

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

CRAIG EVERAERT,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART,
Commissioner of Social Security,

03-C-358-C

Defendant.

REPORT

This is an appeal of a final decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Craig Everaert filed an application for Disability Insurance Benefits on May 28, 1999, alleging that he was unable to work since July 11, 1998, as a result of impairments of his back and neck. After successive denials by the local disability agency and an administrative law judge, the Appeals Council granted plaintiff's request for review and remanded the case to the administrative law judge for additional findings. After a new hearing, a different ALJ issued a decision finding plaintiff not disabled at any time before his insured status expired. That decision became the Commissioner's final decision when the Appeals Council denied plaintiff's request for review and it is the subject of this appeal.

Plaintiff contends that this court must reverse the Commissioner's decision because the ALJ on remand considered matters outside the scope of the Appeals Council's remand order, namely, plaintiff's residual functional capacity. Alternatively, plaintiff attacks the adequacy of the ALJ's residual functional capacity assessment, including his assessment of plaintiff's subjective complaints, and his finding that there are a substantial number of jobs in the regional economy that plaintiff can perform despite his limitations. As explained below, I conclude that the ALJ did not exceed the scope of the Appeals Council's order on remand and that the entirety of his decision is properly before the court for review under 42 U.S.C. § 405(g). Having conducted that review, I am recommending that this court remand the case solely for a new credibility assessment, and that this court reject plaintiff's other challenges to the adequacy of the ALJ's decision.

Facts

I. Medical Evidence Prior To July 11, 1998, Plaintiff's Alleged Onset Date

Plaintiff was born on October 22, 1948. In December 1991, he injured his back when he fell out of a tree while working as a logger. After conservative treatment failed, plaintiff underwent a lumbar discectomy with spinal fusion at L3-L4 and a posterior laminectomy in October 1992. Plaintiff was eventually determined to have a 20 percent permanent disability and was given work restrictions.

In the summer of 1996, plaintiff saw Dr. R.A. Narotzky at the pain clinic for complaints of recurring back pain with radiation into his leg. A myelogram revealed disk space narrowing at the L5-S1 level with vacuum phenomenon with minimal anterior impression on the thecal sac, and status-post anterior posterior fusion at the L3-4 level with no evidence of recurrent disk herniation. The myelogram further showed degenerative changes at the T9-10 level with minimal impression on the thecal sac and no large disk herniation. A post-myelogram computed tomography (CT) scan revealed disk degeneration with a left lateral disk bulge at the L5-S1 level which appeared to abut the nerve root, but was of uncertain clinical significance. The scan also showed an intact fusion at the L3-4 level and a small lateral disk bulge at the L2-3 level which did not definitely abut the nerve root.

Plaintiff underwent hardware injections in July 1996 but they provided no relief. On November 26, 1996, Dr. James Manz examined plaintiff. Plaintiff complained of back pain roughly at or below the beltline, with some radiation into his buttocks. Plaintiff reported that he had tried to work but could not keep a job because of his back pain. Physical examination revealed that plaintiff had a normal gait and normal strength and reflexes in the lower extremities. Plaintiff had a positive straight-leg raising test at 80-90 degrees, restricted lumbar motion in all planes and tenderness localized over the lumbosacral level. Dr. Manz opined that plaintiff's pain was the result of irritation from the fusion hardware or the degenerative changes at the lumbosacral level. Dr. Manz recommended a discography to further pinpoint plaintiff's pain, but plaintiff was reluctant to pursue this option. Plaintiff

underwent facet joint injections at L4-L5 and L5-S1 but they did not provide any long-term pain relief.

Plaintiff saw Dr. Manz on April 1997. He reported that the injections were not helpful and that he was interested in having surgery to remove the fusion hardware. However, on April 15, 1997, plaintiff called Dr. Manz and told him that he wanted to postpone the surgery until fall because of family obligations.

Tuenis Zondag, M.D., examined Plaintiff in June 1997 at the request of Dr. Manz. Plaintiff complained of difficulty with bending, twisting, lifting, prolonged standing and walking. On physical exam, plaintiff had tenderness and limited range of motion but normal strength and a negative straight leg raise test. Dr. Zondag concluded that plaintiff was disabled for social security purposes under Listing 1.05C, due to his intolerance for repetitive bending, repetitive twisting, lifting more than ten pounds and prolonged standing. Dr. Zondag noted that plaintiff had pain, significant limitation of range of motion, radicular distribution with some weakness without reflex loss and findings “that support a progressive degenerative disc having had a fusion.” Dr. Zondag noted that plaintiff had been through at least two years of treatment and had not improved.

The following month, Dr. Zondag reviewed plaintiff’s case at a back care case management conference. Dr. Zondag noted that plaintiff could not “effectively work well” and that Dr. Manz concurred with his opinion concerning social security.

In June 1998, plaintiff reported an increase in low back pain as well as pain in his right ankle where he had a screw in place from a previous surgery. Lawrence Carlson, M.D., documented a little tenderness of plaintiff's ankle and a little spasm on one side of plaintiff's back, but reported otherwise normal examination findings.

II. Medical Evidence From July 11, 1998, Plaintiff's Alleged Onset Date, Through September 30, 1998, the Expiration of Plaintiff's Insured Status

On July 12, 1998, plaintiff was brought by ambulance to the emergency room after he slipped while going down some stairs. Plaintiff had point tenderness over the lower thoracic spine but no tenderness or pain in the lower lumbar spine in the area of the previous surgery. Plaintiff had good movement of his lower extremities with normal strength and sensation and negative straight leg raising. X-rays revealed a compression fracture of T12. Plaintiff was diagnosed with a compression fracture of T12 with no associated neurologic symptoms. An emergency room physician prescribed a narcotic analgesic medication and advised plaintiff to ice his back and perform stretching exercises.

Plaintiff saw Dr. Jeffrey Marquardt at a follow-up visit later that month. Plaintiff reported that his pain was less intense, but that it had moved down into the paralumbar area. Plaintiff was wearing a back brace and using a cane. Dr. Marquardt detected some

tenderness but “not a lot of muscle spasm” in the paralumbar area. He prescribed Daypro, a nonsteroidal anti-inflammatory medication, and Percocet.¹

In August 1998, plaintiff reported that he no longer had any pain in the area of his compression fracture. Instead, he complained of aching and stiffness in the paralumbar area that was relieved by frequent changes in position. He said his elbows hurt and his sleep was disturbed by pain. Dr. Marquardt detected stiffness and tenderness in plaintiff’s paralumbar area but no tenderness over T12. He concluded that plaintiff’s compression fracture appeared to be healed and questioned whether plaintiff might have depression or fibromyalgia. Dr. Marquardt prescribed amitriptyline (an antidepressant also used to treat chronic pain) and ordered a test to rule out Lyme Disease. Results from that test were negative.

At the request of the state agency, John McDermott, M.D., and Pat Chan, M.D., reviewed the record evidence in July and October 1999, respectively, and concluded that, during the relevant period prior to September 30, 1998, plaintiff could perform light work. Also at the request of the state agency, Anthony Matkom, Ph.D., and Jack Spear, Ph.D., reviewed the record evidence in July and November 1999, respectively, and concluded that, during the relevant period, plaintiff did not have a severe mental impairment.

¹ Percocet is a narcotic analgesic prescribed for the treatment of moderate to moderately severe pain. *Physicians’ Desk Reference*, 2001 WL 1920249 (2002).

III. Medical Evidence After September 30, 1998, the Expiration Of Plaintiff's Insured Status

On September 22, 1998, plaintiff reported that he was able to fall asleep better at night but still woke up intermittently because of pain. Plaintiff's narcotic use had tapered down but he still had intermittent aching in different soft tissue areas. Dr. Marquardt observed that plaintiff walked stiffly.

The following month, plaintiff reported continuing aching across both paraspinal areas. His use of pain medication was "down significantly" from when he first suffered the compression fracture and plaintiff reported that Amitriptyline had reduced his pain and improved his sleep. Dr. Marquardt detected some tenderness in the area of T9 and T10 and some mild stiffness and tenderness in the paralumbar muscles. Dr. Marquardt suggested that plaintiff see his neurosurgeon for evaluation to determine whether there might be more nerve impingement at T9-T10.

In December 1998, plaintiff returned to see Dr. Manz for continuing pain associated with his compression fracture. On physical examination, plaintiff had restricted lumbar motion in all planes and some tenderness above the area of his spinal incision. Otherwise, plaintiff had normal gait, sensation, reflexes and motor functioning, negative straight leg raising test and no spasm. Dr. Manz ordered a variety of studies, including a myelogram and bone scan. After reviewing the studies, Dr. Manz noted that plaintiff's previous operative site at L3-L4 was "solidly healed" and looked good. Plaintiff had significant degenerative changes at the L5-S1 level and a compression fracture at T12 which appeared to be healing.

In addition, the myelogram revealed moderate spinal stenosis at the C5-6 and C6-7 levels. Dr. Manz ordered a brace, and by February 1999, plaintiff reported that he was doing much better. At follow-up visits in February and June 1999, Dr. Manz noted that plaintiff remained neurologically intact.

In July 1999, plaintiff saw Dr. Zondag for a fitness for work evaluation. Dr. Zondag noted that plaintiff's pain was localized in his mid-thoracic spine but reported no other abnormal examination findings. He prescribed a nonsteroidal anti-inflammatory medication and referred plaintiff for a functional capacities evaluation.

Plaintiff was evaluated on August 31, 1999. At this evaluation, plaintiff participated fully in only four out of seventeen tasks and self-limited his participation in thirteen out of seventeen tasks, stopping before any maximal effort was observed due to complaints of back pain, left leg pain, right ankle pain, and arm fatigue. The evaluation summary indicated that if a patient was self-limited on eight or more tasks, it was likely that psychosocial or motivational factors were influencing the physical performance. Although plaintiff demonstrated the ability to perform light work during the four tasks that he completed, plaintiff's endurance for an eight-hour work day could not be determined.

In a June 5, 2000 letter to plaintiff's attorney, Dr. Zondag wrote that as of September 1998, plaintiff "was not able to be employed" and his impairments were equivalent to Listing 1.05C. Dr. Zondag indicated that plaintiff had moderate spinal stenosis in the cervical spine that was causing nerve root effects at C6-C7 and C5-C6. Dr. Zondag also completed a

“Physical Residual Functional Capacity Questionnaire” at the request of plaintiff’s attorney on which he concluded that plaintiff was unable to work on a full-time basis. Specifically, Dr. Zondag indicated that plaintiff could sit no more than 30 minutes at a time; stand no more than 15 minutes at a time; walk no more than two blocks at a time; stand or walk less than two hours total in an eight hour work day; and sit about four hours total in an eight hour day. In addition, Dr. Zondag opined that plaintiff could not lift more than 10 pounds occasionally; could never bend or stoop; could climb stairs only occasionally; could rarely twist, crouch or climb ladders; required a position that would allow him to shift positions at will; and was likely to need unscheduled work breaks of 5-8 minutes in length about 3-4 times a day. Finally, Dr. Zondag opined that plaintiff’s pain was likely to interfere frequently with his ability to attend and concentrate and that plaintiff was incapable of even low stress jobs.

IV. Administrative Proceedings

Plaintiff applied for disability insurance benefits on April 19, 1999, alleging disability beginning July 11, 1998. 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 claimant can establish such a disability in either of two ways: 1) by

producing medical evidence that he is disabled *per se* as a result of meeting or equaling certain listed impairments set forth in 20 C.F.R. Regulations No. 4, Subpart P, Appendix 1; or 2) by demonstrating an impairment of such severity as to be unable to engage in “any kind of substantial gainful work which exists in the national economy.” *See Heckler v. Campbell*, 461 U.S. 458, 460 (1983).

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) Does the claimant have the residual functional capacity to perform his or her past work? and
- (5) Is the claimant capable of performing work in the national economy?

See 20 C.F.R. § 404.1520.

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 the claimant is 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). The

inquiry at step five takes into account the claimant's residual functional capacity, age, education and past work experience to determine whether or not he is disabled.

After his claim was denied twice by the local disability agency, plaintiff requested a hearing. An administrative hearing was held before Administrative Law Judge Diane Townsend-Anderson on June 20, 2000. Plaintiff testified that he could not work full time because of continuous pain in his legs, neck and lower back. He said that sitting, standing on concrete and bending exacerbated his pain, and that he was able to walk only a block or two before he felt numbness in his legs. He said that he used ice packs and medication daily for pain relief. He testified that he attempted to work at a grocery store for 10 days in 1997 but he had difficulty concentrating because of pain and was often sent home early by the foreman. Plaintiff rated the severity of his pain as a six or seven on a 10-point scale.

Andrew M. Steiner, M.D., testified as a medical expert. Dr. Steiner disagreed with Dr. Zondag's conclusion that plaintiff met a listing or had any nerve root compromise in the cervical spine. Dr. Steiner opined that plaintiff's back and neck impairments did not meet the criteria for any listed impairment because there was no objective evidence of neurological loss. When asked to described plaintiff's functional limitations, Dr. Steiner testified:

I think the record would described someone functioning, at sedentary and light, very occasional [INAUDIBLE] and more frequently, with a sit/stand option and would have a basis in the record, perhaps 30 minutes or so. I think that certain things would be limited to occasional, and those would include overhead work, and bending, twisting, stooping, and kneeling, and crawling,

and climbing. Things [sic] repetitive neck activities would be precluded.

AR 52.

Lawrence Hollingsworth testified as a vocational expert. After Dr. Steiner testified, ALJ Townsend-Anderson asked Hollingsworth some hypothetical questions regarding the job base that might be available to plaintiff. She asked him to assume an individual of plaintiff's age (50), work experience and education who also had the following limitations: was limited to lifting and carrying 20 pounds occasionally, 10 pounds frequently; could only do work allowing for a sit/stand option every 30 minutes; could not do more than occasional bending, twisting, stooping, crawling, kneeling, climbing or overhead work; could not perform any repetitive rotation or fixed flexion of the neck; and could not be exposed to temperature, humidity extremes or hard floor surfaces. AR 56-57. Hollingsworth testified that there were thousands of both light and sedentary jobs that such an individual could perform, including telephone order clerk, repair order clerk and order clerk. When asked by the ALJ whether those numbers would be reduced if the individual was further restricted to simple and repetitive work with only minimal industrial standards for production and pace, Hollingsworth said no, indicating that all the jobs he had identified were unskilled. AR 58. When questioned by plaintiff's attorney, Hollingsworth testified that the ability to lift 10 pounds frequently and 20 pounds occasionally would allow an individual to perform a full range of work in the light exertional category, but the requirement of a sit/stand option

limited those jobs. According to Hollingsworth, this meant that the types of jobs plaintiff could perform were somewhere between sedentary and light.² AR 59.

In a decision issued September 26, 2000, ALJ Townsend-Anderson concluded that plaintiff was not disabled. She found that although plaintiff was not able to perform his past relevant work when his insured status expired on September 30, 1998, he was able to perform sedentary, unskilled work that existed in significant numbers in the national economy, namely telephone order clerk, repair order clerk and order clerk. ALJ Townsend-Anderson noted in her decision that even though she was “not finding light exertion, the claimant could also perform light assembly jobs.” She found that plaintiff was 50 years old on his alleged onset date and therefore was an individual “closely approaching advanced age” and that he had semi-skilled work experience through which he had acquired skills which could be used in performing jobs within his residual functional capacity. Referring to medical-vocational Rule 201.11, she found that based on plaintiff’s age, education, capacity for sedentary work and work experience, it would direct a finding of “not disabled.” She found that although plaintiff “was unable to perform the full range of sedentary work on the

² The Social Security Administration categorizes jobs in terms of the physical exertion required to perform them: sedentary, light, medium, heavy, and very heavy. 20 C.F.R. § 404.1567. Light work primarily requires "a good deal of walking or standing," or it may involve "sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1657(b). Light work may demand "lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." *Id.* Sedentary work, on the other hand, involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools." 20 C.F.R. § 404.1567(a). Sedentary work generally involves sitting, although it may require some walking or standing. *Id.*

date his insured status expired, he was capable of making an adjustment to work which exists in significant numbers in the national economy.” Therefore, she concluded that plaintiff was not eligible for disability insurance benefits. AR 124-135.

Plaintiff appealed to the Appeals Council. In an order mailed on February 8, 2002, the Appeals Council vacated ALJ Townsend-Anderson’s decision and remanded the case to an administrative law judge. The order noted several errors committed by ALJ Townsend-Anderson regarding the application of the medical vocational rules and her findings regarding the transferability of plaintiff’s skills and his past relevant work. In particular, the Appeals Council noted that it was incorrect for her to have used the framework of medical vocational Rule 201.11 to find that plaintiff was not disabled because that rule applied to a claimant with a limited education, whereas plaintiff had a high school education. It also noted that in spite of the ALJ Townsend-Anderson’s finding that plaintiff had acquired transferable work skills from his past work, there was no testimony from the vocational expert to this effect. Finally, the council noted that neither of the jobs that ALJ Townsend-Anderson had found to be plaintiff’s past relevant work could be considered because plaintiff had not performed the jobs within the 15-year period before his date last insured.

The Appeals Council directed the ALJ upon remand to:

- Obtain evidence from a vocational expert to clarify the effect of the assessed limitations on the claimant’s occupational base . . . and to determine whether the claimant has acquired any skills that are transferable to other occupations under the guidelines in Social Security Ruling 82.41. The hypothetical questions should reflect

the specific capacity/limitations established by the record as a whole. The Administrative Law Judge will ask the vocational expert to identify examples of appropriate jobs and to state the incidence of such jobs in the national economy (20 CFR 404.1566). Further, before relying on the vocational expert evidence, the administrative Law Judge will identify and resolve any conflicts between the occupational evidence provided by the vocational expert and information in the Dictionary of Occupational Titles (DOT) and its companion publication, the Selected Characteristics of Occupations (Social Security Ruling 00-4p).

-Apply the correct medical vocational rule for the period prior to age 50 and, considering the principle of the non-mechanical application of the medical vocational rules, apply the proper medical vocational rule for an individual age 50 for the period beginning on September 30, 1998.

Finally, the Appeals Council authorized the ALJ to “take any further action needed to complete the administrative record and issue a new decision.” AR 167-68.

Pursuant to the Appeals Council’s order, a new administrative hearing was held before ALJ Roger Thomas on May 14, 2002. Dr. Steiner appeared again as a neutral medical expert; Jeanne Krizan testified as a vocational expert. At the beginning of the hearing, plaintiff’s lawyer questioned whether it was necessary to review the entire case in light of the limited issues identified by the Appeals Council in its remand order. ALJ Thomas indicated that because the Appeals Council had vacated the prior decision, a *de novo* review was required. Accordingly, he took new testimony from plaintiff, Dr. Steiner and the vocational expert. Plaintiff again testified that he had constant back pain at around the 7 level. He said

that his doctors had discussed with him the possibility of additional surgery, but they could not guarantee that it would be successful in relieving his pain.

Dr. Steiner opined that plaintiff did not meet any listed impairment at the time his insured status expired because there was no ongoing neurological loss. He further opined that plaintiff had the residual functional capacity to perform work in the light exertional category with a sit/stand option, no repetitive neck rotations or right ankle movement, and only occasional bending, twisting, stooping, kneeling, crawling, crouching or overhead work.

The ALJ asked vocational expert Krizan to consider a hypothetical individual who was limited to light work that allowed him to alternate between sitting and standing and that did not involve more than occasional bending, twisting, stooping, kneeling, crouching, climbing, or overhead working. The ALJ further restricted the hypothetical individual to work that did not require repetitive neck flexion or extension or repetitive use of foot controls with the right foot. Krizan testified that an individual of plaintiff's age, education, and work history with those limitations could perform jobs as a janitor/cleaner, as well as jobs in the manufacturing sector, such as assembler, machine operator, and packager. She stated that approximately 65,000 such jobs existed in the State of Wisconsin. When asked to reduce the exertional level from light work to sedentary, Krizan testified that the cleaning jobs would be eliminated but that approximately 8,000 manufacturing jobs would remain. She testified that all the jobs that she had identified were unskilled. Neither the ALJ nor

plaintiff's attorney asked Krizan whether the evidence she had given conflicted in any way with the *Dictionary of Occupational Titles*.

On July 24, 2002, ALJ Thomas issued a decision finding plaintiff not disabled. In his decision, ALJ Thomas conducted the five-step sequential evaluation process de novo. ALJ Thomas decided the claim at step five, having concluded at steps three and four that plaintiff did not satisfy the criteria for any listed impairment and that he could not return to his past relevant work. He credited the testimony of Dr. Steiner concerning plaintiff's residual functional capacity, finding that plaintiff had the residual functional capacity for a limited range of light level work. In reaching this conclusion, the ALJ noted that, contrary to plaintiff's contention at the hearing, Dr. Steiner had not testified at the previous hearing that plaintiff had a sedentary residual functional capacity. ALJ Thomas found after reviewing the tape from the first hearing that Dr. Steiner had testified that plaintiff's residual functional capacity was between the sedentary and light exertional levels, with limitations consistent with those he offered at the second hearing. In any event, ALJ Thomas noted, none of the findings from the prior decision were entitled to any weight because the Appeals Council had vacated it and remanded it for a de novo hearing and decision. AR 23 at n.1.

The ALJ discounted the opinion of Dr. Zondag, finding that it was inconsistent with other substantial evidence in the record. He noted that Dr. Zondag's restrictive residual functional capacity assessment and his opinion that plaintiff had a listed impairment were not supported by physical examination findings or other objective evidence. Furthermore,

the ALJ found that plaintiff's various daily activities, spotty earnings record and failure to pursue physical or vocational rehabilitation "were inconsistent with an individual motivated to work on a full time competitive basis." AR 22.

At step five, the ALJ found that plaintiff was "closely approaching advanced age" as of the date his insured status expired; had a high school education; and had a history of unskilled to semi-skilled work. Relying on Krizan's testimony, the ALJ found that an individual with these vocational factors and plaintiff's residual functional capacity would be capable of performing light level manufacturing jobs, including assembler, machine operator or packager, of which there existed 55,000 jobs in the regional economy, or light level janitor/cleaner jobs, of which there existed 10,000 jobs in the regional economy.

The ALJ made the following specific findings:

1. The claimant met the disability insured status requirements of the Act on July 11, 1998, his alleged onset date of disability, and continued to meet them only through September 30, 1998.
2. The claimant has not engaged in substantial gainful activity at any time since July 11, 1998.
3. The medical record establishes that the claimant is severely impaired by history of degenerative disc disease of the cervical and lumbar spine, status post anterior and posterior fusion at L3-4 in 1992, and compression deformity at T-12, status post fracture at that level in July 1998, and a history of a right ankle fracture, status post internal fixation, with some post operative and post traumatic changes in that ankle, but that on or before September 30, 1998, the claimant did not have an

impairment or combination of impairments that met or equaled the relevant criteria of any impairment listed at 20 C.F.R., Part 404, Subpart P, Appendix I.

4. The claimant's subjective complaints and functional limitations are inconsistent with the record as a whole with respect to the presence of a disabling impairment on or before September 30, 1998.
5. On or before September 30, 1998, the claimant retained the residual functional capacity for light level work, requiring lifting 20 pounds occasionally and 10 pounds frequently, a sit/stand option at will, only occasional bending, twisting, stooping, kneeling, crouching, climbing, and overhead work, no repetitive neck flexion or extension, and no repetitive use of the right ankle for operation of foot pedals.
6. The claimant's impairments precluded him from returning to his past relevant work on or before September 30, 1998.
7. On or before September 30, 1998, the claimant was a younger individual to an individual closely approaching advanced age (per the order of the Appeals Council), with a high school education, and a history of unskilled to semi-skilled work, with no work skills transferable to his residual functional capacity.
8. Considering the claimant's maximum sustained work capability, age, education, and past work experience, on or before September 30, 1998, there were other jobs the claimant was capable of performing that existed in significant numbers in the national economy, including assembler, machine operator, packager, and janitor/cleaner.
9. The claimant was not under a disability as defined in the Social Security Act at any time on or before September 30, 1998, the date his insured status expired.

AR 24-25.

Plaintiff requested the Appeals Council to review ALJ Thomas's unfavorable decision. Among other things, he argued that ALJ Thomas had exceeded the scope of the Appeals Council's remand order by reconsidering plaintiff's residual functional capacity. AR 443-447. On May 22, 2003, the Appeals Council issued a decision denying plaintiff's request for review, making ALJ Thomas's decision the final decision of the Commissioner for purposes of this appeal.

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, ALJ Thomas'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." "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 v. Chater*, 105 F.3d 1151, 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). When reviewing the Commissioner's

findings under § 405(g), this court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Nevertheless, the court must conduct a "critical review of the evidence" before affirming the Commissioner's decision, *id.*, and 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). 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).

Although the ALJ's reasonable resolution of evidentiary inconsistencies is not subject to review 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).

II. Scope of Appeals Council's Remand

Plaintiff argues that ALJ Thomas went outside the scope of the Appeals Council's remand order and violated the law of the case doctrine when he reconsidered ALJ Townsend-Anderson's finding concerning plaintiff's residual functional capacity and changed it from sedentary to light. Plaintiff maintains that this prejudiced him because, as an individual closely approaching advanced age with a high school education and no transferable skills, he would be disabled under the medical-vocational guidelines if he has a sedentary residual functional capacity, whereas the rules direct a finding of "not disabled" if he has a light residual functional capacity. *Compare* 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.14 *with* Rule 202.14.

I am skeptical whether this court has purview under 42 U.S.C. § 405(g) to review this challenge to ALJ Thomas's decision. Determining whether an ALJ has complied with the intended scope of a directive from the Commissioner (by way of the Appeals Council) seems to be within the exclusive jurisdiction of the Commissioner, with this court limited to reviewing the findings reached by the Commissioner in her final decision.³ 42 U.S.C. § 405(g). However, it is not necessary to decide this question in this case. Even assuming this court has the authority to consider the issue whether ALJ Thomas complied with the remand order, plaintiff's argument fails.

³ The Appeals Council's failure to review ALJ Thomas's decision suggests that the Commissioner was satisfied with ALJ Thomas's compliance with the remand order.

Because the Appeals Council granted plaintiff's request to review ALJ Townsend-Anderson's decision, that decision never became binding. 20 C.F.R. § 404.955(a) (when Appeals Council grants claimant's request for review, ALJ's decision never becomes final). Furthermore, when the Appeals Council remands a case, it vacates the ALJ's decision in its entirety, although it is free to state in its remand order that it agrees with certain findings or portions of the ALJ's decision. See *Hearings, Appeals and Litigation Law Manual*, (HALLEX), I-3-7-1. On remand, the ALJ is limited only by 20 C.F.R. § 404.977(b), which provides that "[t]he administrative law judge shall take any action that is ordered by the Appeals Council and may take any additional action that is not inconsistent with the Appeals Council's remand order."

The Appeals Council directed the ALJ on remand to obtain evidence from a vocational expert regarding the "effect of the assessed limitations" on plaintiff's occupational base. It also directed the ALJ to present hypothetical questions that "reflect the specific capacity/limitations established by the record as a whole." ALJ Thomas's redetermination of plaintiff's residual functional capacity was not inconsistent with this order. Nowhere in its order did the Appeals Council state that it agreed with the first ALJ's assessment of plaintiff's residual functional capacity. Indeed, its statement that the ALJ was to present a hypothetical that reflected plaintiff's "capacity/limitations established by the record as a whole" suggests that the second ALJ should—or at least could—take a new look at plaintiff's residual functional capacity. I am not persuaded that ALJ Thomas acted inconsistently with

the language of the Appeals Council's order when he reconsidered plaintiff's residual functional capacity.

Plaintiff's "law of the case" argument fares no better. The law of the case doctrine states that "[o]nce an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991). This doctrine precludes an ALJ on remand from reexamining issues that were implicitly left intact by a reviewing court on judicial review of the Commissioner's decision. *See, e.g., Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998). However, the cases cited by plaintiff for the proposition that the law of the case doctrine precluded the ALJ from reconsidering issues not mentioned explicitly by the Appeals Council are inapposite: those cases involved appeals to the United States District Court from a final decision of the Commissioner. As the court explained in *Wilder*, the law of the case doctrine "requires the administrative agency, *on remand from a court*, to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart." 153 F.3d at 803 (emphasis added). As this case did not involve a remand from a court, the cases cited by plaintiff do not advance his argument. Plaintiff has not cited and I have not found any case applying the law of the case doctrine to decisions by superior tribunals within an administrative agency.

Accordingly, I am not recommending that this court grant benefits to plaintiff or remand this case on the basis of his claim that ALJ Thomas lacked the authority to

reconsider his residual functional capacity. As for plaintiff's contention that ALJ Thomas failed in other ways to follow the specific directives from the Appeals Council, I agree with other courts that have found it better "to examine the substance of the commissioner's decision for compliance with the Social Security Act and the implementing regulations, rather than to focus on the administrative law judge's compliance with all of the terms of an order of remand from the Appeals Council." *Savoy v. Massanari*, 2001 WL 1502585, *3 (D. Me.2001); *see also Kastman v. Barnhart*, 2002 WL 1461499, *9 (N.D. Ill. 2002) (addressing plaintiff's criticisms of ALJ's compliance with remand order in context of reviewing Commissioner's final decision denying benefits). Plaintiff's arguments are considered below as independent challenges to the supportability of ALJ Thomas's decision.

III. Residual Functional Capacity

Plaintiff challenges the ALJ's finding at step four that he retains the residual functional capacity for a limited range of light work. Plaintiff argues that the ALJ erred in adopting Dr. Steiner's opinion of plaintiff's limitations over that of Dr. Zondag, who concluded that plaintiff lacked the tolerance for competitive work at any exertional level. In addition, plaintiff argues that the ALJ did not properly account in his residual functional capacity assessment for all of plaintiff's non-exertional impairments. Finally, he contends that the ALJ erred in failing to credit fully plaintiff's subjective complaints regarding his pain and limitations. I address each of these arguments in turn.

A. Medical Opinions

Plaintiff argues that the ALJ erred in crediting the opinion of Dr. Steiner over that of Dr. Zondag with respect to plaintiff's residual functional capacity. First, he contends that the ALJ erred in relying on Dr. Steiner's testimony that plaintiff could perform light work because there is nothing in the record to show that Dr. Steiner reviewed new medical evidence that had been added to the record after the first hearing. Plaintiff acknowledges that the new evidence post-dated his date last insured but argues that the records are relevant because they show that his condition "continues to deteriorate further."

Plaintiff's argument is unpersuasive for two reasons. First, when Dr. Steiner testified, he referred specifically to the "new exhibits," pointing out that they showed evidence of depression and right ankle osteoarthritis. Second, it is irrelevant that plaintiff's condition might have deteriorated after the date on which he was last insured. To be entitled to benefits, he had to show that he was disabled on or before that date. The new exhibits to which plaintiff refers are dated approximately three years after his disability insured status expired. Apart from arguing that the records show that he continues to deteriorate, plaintiff has not shown that any of the new records "relate back" to the severity of his condition during the time period when he was insured. As such, they are immaterial to the disability analysis.

Plaintiff also contends that ALJ Thomas should have given little weight to Dr. Steiner's opinion because it changed from his opinion at the first hearing. Plaintiff contends

that at the first hearing, Dr. Steiner testified that plaintiff could perform only sedentary work, but yet at the second hearing he could offer no reason why he changed his opinion to light work.

Again, plaintiff's argument misses the mark. A review of the transcript from the first hearing indicates that Dr. Steiner did not testify that plaintiff could perform only sedentary work. Although the transcription of Dr. Steiner's testimony is incomplete, he did opine that plaintiff was able to function at the sedentary *and* light exertional levels. Further, when ALJ Townsend-Anderson questioned the vocational expert moments later, she posed a hypothetical with a lifting limitation consistent with someone who could perform light work, namely, an ability to lift and carry 20 pounds occasionally and 10 pounds frequently. *See* 20 C.F.R. § 404.1567(b). In fact, even ALJ Townsend-Anderson noted that although she was finding for the purposes of her decision that plaintiff was limited to sedentary work, he could actually also perform some types of light jobs. This finding indicates, as ALJ Thomas found, that Dr. Steiner's testimony at the two hearings was not inconsistent.

Next, plaintiff contends that even if Dr. Steiner's testimony was credible, the ALJ erred in accepting it over the opinion of Dr. Zondag. Plaintiff contends that under the regulations, the ALJ was required to give more weight to the opinion of Dr. Zondag, who was a treating physician, than to Dr. Steiner, who was not. Although it is true that the opinions of treating physicians are generally entitled to more weight than those of non-treating physicians, the regulations make clear that an ALJ can discount a treating physician's

opinion if it is not well-supported by medically acceptable clinical techniques or is inconsistent with other substantial evidence in the record. 20 C.F.R. § 1527(d)(2).

In his decision, the ALJ explained why he was not giving substantial weight to Dr. Zondag's opinion. He noted that Dr. Zondag had completed a residual functional capacity assessment on May 31, 2000, on which he indicated that plaintiff had various limitations that would prevent him from performing any job. However, the ALJ pointed out that the last time Dr. Zondag had examined plaintiff had been on July 28, 1999, when the only objective abnormality the doctor noted was pain localized in the mid-thoracic spine. The ALJ also noted that no other doctor who examined plaintiff after July 11, 1998, reported any other abnormalities that would support the degree of limitation found by Dr. Zondag. In addition, he noted that the functional capacities evaluation in August 1999 was inconclusive because of plaintiff's poor effort. He also noted that there was no clinical support for Dr. Zondag's assertion in his June 5, 2000, letter that plaintiff bilateral arm weakness and difficulty using his arms. These deficiencies are adequate to support the ALJ's decision to afford Dr. Zondag's residual functional capacity assessment little weight. *Dixon v. Massanari*, 270 F.3d 1171, 1177 (7th Cir. 2001) ("[A] claimant is not entitled to disability benefits simply because her physician states that she is 'disabled' or unable to work.").

In his reply brief, plaintiff suggests that Dr. Zondag's opinion was well-documented by the objective medical evidence, which shows various degenerative changes and a compression fracture in plaintiff's spine. However, it was not enough for plaintiff to show

that he has medically-determinable impairments in order to be found disabled. He also had to show that those impairments produced limitations so severe as to render him unable to engage in any kind of substantial gainful work existing in the national economy. Apart from Dr. Zondag's assertion that plaintiff has left nerve root damage at C5-C6, the ALJ did not dispute the existence of the various impairments noted by Dr. Zondag. He simply found that the record lacked adequate clinical support for Dr. Zondag's conclusion that those impairments were so severe as to prevent plaintiff from working. As just noted, this finding has ample support in the record.

B. Completeness

Next, plaintiff contends that the ALJ's residual functional capacity assessment was inadequate because it failed to account adequately for all of plaintiff's limitations. First, he contends that the ALJ committed legal error when he failed to specify how frequently plaintiff would need to alternate sitting or standing. However, the ruling that plaintiff cites to support the contention that "the RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing" applies to individuals who cannot perform a full range of sedentary work. Social Security Ruling 96-9p ("Implications of a Residual Functional Capacity For Less Than a Full Range of Sedentary Work"). In this case, ALJ Thomas found that plaintiff could perform a range of light work that allowed him to sit or stand at will. Moreover, he consulted with a vocational expert to determine the effect the

sit/stand option would have on the job base. The ALJ's failure to be more specific regarding how frequently plaintiff was likely to change positions was not legal error.

Plaintiff also contends that the ALJ erred because he failed to consider evidence concerning plaintiff's mental limitations. Plaintiff asserts that the ALJ failed to mention a Psychiatric Review Technique Form completed by a state agency consultant on which he concluded that there was evidence showing that plaintiff suffered from "depression related to chronic back pain." The consultant determined after reviewing the evidence that the impairment was not severe, noting that it imposed only "slight" limitations on plaintiff's activities of daily living and social functioning and "seldom" interfered with his ability to concentrate or remain on task. AR 307-315. Consistent with this evidence, the ALJ found in his decision that the record documented "no substantial evidence of any severe medically determinable mental impairment" during the relevant period before plaintiff's insured status expired. AR 17.

By definition, a non-severe impairment is one that does not significantly limit the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1521(a). However, under the Commissioner's rulings, the ALJ "must consider limitations and restrictions imposed by all of an individual's impairments, even those that are not 'severe'." Soc. Sec. Ruling 96-8p. Although there is substantial evidence to support the ALJ's conclusion that plaintiff did not have a "severe" mental impairment, the ALJ probably committed a technical error by failing to include the minor limitations identified on the

PRTF in his residual functional capacity assessment. However, I conclude that this error was harmless. All of the relevant jobs identified by the ALJ at step five were unskilled. By definition unskilled work is “work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time.” 20 C.F.R. § 404.1568(a); *see also* SSR 85-15 (“The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting.”). Plaintiff has not pointed to any evidence in the record to support his suggestion that the mild mental limitations identified on the PRTF would prevent him from performing the simple demands of unskilled work. Accordingly, I see no need to remand this case on the basis of the ALJ’s failure to include the PRTF information in his residual functional capacity assessment.

C. Credibility Finding

Although I have found that substantial evidence supports the ALJ’s conclusion that the objective medical evidence did not support a finding of total disability, the ALJ could not reject plaintiff’s application without first considering plaintiff’s subjective complaints. “[O]nce the claimant produces medical evidence of an underlying impairment, the Commissioner may not discredit the claimant’s testimony as to subjective symptoms merely because they are unsupported by objective evidence.” *Carradine v. Barnhart*, 360 F.3d 751,

753 (7th Cir. 2004) (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)). Rather, the ALJ 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.” SSR 96-7p. “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.” *Knight v. Chater*, 55 F.3d 309, 314 (7th Cir. 1995); *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.

Although the ALJ did not use the word “credible” or “incredible” in his decision, his decision contains a paragraph in which he assessed plaintiff’s subjective complaints. The ALJ wrote:

During a visit to Dr. Marquardt in March 1999, while the claimant was in a back brace, the claimant indicated he was able to perform household chores, such as dishes and laundry. In a written report submitted with his application in 1999, the claimant indicated that he cooked, did laundry, shopped, mowed the lawn, and visited with friends. At the hearing, the claimant reported that he drove fifty miles at a time, made meals, washed

dishes, did housecleaning, vacuumed, and went grocery shopping. He indicated he was unable to carry a laundry basket far. He also reported that he watched television three to four hours per day, and read a great deal. He indicated that his sleep was interrupted due to back pain, but that he was able to sleep for six hours with sleep medication, and seldom slept during the day. He indicated that he is taking more Percocet now than previously, and has been prescribed Celebrex, but does not take that medication. After the functional capacities evaluation in August 1999, the record documents no visits for medical evaluation until June 2001. This evidence is inconsistent with disabling pain. Further, a review of the claimant's earning record indicates no annual earnings over \$10,000 since 1976, and minimal earnings from 1992 through 1996. The claimant is not involved in any formal exercise or rehabilitation program to attempt to improve his functioning, and has not sought any vocational services. This evidence is inconsistent with an individual motivated to work on a full time competitive basis.

Plaintiff challenges the ALJ's credibility finding, contending that it rests on "serious errors of reasoning." It is now well-settled in the Seventh Circuit that reviewing courts have more freedom to review the ALJ's credibility determination where that determination rests on objective factors or fundamental implausibilities rather than subjective considerations such as the claimant's demeanor and presentation at the hearing. *See, e.g., Carradine*, 360 F.3d at 754; *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000); *Herron v. Shalala*, 19 F.3d 329, 335 (7th Cir. 1994).

The ALJ's credibility determination in this case falls into the former category. Specifically, the ALJ found that "claimant's subjective complaints and functional limitations are inconsistent with the record as a whole with respect to the presence of a disabling

impairment on or before September 30, 1998.” AR 24. It appears from the paragraph quoted above that the ALJ found plaintiff’s complaints of disabling pain to be inconsistent with 1) plaintiff’s daily activities; 2) his failure to seek medical evaluation for his condition from August 1999 to June 2001; 3) his history of low or nominal earnings; and 4) his failure to participate in a formal rehabilitation or vocational program.

The ALJ’s discussion of plaintiff’s daily activities does not afford an adequate basis on which to uphold the credibility finding. First, his recitation of plaintiff’s activities does not accurately reflect the record; second, the ALJ fails to build a logical bridge from that evidence to his conclusion that plaintiff was not fully credible. For example, the ALJ noted that plaintiff cooked, cleaned and shopped, but plaintiff did not testify that he performs these activities all in one day or every day. To the contrary, plaintiff’s testimony at the first hearing suggests that he performs these activities on a limited basis and for only short periods of time. At the first hearing, the transcript of which was part of the record before the second ALJ, plaintiff described his typical day as follows:

Usually, the first thing in the morning, I’m really stiff. So I have to walk, and I can’t just go and sit in a chair, or make the coffee. I can make coffee, I pick up around the house a little bit, and do what I can. Maybe fold some laundry, after moving around for a half hour to an hour, then I feel a little better, as far as my back is concerned, where I can sit down and have breakfast. The more I use my back, doing little things, the tighter it gets, and the more ache I get. So I believe it’s what they tell me is from inflammation, and so I’ll lay on the couch, I got four ice packs, two I keep in the freezer, two on my back. And if I lay flat for about 20 minutes, it gives me relief, it’s not that burning sensation like I usually have.

AR 47-48.

Further, on the daily activities questionnaire to which the ALJ referred, plaintiff indicated that he does housecleaning and shopping each for a total of two hours a week and that he can mow only part of the lawn, leaving the rest for his wife to finish. In failing to mention these limitations, the ALJ presented a biased picture of plaintiff's abilities that does not jibe with the record. *Binion v. Chater*, 108 F.3d 780, 788 (7th Cir. 1997) ("An ALJ must consider all relevant evidence and may not select and discuss only that evidence that favors his ultimate conclusion.") (citing *Herron*, 19 F.3d at 333).

The Seventh Circuit has made clear that where the evidence indicates that the claimant engages in minimal daily activities such as light housecleaning, grocery shopping or visiting with friends, it is insufficient for the ALJ simply to list those activities as support for his credibility finding without explaining why they are inconsistent with the claimant's claims of pain. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001); *Clifford*, 227 F.3d at 872. In light of the evidence in the record indicating that plaintiff's daily activities are sporadic and limited by pain, it was error for ALJ Thomas simply to list those activities without explaining why they were inconsistent with plaintiff's contention that he cannot work. *See Carradine*, 360 F.3d at 755 (remanding for new credibility determination where ALJ "failed to consider the difference between a person's being able to engage in sporadic physical activities and her being able to work eight hours a day five consecutive days of the week").

Notwithstanding the ALJ's faulty analysis of plaintiff's daily activities, this court still might be able to uphold the ALJ's credibility finding if the other reasons he cited are supported adequately by the evidence and rely upon logical inferences. Besides plaintiff's daily activities, the ALJ rested his credibility finding on plaintiff's failure to seek medical evaluation for his back from August 1999 until June 2001 and for his failure to participate in any rehabilitation program.

However, under SSR 96-7p, the ALJ could not discount plaintiff's subjective complaints on this basis "without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment." The record suggests that there is no further treatment available to help plaintiff's condition. Plaintiff underwent numerous diagnostic tests and studies *before* August 1999 to help determine the source of his pain and whether it could be treated. Although Dr. Manz recommended further surgery as one possible way to treat plaintiff's symptoms, plaintiff testified that his doctors have told him that additional surgery was not guaranteed to provide him with any more relief. AR 84. As for rehabilitation, there is no evidence that any of plaintiff's doctors prescribed physical therapy or recommended that he seek vocational services. Indeed, Dr. Zondag, an occupational health specialist, concluded that plaintiff could not work and recommended that he pursue social security benefits.

According to SSR 96-7p, advice by a medical source that “there is no further, effective treatment that can be prescribed and undertaken that would benefit the individual” may provide a valid reason for the claimant’s failure to seek regular treatment. The absence of any evidence showing that further treatment was available that was likely to benefit plaintiff and the evidence indicating that plaintiff’s doctors were supportive of his application for disability benefits could explain why plaintiff failed to seek further treatment or vocational services. Under SSR 96-7p, the ALJ was required to consider this evidence before concluding that plaintiff was not credible.

Finally, the ALJ noted that plaintiff had annual earnings below \$10,000 from 1976 to 1992 and minimal earnings from 1992 to 1996. Plaintiff does not dispute that his earnings record was relevant to the ALJ’s credibility assessment. *See, e.g., Bean v. Chater*, 77 F.3d 1210, 1213 (10th Cir. 1995) (plaintiff’s poor work history relevant to credibility of subjective complaints); *Ownbey v. Shalala*, 5 F.3d 342, 345 (8th Cir. 1993) (same); *Rivera v. Schweiker*, 717 F.2d 719, 725 (2d Cir. 1983) (“A claimant with a good work record is entitled to substantial credibility when claiming an inability to work because of a disability”). Although plaintiff argues that his poor earnings record is the result of his back injuries combined with “his lack of marketable job skills in rural Wisconsin,” that is not the only reasonable inference that can be drawn from the record. It was equally reasonable for the ALJ to infer that plaintiff’s poor work history was evidence that plaintiff was not motivated to work on a full-time basis.

However, in light of the other defects in the ALJ's credibility assessment, I cannot recommend sustaining that assessment solely on the basis of plaintiff's poor work record. In addition to the analytical errors just discussed, the ALJ failed to consider all of the evidence that the Commissioner has deemed relevant to the credibility assessment. In particular, under the Commissioner's rulings and regulations, the ALJ *must* consider "any measures other than treatment the individual uses or has used to relieve pain or other symptoms" when assessing the credibility of the claimant's subjective complaints. SSR 96-7p; 20 C.F.R. § 404.1529(c)(3).

The ALJ never mentioned plaintiff's use of ice packs even though plaintiff testified at the first hearing that he uses them once or twice a day and mentioned the ice packs again at the second hearing. AR 80. Similarly, although the ALJ noted that plaintiff took Percocet on a daily basis for pain relief, he did not explain whether this fact supported or detracted from plaintiff's credibility or examine whether the medication had any side effects that could affect plaintiff's ability to work. *See* SSR 96-7p and § 404.1529(c)(3)(iv) (providing that "type, dosage, effectiveness, and side effects" of medication is factor ALJ must consider). Like his discussion of plaintiff's daily activities, the ALJ simply stated the evidence concerning plaintiff's medication use without offering any analysis of that evidence.

"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." *Zurawski*, 245 F.3d at 888 (quoting *Bauzo v. Bowen*, 803 F.2d 917, 923 (7th Cir. 1986) (citations omitted) (emphasis added)). The ALJ's decision indicates that he did not give adequate consideration to evidence in the record that tends to support plaintiff's claim that he suffers from pain so severe as to prevent him from working on a regular and consistent basis. Accordingly, I am recommending that this court remand this case to the Commissioner for a new credibility assessment.

IV. Vocational Evidence

Finally, plaintiff contends that there is no substantial evidence to support the ALJ's conclusion that plaintiff could perform 55,000 light jobs in the manufacturing area and 10,000 janitorial jobs given his residual functional capacity. Plaintiff argues that the vocational expert who testified at the hearing cited no basis for her conclusion and fabricated it out of "whole cloth." In addition, plaintiff contends that the ALJ ignored the Appeals Council's order to "identify and resolve any conflicts between the occupational evidence provided by the vocational expert and information in the Dictionary of Occupational Titles," as required by Social Security Ruling 00-4p.

Plaintiff forfeited his opportunity to challenge the ALJ's failure to identify and resolve any conflicts between the vocational expert's testimony and the *DOT* by failing to raise this issue at the hearing. Although under SSR 00-4p and *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002), an ALJ must ask a vocational expert how she reached her conclusions and

whether her assessments conflict with the *DOT*, that duty arises only if the claimant (or his lawyer) explores a discrepancy. *Donahue*, 279 F.3d at 446; *see also Barrett v. Barnhart*, 355 F.3d 1065, 1067 (7th Cir. 2004) (“[B]ecause Barrett’s lawyer did not question the basis for the vocational expert’s testimony, purely conclusional though that testimony was, any objection to it is forfeited.”). By failing to question the vocational expert at the hearing about the foundation for her testimony, plaintiff waived his opportunity to pursue an argument on the basis of SSR 00-4p. Furthermore, there is no reason to suspect that plaintiff was prejudiced by the ALJ’s omission insofar as plaintiff still has not identified any conflict between the vocational expert’s testimony and the *DOT*.

Conclusion

Forty pages of fact review and legal analysis establish that plaintiff’s only valid challenge to the Commissioner’s decision is the ALJ’s procedurally faulty credibility determination. Given the oft-subjective nature of such determinations, this is not exactly a mandate for remand, and until recently, I would not have recommended remanding on this ground alone. Given the deference to which administrative decisions are entitled, along with judicial goal of not sacrificing the claims of others in the queue on the altar of perfectionism (*Stephens v. Heckler*, 766 F.2d 284, 288 (7th Cir. 1985)), such questionable determinations by ALJs often have been left alone, particularly in the absence of other deficiencies in a decision. But the cases cited at 31-37 above appear to signal a jurisprudential shift toward

holding ALJ's more objectively accountable for credibility determinations that can change the outcome of a disability claim.

Such is the case here. This court should be chary of sending any claim back for a third go-round, lest it be accused of micromanaging the administrative process. Further, we cannot yet establish the magnitude of the jurisprudential shift augured by recent cases. So, notwithstanding the deficiencies noted above, it is possible that reasonable courts could differ on the need for remand. Put another way, this court perhaps could justify upholding the Commissioner's decision in this case. That said, I am recommending otherwise for the reasons set forth above.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner denying plaintiff Craig Everaert's application for Disability Insurance Benefits be REVERSED AND REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for a new credibility assessment.

Entered this 26th day of April, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge