that although he sometimes picked up milk or bread, he did not otherwise do any regular grocery shopping because of his physical limitations. He said he ventured away from the house approximately 2-3 times a week. He stated that he was able to prepare dinner approximately two to three times a week, but that his girlfriend prepared it the rest of the time. Plaintiff indicated that he did not perform any house cleaning or yard work. He stated that his pain medications helped to reduce the pain but did not eliminate it.

III. Hearing Testimony

Plaintiff appeared without representation at the administrative hearing. The ALJ explained to plaintiff that a representative could help plaintiff present his case, that some representatives did not charge a fee, and that others charged a contingency fee of the lesser of 25 percent of past due benefits won or \$4,000. He also explained that although plaintiff

could appeal the ALJ's decision if it was unfavorable, an appeal was simply a "paper" review that was less meaningful than a hearing. Plaintiff indicated that he wanted to proceed without representation, and signed a written waiver to that effect.

Plaintiff testified that he had compressed vertebrae in his back, numbness in the right thumb and first two fingers, limited strength and movement in the left hand, numbness in the lower back extending down to the right knee, headaches, and continuous muscle and joint pain. Plaintiff denied having any mental problems. He also denied ever having any problems with alcohol. He testified that the epidural injections had helped his pain a little.

Plaintiff testified that he lived in a two-story house on approximately four acres of land with his girlfriend. Plaintiff testified that they kept various exotic animals on the property, including a Siberian tiger, African lion, 19 wolves and various birds. He said that he and his girlfriend tried "to help the school systems give the kids some place to go and do something" but that they did not charge for tours or breed the animals for sale. He testified that when the kids visited, he talked to them and provided a little information, which the kids and the teachers enjoyed. Plaintiff testified that his girlfriend was the "sole provider" for the animals, but he admitted that he "[threw] them food and stuff like that."

Plaintiff testified that on a typical day, he got up at 8 a.m., took a couple pills, made coffee, showered, went out and checked on the animals and fed them, and then did little things around the property. Plaintiff testified that he did not work steadily at one task but

was up and down or walking while doing tasks. He testified that his main role was to be on the property to protect the animals and keep an eye on things.

Plaintiff testified that he could lift 25 pounds occasionally. Plaintiff testified that he could sit for up to an hour, stand for up to an hour, and walk a quarter mile, and that he could “probably get something done” if he could alternate between sitting and standing. He said he could grasp things with his hands but had trouble picking up small objects.

IV. Vocational Expert Testimony

Gregory Wisniewski testified as a vocational expert. He testified that plaintiff had no transferable skills from any of his past relevant work. The ALJ posed a hypothetical question in which he asked Wisniewski to assume an individual of plaintiff’s age, education and work experience who could lift 20 pounds occasionally and 10 pounds frequently, only seldomly perform crouching, stooping or performing fine finger manipulation and required the ability to change from sitting to standing at one-hour intervals. The vocational expert testified that such an individual would be precluded from performing any of plaintiff’s past work. However, such an individual could perform the job of information clerk and production inspector, of which there were 1,521 and 3,154 jobs in the Wisconsin economy, respectively.

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). Although the Commissioner must carefully consider opinions from medical sources when conducting the five-step sequential inquiry, final responsibility for deciding whether a claimant is disabled is reserved for the Commissioner. 20 C.F.R. § 404.1527(e).

In his written decision, the ALJ conducted a five-step evaluation. At step one, he found that plaintiff had not engaged in substantial gainful activity after his alleged onset date of May 10, 1997. At step two, the ALJ found that plaintiff had the following severe impairments: degenerative disk disease, lumbar stenosis, right carpal tunnel syndrome and obesity. He noted that plaintiff had also complained of headaches but that there was no evidence that plaintiff sought any regular medical treatment for that condition. At step three, the ALJ found that plaintiff's physical impairments did not meet or equal the criteria of any listed impairment, noting that the record did not contain any medical evidence to support such a finding.

At step four, the ALJ assessed plaintiff's residual functional capacity to determine whether he was able to perform his past relevant work. The ALJ concluded that plaintiff had the residual functional capacity for light exertional work that allowed him to alternate between sitting and standing so that he did not have to sit for more than 60 minutes at a time, and which did not require him to perform frequent crouching, stooping or fine finger manipulation. In reaching this conclusion, the ALJ considered plaintiff's subjective

complaints and found that they were not substantiated by the medical evidence or the record as a whole. The ALJ afforded substantial weight to the opinion of the state agency physician who had opined that plaintiff had the residual functional capacity for light work.

On the basis of the vocational expert's testimony, the ALJ found that plaintiff could not perform any of his past relevant work but that he could perform other jobs that existed significant numbers in the regional economy. Specifically, the ALJ found that plaintiff could perform the job of production inspector (3,154 jobs in Wisconsin) or information clerk (1,521 jobs in Wisconsin). Accordingly, the ALJ found that plaintiff was not disabled and therefore ineligible for either DIB or SSI payments under the Social Security Act.

The ALJ made the following specific findings:

1. The claimant met the disability insured status requirements of the Act on 5-10-97, the date that the claimant stated he became unable to work, and continues to meet them through 12-31-02.
2. The claimant has not engaged in substantial activity since 5-10-97.
3. The medical evidence establishes that the claimant has severe degenerative disk disease, lumbar stenosis, right carpal tunnel syndrome, and obesity, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix I, Subpart P, Regulations No. 4.
4. The claimant's subjective complaints and allegations about his limitations and impairments are not fully credible and, when considered in light of all the objective medical evidence and clinical findings as well as the record as a whole, do not reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful work activity. 20 CFR 404.1529, 20 CFR 416.929, and SSR 96-7p.

5. The claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of light work but must be able to exercise a sit/stand option so that he does not need to sit or stand for more than 60 continuous minutes. The claimant must be able to alternate between sitting and standing throughout the workday as necessary. The claimant is precluded from frequent crouching, stooping, and fine finger manipulation (20 CFR 404.1545 and 416.945).
6. The claimant is unable to perform his past relevant work as a truck driver, store manager, bartender, painter, or card dealer.
7. The claimant is 39 years old, which is defined as a younger person (20 CFR 404.1563 and 416.963).
8. The claimant has a high school education (20 CFR 404.1564 and 416.964).
9. The claimant does not have any acquired work skills, which are transferable to the skilled or semiskilled work functions of other work (20 CFR 404.1568 and 416.968).
10. Based on an exertional capacity for light work and the claimant's age, education, and work experience, section 404.1569 of Regulations No. 4 and section 416.969 of Regulations No. 16 and Rule 202.21, Table No. 2, of Appendix 2, Subpart P, Regulations no. 4 would direct a conclusion of "not disabled."
11. Although the claimant's exertional and nonexertional limitations do not allow him to perform the full range of light work, using the above-cited rule as a framework for decision-making and considering the testimony of the vocational expert, there are a significant number of jobs in the national economy which he could perform. Examples of such jobs are: information clerk (1,521 jobs available in the state of Wisconsin) and production inspector (3,154 jobs available in the state of Wisconsin).
12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

ANALYSIS

I. Standard of Review

In a social security appeal brought under 42 U.S.C. § 405(g), this court does not conduct a new evaluation of the case but instead reviews the final decision of the Commissioner. In this case, the ALJ's decision constitutes the decision that this court must review. The court's review is limited. Under § 405(g), the Commissioner's findings are conclusive if they are supported by "substantial evidence." *See Stevenson*, 105 F.3d at 1153; *Brewer*, 103 F.3d at 1390. "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). This is a low standard that 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). Presumably, this works in both directions: this court cannot scour the record to redetermine questions of credibility in an attempt to *uphold* the Commissioner's decision below.

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. Review of ALJ’s Decision

A. The ALJ’s Credibility Finding was Inadequate

Plaintiff disputes the ALJ’s conclusion that he can perform a limited range of light work on a consistent basis. Plaintiff asserts that he cannot drive on a regular basis, perform any single activity for any length of time or function at all on some days. The ALJ noted these allegations in his decision, but determined that plaintiff’s subjective complaints were not substantiated by the evidence. Although plaintiff, who is proceeding pro se, doesn’t use all the buzz words or spell things out with the clarity one could expect from an attorney,

there is no doubt that he disputes the ALJ's credibility determination and what he characterizes as the ALJ's "pick and choose" review of the file to support his finding. *See* dkts. 12 & 14.

In evaluating the credibility of statements supporting a Social Security application, an ALJ must comply with Social Security Ruling 96-7p. *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003). That ruling sets forth a two-step process that the ALJ must follow when evaluating an individual's own description of his or her impairments. According to the ruling, the first question the ALJ must answer is whether there is "an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the individual's pain or other symptoms." Soc. Sec. Ruling 96-7p, 1996 WL 374186, *1 (1996). If the record does not allow the ALJ to make such a finding, then that ends the inquiry, for a finding of disability cannot be made solely on the basis of symptoms, even if they appear genuine. *Id.*

If, however, the medical evidence shows the existence of an underlying impairment that reasonably could be expected to produce the claimant's pain or other symptoms, the ALJ then must proceed to evaluate the "intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." *Id.* When conducting this evaluation, "the ALJ may not disregard subjective complaints merely because they are not fully supported by objective

medical evidence." *Knight v. Chater*, 55 F.3d 309, 314 (7th Cir. 1995). "The absence of objective medical evidence is just one factor to be considered along with: (a) the claimant's daily activities; (b) the location, duration, frequency and intensity of pain; (c) precipitating and aggravating factors; (d) type, dosage, effectiveness and side effects of medication; (e) treatment other than medication; (f) any measures the claimant has used to relieve the pain or other symptoms; and (g) functional limitations and restrictions." *Id.*; see also SSR 96-7p; 20 C.F.R. § 404.1529(c).

An ALJ's evaluation of a claimant's credibility must contain "specific reasons" and "must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." SSR 96-7p. "In this regard it is not sufficient for the adjudicator to make a single, conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001) (quoting SSR 96-7p). "It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms." *Id.* Rather, the ALJ must articulate "in a manner sufficient to permit an informed review" how he weighed the various factors. *Herron v. Shalala*, 19 F.3d 329, 334 (7th Cir. 1994) (citation omitted).

In his decision, the ALJ noted that he was required under the regulations to assess plaintiff's credibility by analyzing various factors as set out in the Commissioner's ruling and

regulations. The ALJ then summarized various statements made by plaintiff concerning his subjective complaints, which I paraphrase:

On April 5, 2000, plaintiff stated on a disability form that he could not engage in prolonged standing or sitting;

On June 12, 2000, Dr. Sukhwal recorded that plaintiff had been mowing his lawn with a riding lawnmower, and that, aside from being hit in the head by the mower, plaintiff was not “having too many problems;”

On October 22, 2000, plaintiff reported to the SSA that his pain had gradually intensified since his motorcycle accident, his pain was constant and his medications numbed his pain;

On October 22, 2000, plaintiff reported on a Daily Activities Questionnaire that he had “good” days on which he could wash laundry, cook dinner, use the computer and pick up mail, but there were “bad” days on which he could do only one or two of these things; that he ran errands such as banking and going to the post office and picking up simple things such as milk or bread, but he did not drive for more than 15 minutes at a time; and he went out and walked around each day;

When completing his form requesting a hearing, plaintiff stated that his condition had deteriorated such that he was unable to leave his home;

At the hearing, plaintiff testified that he had limited strength in his arms, trouble picking up small things, that he could occasionally lift up to 25 pounds, that he could sit or stand for about 60 minutes continuously, that he had a lot of exotic animals on his land that he tried to give school kids the opportunity to visit and that his friend took care of the animals but he fed them; and

Plaintiff told Dr. Munshi on January 24, 2001 that the steroid injections were not very effective in reducing his pain, but he testified at the hearing that they had alleviated some of his back pain.

After this summary, the ALJ stated:

The undersigned finds that the claimant's subjective complaints and allegations about his limitations and impairments are not substantiated by the evidence. Specially, in light of all the objective medical evidence and clinical findings as well as the record as a whole, do not reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful work activity.

AR 27.

This credibility determination is inadequate. Although the ALJ mentioned the relevant factors in his decision and recited evidence that fell into each category—for example, he addressed pain medications by noting that plaintiff said his medications numbed his pain and that plaintiff had undergone epidural injections—he failed to explain sufficiently how he weighed that evidence to allow this court to permit an informed review. For example, it is unclear whether the ALJ perceived an inconsistency between plaintiff's testimony that the steroid injections had alleviated his pain "a little bit" and his statement to Dr. Munshi that they had not been very effective, or whether he was simply setting out this evidence to show that he was accepting plaintiff's allegation that he had pain. Similarly, although the ALJ recited plaintiff's daily activities, his decision offers no clue as to how he weighed this evidence. Plaintiff's limited daily activities, particularly as reported on his Daily Activities Questionnaire, are not patently inconsistent with an inability to engage in substantial gainful activity. *Compare Zurawski*, 245 F.3d at 887 (plaintiff's activities of washing dishes, doing laundry, helping children prepare for school and preparing dinner did not necessarily contradict claim of disabling pain). Likewise, without more information, plaintiff's report

that he was able to mow his lawn with a riding mower is not necessarily inconsistent with his allegation that he was unable to sit for long periods of time.

Perhaps the ALJ disregarded all of plaintiff's previous statements regarding his subjective complaints in favor of his hearing testimony, which tended to suggest that plaintiff could perform a limited range of light work. Although weighing the evidence in this fashion would have been reasonable, there is nothing in the ALJ's decision to suggest that he actually did this. Plaintiff's hearing testimony regarding his limitations and activities differed little from his daily activities questionnaire, except that he did not mention that he had "bad days" on which he could barely function. Did the ALJ reject plaintiff's assertion in his daily activities questionnaire regarding "bad days" for this reason? Or did the ALJ accept that plaintiff had "bad days" but concluded that he could sustain a 40-hour work week despite them? The ALJ's decision does not tell us.

The ALJ noted that plaintiff's subjective complaints were not substantiated by the objective medical evidence, and it is true that the medical record provides little support for the degree of pain alleged by plaintiff. The MRI showed no evidence of disk herniation and physical examinations showed no signs of significant strength or motion deficits. On the other hand, Dr. Munshi opined that plaintiff has lumbar stenosis (narrowing of the intervertebral space) and recommended that plaintiff undergo surgery. Although the Commissioner argues that Dr. Munshi's opinion was entitled to little weight because it was inconsistent with the opinions of plaintiff's regular physicians who saw no evidence of

stenosis and recommended conservative treatment, the ALJ accepted Dr. Munshi's opinion without qualification.

In any case, the lack of clinical support for the intensity of a claimant's symptoms is not an adequate basis for rejecting the claimant's allegations about his pain and other limitations. To the contrary,

once the presence of a medically determinable physical or mental impairment is established that could reasonably be expected to produce the pain alleged, but the intensity or persistence of the pain is unsubstantiated by the medical record, the ALJ is obliged to *examine and weigh* all the evidence including observations by treating and examining physicians, third-party testimony, the claimant's testimony and daily activities, functional restrictions, pain medication taken, and aggravating or precipitating factors to evaluate how much the claimant's impairment affects his ability to work.

Herron, 19 F.3d at 334 (emphasis added). Although the ALJ identified relevant evidence in the record pertaining to these various factors, he failed to examine and weigh it.

In sum, the ALJ's credibility finding is so devoid of any examination of the evidence that this court is left without a glimpse into his reasoning. Indeed, it is telling that the Commissioner does not attempt to ferret out the ALJ's reasoning behind his credibility determination. Instead, as is common in defending her decisions during these appeals, the Commissioner does not focus on the ALJ's decision but argues that "the record" supports the ALJ's credibility finding. The Commissioner points out that plaintiff's testimony at the hearing that he never had any problems with alcohol stands in direct contradiction to the medical records, which contained several reports noting that plaintiff had an alcohol problem; plaintiff testified he did little more than "throw food" at the exotic animals on his

property, but he told several medical sources that he was a “trainer” of exotic animals and owned a company called Deva Exotics; and plaintiff’s testimony about what he did on a typical day was inconsistent with his allegation of disability.

The Commissioner makes a valid point: all of these contradictions would have been adequate to support a determination that plaintiff was not entirely credible. But the problem is that the ALJ never mentioned any of these reasons in his opinion. Although this court does not require ALJs to write perfect decisions and will uphold a decision where, though not explicit, the ALJ’s reasoning can be fairly inferred from the decision, it goes too far for the Commissioner to argue that this court essentially should conduct its own fact-finding and uphold the ALJ’s decision for reasons not supplied explicitly or implicitly by the ALJ. As this court has noted in too many previous cases (and already has noted in this one), even if there is enough evidence in the record to support an ALJ’s decision, principles of administrative law require the ALJ rationally to articulate the grounds for his decision and then confine the court’s review to the reasons supplied by the ALJ. *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002); *see also O’Connor v. Sullivan*, 938 F.2d 70, 73 (7th Cir. 1991) (court has no authority to supply a ground for agency’s decision).

Accordingly, I am recommending that this court reverse the Commissioner’s decision and remand it for a new credibility finding.

B. The ALJ Adequately Developed the Record

Plaintiff argues that this court should reverse the Commissioner's decision because the ALJ did not have all of plaintiff's medical records at the time of the decision. In particular, plaintiff argues that the ALJ did not have all of the documentation of all of the broken bones and other injuries that plaintiff sustained from 1969-1994.

It is true that not all of these records are part of the administrative record. However, that omission is not grounds to reverse the ALJ's decision. An ALJ need not gather additional evidence if he is able to determine whether the claimant is disabled from the existing record. *See* 20 C.F.R. § 404.1527(c)(3) (Commissioner will try to obtain additional evidence if evidence before her is insufficient to determine whether claimant is disabled or, if after weighing conflicting evidence, she cannot reach a conclusion); *see also Luna v. Shalala*, 22 F.3d 687, 692 (7th Cir. 1994) ("how much evidence to gather is a subject on which we generally defer to the [Commissioner]'s reasoned judgment."). The ALJ had all of plaintiff's medical records going back to May 1997, the date plaintiff alleged he had first become disabled. Many of those records described plaintiff's past medical history, including his various accidents and the injuries that resulted from them. In addition, plaintiff described his various injuries to the ALJ at the hearing. This evidence was sufficient to allow the ALJ to assess plaintiff's impairments and the limitations they imposed on plaintiff's work abilities during the time period in question. The detailed medical records from plaintiff's past

injuries would not have been useful because they predated the date on which plaintiff alleged that he first became unable to work.

Plaintiff also asserts that the ALJ told him at the hearing not to comment on his case because it was “cut and dry.” There is no support for plaintiff’s assertion in the record. To the contrary, the transcript from the administrative hearing reveals that the ALJ asked numerous questions of plaintiff about his impairments, limitations, treatment and daily activities. Plaintiff responded freely to the ALJ’s questions and asked questions of his own. In addition, the ALJ gave plaintiff several opportunities towards the end of the hearing to tell him anything else he wanted him to know about his case. The ALJ adequately developed the record.

C. Conclusion

Because plaintiff is proceeding *pro se*, I have independently reviewed the record to determine whether the ALJ committed any other errors warranting remand. He didn’t. He obtained a valid waiver of plaintiff’s right to representation and proceeded to conduct a fair and thorough hearing. His only error was in failing to provide an adequate explanation for his determination that plaintiff’s subjective complaints were not entirely credible. Because this court’s review is limited to those reasons that are fairly discernible from the ALJ’s decision, that omission means this court must remand the case even though the record as a whole arguably supports his ultimate conclusion that plaintiff is not disabled. To hold

otherwise would allow the Commissioner to ignore her own, plainly-stated rulings and regulations in the interests, I suppose, of “efficiency.” Sometimes no-harm/no-foul jurisprudence is appropriate, sometimes it’s not. The law of this circuit makes it clear that we are confronted here with a “not” situation. To achieve genuine efficiency, the Commissioner would be better served by a more diligent application of her own rules, followed by a more candid in-house review of her ALJs’ decisions when faced with an appeal.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the decision of the Commissioner denying plaintiff Michael Demmer’s applications for disability insurance benefits and supplemental security income be REVERSED AND REMANDED for a new credibility finding pursuant to sentence four of 42 U.S.C. § 405(g).

Entered this 4th day of August, 2003.

BY THE COURT:

C

STEPHEN L. CROCKER
Magistrate Judge