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

NANCY PROCHASKA,

Plaintiff,

v.

REPORT AND
RECOMMENDATION

JO ANNE B. BARNHART, Commissioner
Social Security Administration,

04-C-644-C

Defendant.

REPORT

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Nancy Prochaska challenges the commissioner's determination that she is not disabled and therefore not entitled to either disability insurance benefits or supplemental security income under sections 216(I) and 223 and 1614(a)(3)(A) of the Social Security Act, codified at 42 U.S.C. §§ 416(I), 423(d) and 1382c (3)(A). Plaintiff contends that the commissioner's decision is not supported by substantial evidence because the administrative law judge who decided her claim at the administrative level failed properly to account for all of her limitations, made a faulty credibility determination and relied on vocational expert testimony that was unfounded.

Having carefully reviewed the administrative record and the parties' submissions, I am recommending that this court reject plaintiff's arguments and affirm the commissioner's decision. Unfortunately, the ALJ's decision is neither thorough nor clear, but it still is sufficiently articulate to permit meaningful review, and substantial evidence supports the ALJ's ultimate conclusion that plaintiff is not disabled.

Legal and Statutory Framework

To be entitled to either disability insurance benefits or supplemental security income payments under the Social Security Act, a claimant must establish that he is under a disability. The Act defines "disability" as 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)©).

The commissioner has promulgated regulations setting forth the following 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. § 404.1520. The inquiry at steps four and five requires an assessment of the claimant's "residual functional capacity," which the commissioner has defined as "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Social Security Ruling 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." *Id*.

In seeking benefits the initial burden is on the claimant to prove that a severe impairment prevents her from performing past relevant work. If she can show this, the burden shifts to the commissioner to show that the claimant 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).

The following facts are drawn from the administrative record:

Facts

I. Background and Medical Evidence

Plaintiff has a high school education, training as a certified nursing assistant and past work experience as a machine operator at a window factory. She was 48 years old at the

time of the administrative hearing. On August 22, 2000, plaintiff filed applications for disability insurance benefits and supplemental security income, alleging that she was unable to work because of a low back injury. Plaintiff alleged that on January 12, 2000, she aggravated an old back injury and had not worked since that date.

Plaintiff first injured her back at work in 1996. A MRI scan and CT scan at the time showed a possible disc herniation at L5-S1 and a bulge at the right L4-L5 level, along with degenerative changes at the left L5-S1. Neurological testing revealed no nerve damage, and plaintiff eventually returned to work.

In early January 2000, after plaintiff was transferred to a job that required repetitive bending, reaching and twisting, she began experiencing increasing low back pain. On January 20, 2000, plaintiff saw Dr. Thomas Rieser with complaints of low back pain, right hip/buttock pain, right anterior thigh pain and right posterior lower leg pain from the knee to the foot and toes. Dr. Rieser concluded that plaintiff had aggravated her degenerative disc disease. On February 29, 2000, a new MRI showed a bulge at L5-S1 on the left and at L4-L5 centrally. A discogram later confirmed degenerative changes at L4-L5 and L5-S1 without discrete tear or herniation.

On March 15, 2000, plaintiff saw Dr. John Brendel. Dr. Brendel diagnosed plaintiff with L4-5 moderate stenosis, without neuroforaminal involvement, and low back pain and some acquired changes at both L45 and L5-S1. Dr. Brendel detected no radicular symptoms and was uncertain what was causing the radicular pain in plaintiff's right leg. He

administered a lumbar epidural injection, which provided plaintiff with little pain relief. AR 168.

Plaintiff's employer fired her on May 17, 2000, after it discovered that she had failed to report her 1996 back injury when asked about it on a Post Offer Medical Questionnaire form. As a result of her discharge for misconduct, plaintiff's application for unemployment compensation benefits was denied. Plaintiff filed an administrative appeal from that decision, contending that she was instructed by employment agency personnel not to report her back injury. The appeal tribunal rejected that explanation, finding that plaintiff had chosen to report false information. AR 94-95.

On June 15, 2000, plaintiff was seen for an independent medical examination in connection with her worker's compensation claim by Dr. David Zeman, an orthopedic surgeon. Plaintiff told Dr. Zeman that she had constant lower back pain radiating down her right leg. The pain was aggravated by physical activity, although sitting was more painful than standing. Dr. Zeman observed that plaintiff was overweight but in no distress. She walked with a slight limp in her right leg some of the time. She was able to switch between sitting and standing without apparent difficulty, although she had problems moving from a seated position to supine and back up. Straight leg raising, prone leg raising, knee flexion, and hip movement caused pain in plaintiff's lower back. Her lower back was tender to the touch. Dr Zeman diagnosed low back pain with right radicular pain without objective evidence of radiculopathy and with degenerative disk disease at L4-L5 and L5-S1. He

concluded that plaintiff was capable of returning to work without restriction regarding her lower back. AR 187.

On October 26, 2000, Dr. Rieser saw plaintiff to follow up on her low back and leg pain. He opined that plaintiff had reached a healing plateau, noting that physical therapy and epidural steroid injections had not helped. He indicated that plaintiff's options were to have two-level fusion surgery or to live with the pain. Dr. Rieser stated that plaintiff would be limited to "sedentary type of work" no matter what she did. He stated that plaintiff would have a 20-30 pound weight lifting restriction, with no repetitive lifting, bending or twisting. AR 190.

On January 10, 2001, Dr. Leo Lofland examined plaintiff at the request of the Social Security Administration. Dr. Lofland concluded that plaintiff would be unable to return to her past work at the window factory and that working as a certified nursing assistant was not a reasonable alternative. Although Dr. Lofland opined that plaintiff's disability was permanent, he did not identify any specific work-related restrictions. AR 199-200.

On January 11, 2001, Dr. Rieser referred plaintiff to Dr. Daniel Lochman for an evaluation of her knee pain. AR 202. Plaintiff told Dr. Lochman that she had pain in both knees that worsened with activity and walking but was slightly relieved when she took ibuprofen. An examination and X-rays of her knees revealed some valgus deformity with lateral joint sclerosis indicative of early degenerative changes. Dr. Lochmann noted that plaintiff's concurrent back pain might be contributing to plaintiff's abnormal gait pattern,

which might in turn be causing some of her knee pain. Dr. Lochmann prescribed an anti-inflammatory (Celebrex) and recommended that Ms. Prochaska try knee braces to eliminate the deformity.

On January 25, 2001, Dr. Robert Nallear, a state disability agency consulting physician, completed an assessment of Ms. Prochaska's physical residual functional capacity. AR 209-16. From his review of the medical records, Dr. Nallear concluded that plaintiff could lift 20 pounds occasionally and 10 pounds frequently and could sit or stand and walk for total of six hours each in an eight-hour work day. He also found that she could never stoop or crouch.

On February 19, 2001, Dr. Paul Alan Cederberg, an orthopedic surgeon, performed on independent medical evaluation of plaintiff. AR 217-23. His examination showed that plaintiff was overweight but in no acute distress. She had no localized tenderness in her lower back, could walk on her toes and heels and experienced no pain when she rotated her hips. Her reflexes were brisk and her muscle strength intact "except for some give-way strength" in her right leg. Dr. Cederberg diagnosed degenerative disk disease of the lower spine accompanied by subjective symptoms disproportionate to the clinical findings. He opined that plaintiff had no work-related restrictions.

At an April 12, 1999 routine physical exam by Dr. Michael Cragg, plaintiff's regular treating physician, Dr. Cragg noted that plaintiff had a history of depression and panic attacks for which she was taking Paxil. Dr. Cragg noted that plaintiff was doing "quite well" and that he would continue to prescribe Paxil indefinitely. AR 207.

At plaintiff's April 13, 2000 annual checkup (AR 204-05), Dr. Cragg described plaintiff's appearance as unremarkable except for moderate obesity. Plaintiff reported that she had gained a lot of weight in the last year. Dr. Cragg noted that plaintiff had injured her back and was under Dr. Rieser's care for that. Plaintiff had no complaints other than back pain and pain that occasionally radiated into her right leg. She reported that her panic attacks were fine as long as she took her Paxil. Her gait was normal and she had normal range of motion in her extremities. Because plaintiff had gained weight, Dr. Cragg ordered cholesterol and blood sugar level tests; all results were normal. AR 203.

On May 29, 2001,state psychologist Dr. Jean Warrior completed a Psychiatric Review Technique form for plaintiff. AR 236-49. Dr. Warrior concluded that plaintiff had no medically determinable mental impairment and no functional limitations related to her mental condition. In the "notes" section of her report, Dr. Warrior noted that plaintiff had not alleged any psychiatric impairment and that her activities and functioning remained normal. AR 248.

On November 13, 2001, Dr. Cragg completed a functional capacities evaluation of plaintiff. AR 250-251. He stated that she could sit, stand and walk for a maximum of four hours each. Plaintiff could not bend, stoop, squat, crawl, or climb; she could only occasionally reach above shoulder level, crouch, kneel, balance, or engage in pushing and pulling. She could occasionally carry up to 10 pounds and occasionally lift up to 24 pounds.

She could use her right foot to operate foot controls, but not her left foot. She could engage in simple grasping, firm grasping and fine manipulation with both hands.

Plaintiff saw Dr. Cragg on December 10, 2001, four days after her administrative hearing but before the administrative law judge had issued his decision. AR 253. Plaintiff reported that she had chronic low pack pain with pain shooting into her left leg pain. She told Dr. Cragg that she could not afford back surgery and that her situation was causing depression, anxiety and occasional panic attacks. Plaintiff complained that she slept poorly and felt claustrophobic. She was taking her Paxil and one or two Ultram on occasion for pain. Dr. Cragg recommended that plaintiff increase her Paxil dosage to combat depression. AR 253.

On December 12, 2001, Dr. Cragg wrote a letter to plaintiff's attorney in which he stated that he had treated plaintiff for many years and that she had a long history of depression and panic disorder. Dr. Cragg indicated that plaintiff's depression could be "particularly disabling" and that her recent problems were consistent with her long history of depression. AR 254. Plaintiff's attorney sent this letter to the administrative law judge for consideration.

II. Hearing Testimony

At her December 6, 2001, hearing, plaintiff testified that she stopped working at the window factory on January 12, 2000, after re-injuring her back on the job. Plaintiff testified

that she was in constant pain in her back, right leg and knees. Plaintiff stated that if she stood for more than 20 minutes, her leg became weak and felt like it was going to "give out" on her. She estimated that she could walk about half a block before she would have to sit down. To relieve her pain, plaintiff took ibuprofen and sometimes Ultram, and changed positions. Plaintiff testified that because of her lack of mobility, she had gained 50 pounds since January 2000. She testified that she was 5'2" and weighed 195 pounds. Plaintiff stated that she had moved to a small efficiency apartment with no stairs because she could no longer climb the stairs in her ranch home.

Plaintiff testified that since 1980, she had been taking anti-depressants. She testified that in March 1999, she saw Dr. Cragg because she was feeling very depressed and was having anxiety and panic attacks, for which Dr. Cragg prescribed Paxil. Plaintiff testified that she didn't function normally when she was depressed, stating that some days she did not feel up to doing anything and avoided going out. She testified that as a result of her injury, it took her "much, much longer" to do things, which contributed to her depression. Regarding her panic attacks, plaintiff stated that she got very nervous when driving and felt like she just wanted to get home where she knew she would be safe. Plaintiff also testified that she had a very hard time concentrating.

In response to questioning by the ALJ, plaintiff testified that she did not think she could perform light work such as custodial work or a surveillance system monitor or a cashier because she was unable to stand for a very long period of time.

Richard Armstrong testified as a vocational expert. Armstrong testified that an individual of plaintiff's age, education and work experience who had the limitations identified by Dr. Cragg on his residual functional capacities assessment would be unable to perform plaintiff's past work as a machine operator. However, he testified that such an individual could perform the following jobs that existed in significant numbers in Wisconsin: cashiering (11,000 jobs); manufacturing (7,000 jobs); assembly (5,000); and packaging and visual inspection (1,000 jobs). Armstrong testified that no jobs would be available to an individual who had to miss more than two days a month because of physical or psychological symptoms.

III. The ALJ's Decision

The ALJ conducted a five-step evaluation. At step one, he found that plaintiff had not engaged in substantial gainful activity since the alleged onset of her disability. At step two, he found that plaintiff has the following impairments that are "severe" as that term is defined in the regulations: a "knee problem" and degenerative disc disease. At step three, the ALJ concluded that plaintiff's impairments were not severe enough either alone or in combination to meet or medically equal any impairment that the commissioner presumes to be disabling.

At step four, the ALJ concluded that plaintiff could not return to her past work as a machine operator. In reaching this conclusion, he adopted the residual functional capacity

findings of Dr. Cragg, concluding that plaintiff could lift a maximum of 24 pounds occasionally; carry 10 pounds occasionally; could not bend/stoop, squat, crawl, or climb heights; could only occasionally reach above shoulder level, crouch kneel, balance, push or pull; could not use her left foot for repetitive movements as in operating foot controls; could not use both feet for repetitive movements; was able to use her right foot for repetitive movements; and was able to sit, stand and walk for four hours each in an eight-hour day.

Relying on the testimony of the vocational expert, the ALJ found that plaintiff was unable to perform her past relevant work as a machine operator. The ALJ then considered whether there were other jobs in the national economy that plaintiff could perform in light of her age, education, past work experience, impairments and residual functional capacity. Relying on the vocational expert's testimony, the ALJ found that plaintiff could perform the jobs of cashier (11,000 jobs in the relevant region); assembly (5,000 jobs); packaging (1,000 jobs); and visual inspection (1,000 jobs). Accordingly, the ALJ found that plaintiff was not under a disability at any time through the date of the decision and therefore was not entitled to Disability Insurance Benefits or Supplemental Security Income payments.

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. This review is deferential: under § 405(g), the commissioner's findings are conclusive if they are supported by "substantial evidence." *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the commissioner's findings under § 405(g), this court cannot reconsider facts, reweigh the evidence, decide questions of credibility, or otherwise substitute its own judgment for that of the ALJ regarding what the outcome should be. *Clifford*, 227 F.3d at 869. 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). When the ALJ denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001).

II. Plaintiff's Impairments

Plaintiff contends that the ALJ's decision is not supported by substantial evidence because the ALJ failed to consider all of her impairments when assessing her residual functional capacity and in formulating his corresponding hypothetical question to the vocational expert. Specifically, plaintiff contends the ALJ ignored evidence showing that she suffers from depression, impaired concentration and pace and obesity.

A. Mental Impairment

The ALJ noted that the record contained some evidence–namely Dr. Cragg's reports–indicating that plaintiff might suffer from a mental impairment. However, the ALJ concluded that the record as a whole failed to show that plaintiff had a medically determinable mental impairment. To be found disabled, an applicant for social security disability benefits must demonstrate that she is unable to work because of a "medically determinable physical or mental impairment." An "impairment" must result from anatomical, physiological, or psychological abnormalities that can be shown by medically acceptable clinical and laboratory diagnostic techniques and must be established by medical evidence consisting of signs, symptoms or laboratory findings. 20 C.F.R. § 404.1508; Soc. Sec. Ruling 96-4. A claimant's self-reported symptoms alone are insufficient to establish disability. 20 C.F.R. § 404.1528(a).

The ALJ's conclusion that plaintiff did not have a "medically determinable" mental impairment is supported by substantial evidence. The ALJ noted that in contrast to Dr. Cragg's assertion that plaintiff suffered from disabling depression, plaintiff had not alleged a disabling mental impairment when she applied for social security benefits. In addition, he noted that there was no evidence in the record that plaintiff had sought any psychological or psychiatric treatment. Contrary to plaintiff's contention, plaintiff's failure to allege that she could not work because of a mental impairment and her failure to seek psychological or psychiatric treatment for such a condition supports the ALJ's conclusion that plaintiff did

not have such an impairment. Moreover, the ALJ properly relied on the medical opinion of state agency psychologist Dr. Warrior, who concluded from her review of the record that plaintiff had not shown the existence of medically determinable mental impairment.

Plaintiff makes much of Dr. Cragg's diagnosis of depression with a panic disorder, arguing that the ALJ was required to accept that diagnosis because Dr. Cragg was plaintiff's treating physician. However, Dr. Cragg failed to support his diagnosis with any objective clinical findings or even to explain the basis for his diagnosis. For instance, Dr. Cragg did not conduct any mental status evaluation or testing of plaintiff, cite to any observations that he made of plaintiff that might support his diagnosis or recommend that plaintiff undergo psychiatric evaluation. Although plaintiff cites to a vocational report wherein it was noted that Dr. Cragg had reported in March 1999 that plaintiff had problems with "anxiety, poor concentration and panic feelings," AR 133, the actual reports from Dr. Cragg are not in the record.

A treating physician's opinion is entitled to controlling weight only if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d), 416.927. The reports from Dr. Cragg that were in the record offered only a conclusory opinion that was unsupported by any clinical findings and that was contradicted by other evidence in the record. Accordingly, the ALJ was well within his discretion to reject it. *See Veal v. Bowen*, 833 F.2d 693, 699 (7th Cir. 1987) ("Where diagnoses are not supported by

medically acceptable clinical and laboratory diagnostic techniques, this court need not accord such diagnoses great weight."). It is "axiomatic" that the claimant bears the burden of supplying adequate records and evidence to prove her claim of disability. *Scheck v. Barnhart*, 357 F.3d 697, 702 (7th Cir. 2004). *See also* 20 C.F.R. § 404.1512(c) ("You must provide medical evidence showing that you have an impairment and how severe it is during the time you say that you were disabled."); *Bowen v. Yuckert*, 482 U.S. 137, 146, n. 5 (1987) ("It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so."). Plaintiff failed to support her claim.

Plaintiff suggests that the ALJ was required to obtain a consultative psychiatric examination of plaintiff before rejecting her claim of a mental impairment. While it is true that the ALJ has a duty to make a complete record, "this requirement can reasonably require only so much." *Scheck*, 357 F.3d at 702. As the Seventh Circuit explained in *Kendrick v. Shalala*, "[t]he difficulty is that no record is 'complete'--one may always obtain another medical examination, seek the views of one more consultant, wait six months to see whether the claimant's condition changes, and so on. Taking 'complete record' literally would be a formula for paralysis." *Kendrick v. Shalala*, 998 F.2d 455, 456 (7th Cir. 1993). Therefore, courts generally defer to the commissioner's reasoned judgment as to how much evidence to gather. *Luna v. Shalala*, 22 F.3d 687, 692 (7th Cir. 1994).

Here, the record shows that the ALJ was concerned about the dearth of documentary evidence to support plaintiff's allegation at the hearing that she had a mental impairment.

Specifically, when plaintiff's attorney stated at the hearing that plaintiff had a long history of depression dating back to 1979, the ALJ asked if the records supporting that allegation were in the record. The ALJ noted that "[i]f there's that much treatment, I'm not seeing it here." AR 283. When plaintiff's attorney indicated that he could quote a summary of the records, the ALJ indicated that he preferred to have the actual records. AR 287. At the end of the hearing, the ALJ reminded plaintiff's lawyer to "get me those psych records;" plaintiff's lawyer said he would. AR 307. However, after the hearing, plaintiff submitted only a record of a post-hearing visit with Dr. Cragg and Dr. Cragg's December 12, 2001 letter to counsel in which he stated that plaintiff had a "long history of depression and panic disorder." Plaintiff did not submit the contemporaneous medical records documenting that "long history" and did not request a consultative psychiatric evaluation.

Plaintiff knew that the ALJ was skeptical of her mental impairment allegations, yet she failed to submit evidence to support her claim. When an applicant for benefits is represented by counsel, the commissioner is entitled to assume that the applicant is making her strongest case for benefits. *Glenn v. Secretary of Health and Human Services*, 814 F.2d 387, 391 (7th Cir. 1987). In light of plaintiff's representation that she had records to support her claim of a disabling mental impairment and her subsequent failure to provide them, it was not unreasonable for the ALJ to decide plaintiff's claim on the basis of the evidence before him.

Even if this court were to assume that Dr. Cragg's diagnosis was correct and the ALJ erred in finding that claimant had no mental impairment, the mere existence of a mental impairment does not constitute a disability. Even if plaintiff suffered from depression and panic attacks, these conditions had a minimal impact on her ability to perform work-related activities. The record indicates that Dr. Cragg diagnosed plaintiff with depression in 1992, yet plaintiff was able to work for many years in spite of that diagnosis. In fact, Dr. Cragg noted in April 2000, several months after plaintiff stopped working, that plaintiff was doing well so long as she took her Paxil. Although Dr. Cragg later indicated that plaintiff's depression could be "particularly disabling," he failed to explain the basis for this vague statement or to identify work-related limitations resulting from plaintiff's mental condition.

The only evidence of plaintiff's panic attacks is her testimony that the attacks occurred when she was driving and made her want to go home. Assuming that this testimony is true, it fails to demonstrate that plaintiff's panic attacks are so severe as to preclude her from working. Plaintiff also testified that on many days she did not leave home, but her testimony suggests this was due to her alleged lack of mobility more than any mental condition. Finally, plaintiff testified that she has difficulty maintaining concentration and staying on task, but other evidence in the record indicates that plaintiff was able to read newspapers and magazines, perform crossword puzzles and do embroidery. In fact, when the ALJ asked plaintiff at the hearing whether she might be able to perform light work such as custodial work or cashiering, plaintiff said only that she did not think she

could stand for a long enough period of time to perform such jobs. Consistent with the various forms she completed in connection with her applications for disability benefits, plaintiff never identified any mental limitations as the reason she could not work. Also, it is telling that none of the other physicians or vocational evaluators who interviewed plaintiff noted that plaintiff had complained of or had demonstrated any symptoms consistent with a mental impairment.

In sum, even if the ALJ erred by concluding that plaintiff failed to demonstrate that she suffered from a medically determinable mental impairment, this error was harmless absent evidence that plaintiff's mental impairment imposed more than minimally on her ability to work.

B. Obesity

Next, plaintiff contends that the ALJ erred by failing to consider her obesity. Plaintiff asserts that because the impairments from which the ALJ found she suffers– a knee problem and degenerative disc disease–are of the sort likely to be exacerbated by obesity, the ALJ was obliged to account for her obesity when assessing her residual functional capacity.

Although obesity no longer is a listed impairment, the commissioner's regulations require adjudicators to consider it when making disability determinations. *See* Soc. Sec. Ruling 02-1p (Sept. 12, 2002). Under the regulations, obesity can be a medically determinable impairment that can exacerbate other impairments or reduce an individual's

residual functional capacity. *Id*.; *Clifford v. Apfel*, 227 F.3d 863, 873 (7th Cir. 2000) (ALJ must consider cumulative effect of obesity on other impairments).

In the instant case, the commissioner concedes that there is evidence indicating that plaintiff is obese. However, the commissioner claims that the ALJ did not err by failing to address plaintiff's obesity in his decision because there is no evidence that plaintiff's obesity, alone or in combination with her other impairments, imposes any functional limitations on plaintiff's ability to perform basic work activities beyond the functional limitations already found by the ALJ.

The commissioner is correct. According to SSR 02-1p, excessive weight alone does not evidence impaired functionality. Nowhere in the record does any doctor–or even plaintiff herself–suggest that her obesity has aggravated her back or knee condition or has inhibited her ability to stand or ambulate. In fact, plaintiff attributed the problems in her knees to the fact that she was walking different following her back injury. AR 199. Dr. Lofland, the consulting physician who examined plaintiff, noted that although plaintiff walked with short steps, her gait otherwise was normal, and plaintiff could rise from a chair and get onto and off of the examining table without difficulty. Dr. Lochmann, the doctor who evaluated plaintiff's knee pain, did not suggest that plaintiff's knee pain was exacerbated by her obesity and he did not advise plaintiff to lose weight. In contrast to other cases in which courts chastised ALJs for ignoring the effects of obesity, *e.g. Barrett v. Barnhart*, 355 F.3d 1065, 1068 (7th Cir. 2004); *Clifford*, 227 F.3d at 873, the record in this case does not suggest that plaintiff's excessive weight contributes to her back or knee conditions.

Finally, Dr. Cragg, who diagnosed plaintiff with chronic obesity, opined that plaintiff nonetheless was capable of sitting, standing and walking for four hours each in an eight-hour work day. By adopting Dr. Cragg's functional capacity assessment, the ALJ indirectly factored plaintiff's obesity into his decision. Therefore, even though the references to plaintiff's weight in the medical records should have alerted the ALJ to plaintiff's obesity, any remand for explicit consideration of this impairment would not affect the outcome of this case. *See Keys v. Barnhart*, 34 F.3d 990, 994-95 (7th Cir. 2003) (applying harmless eror review to ALJ's determination).

III. Credibility Assessment

Next, plaintiff argues that the ALJ's credibility determination is flawed. Because the ALJ is best positioned to evaluate the credibility of a witness, a court cannot reverse an ALJ's credibility finding unless it is "patently wrong." *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000) (internal quotations and citation omitted). "Where, however, 'the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result,' we cannot uphold the ALJ's determination." *Shramek v. Apfel*, 226 F.3d 809, 811 (7th Cir. 2000).

Plaintiff incorrectly asserts that remand is required because the ALJ did not discuss all of the factors set forth in SSR 96-7p. That ruling provides that in evaluating the credibility of a claimant's subjective complaints, the ALJ must consider the individual's daily

activities; the location, duration, frequency, and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; other treatment or measures taken for relief of pain; and any other factors concerning the individual's functional limitations and restrictions. *Id.*; 20 C.F.R. § 404.1529(c). Although plaintiff asserts that the ALJ failed to consider her use of medications and course of treatment, the ALJ explicitly noted in his decision that he had reviewed these factors and had found that they were consistent with her impairments. Plaintiff appears to suggest that the ALJ should have gone further and found that plaintiff's medication use and course of treatment showed that her subjective complaints were credible. However, as the ALJ noted, there was contradictory evidence in the record, namely, plaintiff's daily activities and her dishonesty in connection with an unemployment compensation application, that tended to undermine the credibility of plaintiff's allegation of total disability.

Plaintiff argues that the ALJ's evaluation of her daily activities is incomplete and therefore fails to support his conclusion that her activities were inconsistent with her allegations of disability. Referring to a daily activities form that plaintiff submitted in connection with her application, the ALJ noted that plaintiff indicated that she "cooks, cleans house, reads, and attends to personal grooming on a daily basis" and "drives, shops, visits relatives and friends on a weekly basis." Plaintiff argues that the ALJ's conclusion fails

to account for plaintiff's statements on other forms wherein she indicated that the amount of time she spends doing housework varies depending on her pain, that she takes breaks between activities and that she changes positions frequently.

I agree with plaintiff that the ALJ's assessment of plaintiff's daily activities provides little support for his credibility determination. It is well-settled that the sorts of minimal daily activities to which the ALJ referred in his decision are not necessarily consistent with an ability to work full time. *See, e.g., Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001); *Clifford*, 227 F.3d at 872. Nonetheless, I cannot say that it was patently wrong for the ALJ to conclude that plaintiff's ability to perform household chores on a daily basis was inconsistent with her claims of limited mobility and constant pain.

Moreover, although the ALJ cited only to plaintiff's daily activities questionnaire, other evidence in the record supports the ALJ's conclusion that plaintiff is "fairly active." Plaintiff reported this daily routine to one vocational evaluator: rise at 6:30 a.m.; take a shower; have breakfast; get her mail at the post office; perform various household chores including the laundry, dishes and straightening up the house; have lunch; sit in her recliner and watch television, read or do crossword puzzles. She reported that she socialized with her live-in boyfriend and talked with friends and family over the phone, and went to bed by 9 p.m. AR 135. It was not patently wrong for the ALJ to conclude that such a daily routine was not inconsistent with an ability to perform jobs in the sedentary-light range.

Plaintiff also contends that it was inappropriate for the ALJ to base his credibility determination on evidence that she had falsified an employment application without giving plaintiff an opportunity at the administrative hearing to explain her actions. It was poor form for the ALJ to have relied on plaintiff's failure to include her 1996 back injury on an employment application without also hearing her side of the story, but it was not improper. The decision from the Department of Workforce Development was in the record at the time of the hearing, so plaintiff could have raised the issue on her own without waiting for the ALJ to do so. More importantly, the evidence in the record shows that plaintiff did not dispute that she knew she was being untruthful when she failed to report her previous back injury and worker's compensation claim on her employment application. The ALJ reasonably could conclude that plaintiff's willingness to lie to ensure that she obtained employment tended to show that she might be willing to lie to ensure that she obtained social security benefits.

To be sure, the ALJ's cursory analysis of plaintiff's daily activities and his reliance on plaintiff's previous dishonesty in connection with her employment application do not provide compelling support for the ALJ's credibility assessment. However, the ALJ also discussed the reports of two medical examiners who concluded not only that plaintiff could work, but that she could do so without restriction. He also discussed the opinions of plaintiff's treating physicians, Drs. Rieser and Cragg, who assigned work restrictions that were inconsistent with plaintiff's allegation of total disability. Although the ALJ did not

make clear that he was relying on these opinions when assessing plaintiff's credibility, this court must give the ALJ's decision "a commonsensical reading rather than nitpicking at it." *Shramek*, 226 F. 3d at 811 (internal quotations and citation omitted). A fair reading of the ALJ's decision indicates that the various medical reports were relevant to his credibility assessment. These reports, combined with the ALJ's other credibility findings, provide adequate support for his credibility determination. *See Jens v. Barnhart*, 347 F.3d 209, 213-14 (7th Cir. 2003) (mere omissions in ALJ's credibility determination do not demonstrate lack of substantial evidentiary support); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir.1989) ("No principle of administrative law or common sense requires [this court] to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result").

IV. Step Five Analysis

Finally, plaintiff contends that the commissioner's decision at step five–that she can perform a significant number of jobs despite her impairments–is not supported by substantial evidence. Plaintiff contends that the ALJ's hypothetical was defective because his residual functional assessment failed to specify how much plaintiff can lift and carry on a frequent basis. Plaintiff asserts that Dr. Cragg's RFC assessment showed that the most plaintiff could lift was 24 pounds, but only on an occasional basis, and the most she could carry was 10 pounds, again only on an occasional basis. She argues that it is reasonable to

infer from Dr. Cragg's failure to specify that she could lift and carry 10 pounds on a *frequent* basis that she cannot lift or carry anything on a frequent basis. According to plaintiff, this precludes her from meeting the requirements of either light or sedentary work because both require frequent lifting and carrying of objects weighing up to 10 pounds.

Although plaintiff may be correct that her inability frequently to lift and carry objects weighing up to 10 pounds might preclude her from performing the full range of light work, *see* 20 C.F.R. § 404.1567(b) (defining light work), she is incorrect that such a limitation would preclude her from performing sedentary work. Sedentary work is defined as that which "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). It is unreasonable for plaintiff to suggest that Dr. Cragg's failure to indicate that she can frequently carry objects weighing up to 10 pounds means that she is unable occasionally to carry even light objects such as files or small tools. The record does not show that plaintiff has any upper extremity impairment and she did not report any limitations in lifting or carrying in her written statements or testimony at the administrative hearing. The only upper extremity complaint that plaintiff reported was pain when she did anything above shoulder level. Plaintiff reported that she does dishes, laundry and cooks on a daily basis. Certainly, these activities involve some degree of lifting and carrying of light objects.

Moreover, the ALJ did not find that plaintiff could perform the full range of either light or sedentary work. As he pointed out and the vocational expert recognized at the

hearing, the limitations endorsed by Dr. Cragg placed plaintiff somewhere between the sedentary and light ranges of work insofar as the lifting limitations indicated sedentary work, while the sitting, standing and walking limitations were consistent with light work. The vocational expert's testimony reflects that in identifying the number of jobs that plaintiff could perform, he was working specifically from Dr. Cragg's RFC form, in that he indicated that plaintiff's RFC "appears to be primarily [falling] halfway between a sedentary and light category." AR 290. Where a claimant's RFC does not coincide with the definition of any one of the ranges of work as defined in the regulations, it is proper for an ALJ to consult a vocational specialist regarding whether there are a significant number of jobs in the regional economy that the claimant can perform. Soc. Sec. Ruling 83-12.

Plaintiff also points out that because the ALJ found that she was unable to stoop, he was required under Soc. Sec. Ruling 96-9p to consult with a vocational resource. SSR 96-9p (Because complete inability to stoop would significantly erode the unskilled sedentary occupational base, ALJ should consult with vocational resource when confronted with claimaint who is limited to less than occasional stooping). *See also Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999). I am not sure what point plaintiff is trying to make with this argument. The ALJ complied with the ruling by consulting with a vocational expert, who specifically accounted for plaintiff's inability to stoop when determining what jobs plaintiff could perform.

Plaintiff argues that the vocational expert's testimony does not provide substantial support for the ALJ's decision at step five because the testimony of the vocational expert conflicts with the *Dictionary of Occupational Titles* (DOT). However, plaintiff forfeited her 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 her 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 his testimony, plaintiff waived her opportunity to pursue an argument on the basis of SSR 00-4p.

Finally, plaintiff contends that in adopting Dr. Cragg's RFC as the basis for his hypothetical question, the ALJ failed to account for all of plaintiff's limitations, including depression, panic attacks, obesity, and deficiencies in concentration and pace. As explained above, however, Dr. Cragg accounted for plaintiff's obesity in his residual functional capacity assessment. As for plaintiff's alleged mental limitations, the ALJ properly concluded that plaintiff had not shown the existence of any mental impairment, much less one that was

severe. Because a hypothetical question need only include limitations that are supported by medical evidence in the record, *Steele*, 290 F.3d at 942, the ALJ did not err in failing to include plaintiff's limitations stemming from her alleged mental impairment.

Conclusion

Although the ALJ could have done a better job analyzing the evidence and explaining the bases of his opinions and conclusions, none of his miscues, either singly or collectively, provides a basis to overturn the commissioner's decision to deny benefits.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the decision of the Commissioner denying Nancy Prochaska's applications for Disability Insurance Benefits and Supplemental Security Income be AFFIRMED.

Entered this 19th day of April, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

April 19, 2005

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Re: Prochaska v. Barnhart
Case No. 04-C-644-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before May 3, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 3, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge